



Broadcasting Decision CRTC 2020-205 and Broadcasting Order CRTC 2020-206

PDF version

Reference: 2019-303

Ottawa, 29 June 2020

Allarco Entertainment 2008 Inc., the general partner, as well as limited partner with C.R.A. Investments Ltd. (the limited partners), carrying on business as Allarco Entertainment Limited Partnership

Across Canada

Public record for this application: 2017-0743-1

Public hearing in the National Capital Region

5 November 2019

Super Channel – Licence renewal and issuance of mandatory order

The Commission finds that Super Channel, a national, English-language general interest pay television discretionary service, is again in serious non-compliance with its regulatory requirements. This represents the second consecutive licence term that Super Channel has been found in serious non-compliance since the service was first authorized to operate in 2006. Based on the nature of the non-compliance and the recurrence, the Commission has significant concerns with the licensee's willingness and ability to operate the service in a compliant manner.

*Consequently, while the Commission **renews** the broadcasting licence for the English-language discretionary service Super Channel for a four-year period, the Commission also **suspends** that broadcasting licence. However, the suspension will automatically go into effect **only** if:*

- the licensee fails to make shortfall payments or remit reimbursed funds in accordance with the requirements specified in **conditions of licence 9, 10 and 12, respectively**, as set out in Appendix 1 and scheduled in Appendix 3 to this decision; or*
- the licensee obtains protection under the Companies' Creditors Arrangement Act or the Bankruptcy and Insolvency Act.*

*Further, the licensee shall devote 30% of its previous broadcast year's gross revenues to Canadian programming expenditures, and the Commission **issues** a mandatory order to reinforce this condition of licence.*

The Commission also directs the licensee to complete an annual Production Report, as set out in Appendices 4 to 9 to this decision. This report is to be filed each year by no later than 30 November, beginning with the 2020-2021 broadcast year.

Application

1. Allarco Entertainment 2008 Inc., the general partner, as well as limited partner with C.R.A. Investments Ltd. (the limited partners), carrying on business as Allarco Entertainment Limited Partnership (Allarco) filed an application requesting that the Commission renew the broadcasting licence for the national, English-language general interest pay Category A service Super Channel and designate it instead as a discretionary service.

Background

2. The Commission has the authority, pursuant to section 9(1) of the *Broadcasting Act* (the Act) to issue and renew licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee as it deems appropriate for the implementation of the broadcasting policy set out in section 3(1) of the Act.
3. Pursuant to this provision, and following a competitive process, Super Channel was originally licensed in Broadcasting Decision 2006-193 as a national, English-language general interest pay television programming service.¹
4. In 2009, Allarco obtained creditor protection from the *Companies' Creditors Arrangement Act* (CCAA), from which it emerged successfully in 2010.
5. In Broadcasting Decision 2013-468 (the 2013 renewal decision), the Commission renewed Super Channel's licence until 31 August 2017.² In that decision, the Commission determined that short-term renewal was appropriate in light of Super Channel's significant and severe non-compliance relating to its regional outreach programs and script and concept development expenditure requirements. Although it recognized the licensee's financial difficulties at the time, the Commission nevertheless required that the licensee be held to account for its non-compliance. The Commission therefore required that the licensee pay a portion of the shortfall, amounting to \$6 million over the course of the subsequent licence term and required that the licensee report on these expenses annually. However, given the difficult financial situation of the licensee, the Commission also reduced the above-mentioned expenditure requirements for Super Channel's second licence term

¹ That licence term expired on 31 August 2012 and that broadcasting licence was administratively renewed in Broadcasting Decision 2011-417 from 1 September 2011 to 31 August 2013.

² That broadcasting licence was administratively renewed in Broadcasting Decisions 2016-463, 2018-317, 2019-134 and 2019-424 from 31 August 2017 to 31 August 2018, from 1 September 2018 to 31 August 2019, from 1 September to 31 December 2019, and from 1 January to 30 June 2020, respectively.

and permitted these expenditures to be counted towards Super Channel's Canadian programming expenditure (CPE) requirement.

6. On 26 May 2016, Allarco once again obtained creditor protection from the CCAA, from which it emerged on 5 April 2018.
7. As is the normal approach with applications for the renewal of broadcasting licences, the present application was originally published under Part 1 of the *CRTC Rules of Practice and Procedure*. Following the intervention period, the Commission sent multiple requests for information to the licensee. The application was re-published for comment under Part 1. In both of these intervention periods, the Commission received interventions that raised issues regarding instances of apparent non-compliance. The intervenors claimed that the licensee was in non-compliance with several of its requirements, including that related to spending on Canadian programming, script and concept development and regional outreach. In light of these instances of apparent non-compliance and their nature, and given the instances of non-compliance noted during the last licence renewal, the application was published a third time as part of the non-appearing hearing announced in Broadcasting Notice of Consultation 2019-127. However, given the severity of the apparent non-compliances and the potential consequences, Allarco requested to appear before the Commission. As a result, the application was subsequently withdrawn from the aforementioned non-appearing hearing and was considered as part of the 5 November 2019 appearing hearing.

Interventions

8. The Commission received several interventions³ questioning Allarco's practices and requesting, all or in part, that the Commission, among other things:
 - renew Super Channel's licence for a maximum of three years;
 - issue a mandatory order pursuant to section 12 of the *Broadcasting Act* (the Act) requiring the licensee to comply with the *Discretionary Services Regulations* and its conditions of licence;
 - consider Canadian programming expenditures not paid to producers as a CPE shortfall;
 - order that ineligible CPE-related condition of licence amounts for regional outreach programs and script and concept development expenditures be expended in the next licence term;

³ From the Canadian Media Producers Association, On Screen Manitoba, the Writers Guild of Canada, the Directors Guild of Canada, the Canada Media Fund, the Alberta Media Production Industries Association, the Documentary Organization of Canada, the Shaw Rocket Fund, Shaftesbury – Production Company, and the Canadian Association of Stand-up Comedians

- maintain existing conditions of licence concerning regional outreach program and script and concept development expenditures; and
 - impose new conditions of licence regarding programs of national interest.
9. The Commission also received numerous interventions in support of the application from independent producers and various broadcasting industry non-profit associations and organizations. These intervenors, all or in part, said that Allarco:
- provides a great deal of support to Canadian producers;
 - is one of the last independent English-language broadcasters and one of the only services in western Canada offering alternative programming;
 - is the only broadcaster that provides them funding for their productions; and
 - is very supportive of their associations' fundraising programs.

Issues

10. After examining the record for this proceeding in light of applicable regulations and policies, the Commission considers that the issues it must address relate to the following:
- the eligibility of certain expenditures devoted to regional outreach programs (conditions of licence 6 and 8 set out in Appendix 1 to the 2013 renewal decision);
 - the eligibility and late payment of certain expenditures devoted to script and concept development (conditions of licence 7 and 8 set out in Appendix 1 to the 2013 renewal decision);
 - the eligibility of certain Canadian programming expenditures (condition of licence 5 set out in Appendix 1 to the 2013 renewal decision);
 - the licensee's compliance relating to the broadcast of Canadian programs (condition of licence 3 set out in Appendix 1 to the 2013 renewal decision);
 - other issues;
 - licence renewal and term; and
 - any applicable additional regulatory measures.

Expenditures devoted to regional outreach program

11. Sections 3(1)(e) and (s)(i) of the Act declare that each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming and that private networks and programming undertakings should, to an extent consistent with the financial and other resources

available to them, contribute significantly to the creation and presentation of Canadian programming.

12. In accordance with these objectives from the broadcasting policy for Canada (the policy) and pursuant to its authority in section 9(1) to issue and renew licences subject to such conditions related to the circumstances of the licensee as it deems appropriate for the implementation of the policy set out in section 3(1), the Commission has required programming undertakings to contribute in various ways to the creation of Canadian programming.

13. As a part of the 2013 renewal decision, the Commission imposed several spending-related conditions of licence designed to ensure the licensee's continued support for investment in and production of Canadian programming. In addition to its CPE requirements, the Commission also imposed the following condition of licence (condition of licence 6 set out in Appendix 1 to the 2013 renewal decision):

Included in the expenditures required under condition of licence 5, the licensee shall expend on regional outreach programs at least \$500,000 in each broadcast year.

14. Additionally, as noted above, the Commission also imposed a condition of licence related to the licensee's shortfalls, incurred as a result of its failure to comply with its requirements in its previous licence term with respect to its regional outreach program (condition of licence 8 set out in Appendix 1 to the 2013 renewal decision):

In addition to the expenditures required under conditions of licence 5, 6 and 7, the licensee shall expend as payment of the shortfall on its expenditures on regional outreach programs an amount equal to \$500,000 and \$1 million, respectively, on script and concept development in each broadcast year until the end of the current licence term which expires on 31 August 2017. The total amount to be paid equals \$6 million.

Apparent non-compliance with conditions of licence 6 and 8 set out in Appendix 1 to the 2013 renewal decision, relating to expenditures on regional outreach

15. Generally, in reporting its expenditures on its regional outreach program, the licensee claimed expenses relating to indirect staff costs, which mostly consisted of portions of the licensee's staff salaries; outreach, which consisted of sponsorship of industry festivals and conferences; and the engagement of contractors, which consisted of assisting producers in the development of projects. Moreover, certain sponsorship expenditures appear to have been included in both the calculations of expenditures devoted towards the requirements imposed by conditions of licence 6 and 8, which mean they could have been claimed twice.

16. The licensee submitted that the reported expenditures were appropriate given that the Commission has never published a list of eligible outreach expenditures. In Allarco's view, the Commission has been aware, since the inception of this program, that the licensee's staff would be involved. In particular, according to the licensee, certain expenses identified as potentially ineligible by Commission staff were identical in

kind to those that it reported to the Commission, without being subsequently questioned, during its first licence term. Allarco added that it had filed detailed financial data for expenditures made to compensate for shortfalls during its first licence term regarding expenditures devoted to regional outreach and to script and concept development.⁴ Allarco also added that the Commission had not provided any indication that these expenditures might be ineligible during the six-year period following the last renewal of its licence.

17. In its original licence application, Allarco indicated that as a part of its script and concept development initiative, it would have representatives providing support to producers in each province across the country. Allarco explained that, as a result of its first entry into CCAA protection in 2009, it no longer had representatives in each province and that it had to reallocate these representatives' development functions to Allarco's staff members, who, in addition to their regular duties, also contributed to regional outreach projects. It also indicated that it expended fees on engaging contractors, such as script readers, who reviewed projects and liaised with producers and script writers. Additionally, the licensee stated that, when reporting indirect staff costs and contractor fees, it based its reported expenses on estimates of the time that these individuals devoted to administering the regional outreach program. Allarco also submitted that it supported Canadian producers, including indigenous and Quebec- or Atlantic-based producers, by supporting organizations that requested financial assistance for conferences, training, co-production markets and film festival industry events where Canadian producers are in attendance as active participants. Allarco added that, in many instances, it delegated staff to attend these events and meet with Canadian producers.

Positions of parties and licensee's reply

18. Canadian Media Producers Association (CMPA), On Screen Manitoba, Directors Guild of Canada (DGC), and the Documentary Organization of Canada (DOC) opposed these practices and submitted that normal operating costs, such as the allocation of staff, should not be eligible to be counted toward meeting the conditions of licence in question and should be excluded. They requested that the Commission find the licensee in non-compliance and require that it pay any resulting shortfall. They also requested that the Commission maintain the regional outreach program requirements as set out in condition of licence 6 but preclude the licensee from including normal operating costs in its calculation of expenditures.
19. Additionally, On Screen Manitoba requested that Allarco be required to hold informal consultations with each provincial industry association to determine future spending on regional outreach program and develop an evidence-based approach for shaping

⁴ Condition of licence 9 in Appendix 1 of Broadcasting Decision CRTC 2013-468 requires that "The licensee shall submit annual reports to the Commission detailing the amount spent on the payment of the shortfall on expenditures on regional outreach programs and on script and concept development as well as on the initiatives that received funding, concurrently with the filing of its annual returns on 30 November of each broadcast year, until the total amount of the shortfall has been paid".

the program and measuring its effectiveness, should this condition of licence be re-imposed.

20. Several associations⁵ that received funding from Super Channel, however, supported Super Channel and expressed the view that its sponsorship provides valuable support to the Canadian production industry.
21. In response to the above-mentioned interventions, the licensee indicated that it would continue to adhere to the regional outreach program requirements as set out in condition of licence 6 and was prepared to exclude the cost of staff time, but requested clearly-worded direction from the Commission with respect to which expenditures would be eligible to count towards its expenditure requirements on regional outreach.
22. The licensee also stated it was prepared to meet with producers' groups and associations to develop more advantageous ways of expending regional outreach funds.
23. However, Allarco indicated that it was not willing to pay any resulting shortfall if the Commission were to determine that some or all of the expenditures reported towards meeting conditions 6 and 8 were ineligible.

Commission's analysis and determinations

24. The licensee's expenditures on the regional outreach program consist mainly of sponsorships, staff salaries and contractor fees. While the Commission did not provide specific guidance or criteria relating to the eligibility of specific expenditures for the regional outreach program, the licensee, upon receiving its licence in 2006, following a competitive process, indicated that the expenditures were intended for designing innovative projects with independent producers and ensuring that these productions were broadcast.
25. Sponsorships represent close to one quarter of the licensee's total regional outreach program expenses. Although sponsorships represent a means of promotion for the service, they do appear to provide real financial assistance to the production industry.
26. With regard to the sponsorship expenditures that appeared to be claimed twice towards meeting conditions of licence 6 and 8, the licensee submitted supporting documentation and the Commission is satisfied respecting this matter.
27. Regarding the other expenses, namely payroll and contractor fees, the Commission notes that upon receiving its licence in 2006, the licensee stated that it intended to have creative development staff in every province. The licensee has argued that the

⁵ These included Meridian Artists, Women in Film Atlantic, Canadian film center, imagineNATIVE Film + Media Arts Festival, Atlantic Film Festival Association, Greater Vancouver International Film Festival Society, Women In Film and Television Vancouver Society, Women In Film and Television Toronto, St. John's International Women's Film Festival, Yukon Film Society, and National Screen Institute – Canada.

Commission was aware that it intended to closely involve its staff in its regional outreach activities. However, payroll and contractor fees represent more than two-thirds of the total amount allocated to the regional outreach program during the current licence term. While the Commission understands the staff's and contractors' involvement, it is not convinced that the amounts reported by the licensee are fully justified and proportional to the sponsorship expenses which were mainly incurred through the day to day operation of the undertaking. The Commission considers that they are not reflective of the proposals that the licensee had submitted at the time to the Commission, as they do not necessarily represent an additional contribution to the broadcasting system.

28. The licensee also explained that employee and contractor tasks included the selection of projects eligible for a loan. As it is explained below, the licensee reported collectable loans to fulfil its required expenditures under conditions of licence 7 and 8 set out in the 2013 renewal decision. In the Commission's view, this means that the licensee used funding meant for regional outreach to select projects to receive loans that the licensee reported to meet its requirements on script and concept development expenses.
29. Regarding the argument of the licensee on the lack of clarity of the eligible outreach expenditures, the Commission notes that the licensee never contacted the Commission to clarify the definition or eligibility of these expenses. The licensee was questioned at the hearing on the reason why it did not feel the need to seek better guidance from the Commission, to which it replied that as it had never received any feedback from the Commission's staff on its reporting, it believed it was doing it correctly.
30. During the hearing, the Commission asked the interveners⁶ to provide, as an undertaking, a definition of regional outreach expenses. All definitions submitted characterize regional outreach program expenditures as not self-serving.
31. The Commission is of the view that the licensee's expenditures on its regional outreach program, particularly as they relate to the significant amounts expended on staff pay and contractor fees deviate from the purpose of this condition of licence, which was to ensure significant support for regional production and for the promotion of Canadian programming. However, the Commission recognizes that the absence of a clear definition may have made the appropriate implementation of its conditions of licence related to regional outreach expenditures and shortfall difficult for the licensee. Therefore, under these particular circumstances, the Commission does not make a finding of non-compliance regarding condition of licence 6 and the regional outreach program component in condition of licence 8.

Expenditures devoted to script and concept development

32. As explained above, as part of the 2013 renewal decision, the Commission imposed several spending-related conditions of licence designed to ensure the licensee's

⁶ CMPA, DOC, On Screen Manitoba, DGC

continued support for the investment in and production of Canadian programming. In addition to its CPE requirements outlined in condition of licence 5 as set out in Appendix 1 to the 2013 renewal, the Commission also imposed the following condition of licence in relation to the licensee's required support for script and concept development (condition of licence 7 set out in Appendix 1 to the 2013 renewal decision):

Included in the expenditures required under condition of licence 5, the licensee shall expend on script and concept development, including bursaries for writers, excluding overhead costs, at least \$500,000 in each broadcast year.

33. Additionally, in recognition of the licensee's past failure to comply with its condition of licence with respect to script and concept development in the previous licence term, the Commission imposed the following condition of licence (condition of licence 8, also set out in Appendix 1 to the 2013 renewal decision):

In addition to the expenditures required under conditions of licence 5, 6 and 7, the licensee shall expend as payment of the shortfall on its expenditures on regional outreach programs an amount equal to \$500,000 and \$1 million, respectively, on script and concept development in each broadcast year until the end of the current licence term which expires on 31 August 2017. The total amount to be paid equals \$6 million.

Apparent non-compliance with conditions of licence 7 and 8 set out in Appendix 1 to Broadcasting Decision 2013-468, relating to expenditures on script and concept development

34. According to Allarco, it provided payment in accordance with its requirements under both conditions of licence 7 and 8 and reported these payments as part of its annual returns. However, further to Commission questioning as part of this proceeding, Allarco indicated that the entirety of its payments for the 2013-2014 to 2017-2018 broadcast years were, in fact, provided as repayable loans to various independent producers, with the majority of these loans having been reimbursed to Allarco.
35. The licensee indicated that it has never collected interest on these loans, that it has never engaged third-party collection services to collect unpaid loans, and that it writes off loans for projects that are abandoned rather than produced.
36. As noted above, Allarco was permitted to claim its expenses made under condition of licence 7 toward its overall CPE requirements as outlined in condition of licence 5. The Commission evaluates eligible CPE expenses in accordance with its long-standing policy on CPE as detailed in Public Notice 1993-93 (the CPE policy).

Positions of parties and licensee's reply

37. CMPA and On Screen Manitoba, supported by DOC and Shaftesbury as well as the Canadian Association of Stand-up Comedians, requested that reimbursed loans be excluded as eligible contributions from the licensee toward meeting its conditions of

licence, and that the Commission direct the licensee to make up any remaining shortfall expenditures relating to script and concept development pursuant to conditions of licence 7 and 8. They also requested that in the new licence term the Commission maintain the script and concept development requirements as set out in condition of licence 7, and that the licensee be directed to exclude loans when calculating these expenditures.

38. In addition, when asked by the Commission to submit a definition of script and concept development expenditures CMPA, On Screen Manitoba, DOC and DGC argued that the current definition was very clear and confirmed that there was no room for interpretation.
39. The Writers Guild of Canada (WGC) submitted that loans should not be eligible as expenditures towards fulfilling conditions of licence 7 and 8, and expressed disappointment that the licensee had not awarded bursaries to writers in order to meet these expenditure requirements.
40. Numerous individual independent producers submitted that Super Channel has provided support for the production of Canadian programming and that these loans have significantly contributed to their ability to move projects from development to production.
41. The licensee indicated that since Super Channel launched in 2007, it had always used loans to meet its conditions of licence regarding script and concept development. It also argued that for many years it has been common practice for the licensees of Canadian pay television services to provide loans to producers. It also submitted, in reply to interventions, that there is no definition of what constitutes an appropriate expense, arguing in particular that loans such as those provided by Super Channel are, indeed, expenses.
42. Furthermore, the licensee argued that, following the Commission's request in the context of its licence renewal in 2013, it filed, on an annual basis, detailed financial data, to report script and concept development shortfalls pertaining to its condition of licence 8.⁷ It added that no attempt was made by the Commission to advise or otherwise alert Super Channel that some expenditures would be considered ineligible in calculating contributions made toward meeting the requirements of Super Channel's conditions of licence.
43. In referencing the Commission's policy on eligible expenses used for the calculation of Canadian programming expense requirements, which are outlined in the CPE policy, the licensee argued that the CPE policy only references criteria related to the conditions of licence and expectations for English-language private television services but does not mention pay services at all. It noted that Super Channel was licensed, since launching in 2007, as a pay service.

⁷ Pursuant to condition of licence 9 in Appendix 1 of Broadcasting Decision 2013-468.

44. Despite arguing that the CPE policy was not intended to apply to pay services, the licensee also argued that the CPE policy does not indicate that script and concept loans are not eligible expenses. In particular, the licensee argued that while the CPE policy states that loans by broadcasters to assist in the financing of Canadian productions are ineligible expenses, that statement should not apply to script and concept development loans because these loans do not assist in the financing of productions *per se*, since a large percentage of such projects do not make it past the development phase to production. Further, in cases where projects reach the production stage, the loans must be repaid before production begins.
45. Notwithstanding this argument, the licensee stated that the loans it provided aided in the production of 78 productions and that most of these productions were then broadcast by Super Channel.
46. In response to the Commission questioning about this issue at the oral hearing, Allarco stated that if the Commission were to make a finding that the loans were ineligible expenses for the purpose of these conditions of licence and make a subsequent finding of non-compliance and require the repayment of arrears, it had no intention of repaying any of those arrears. It further indicated that the service would need to be financially self-sufficient to continue operating, and that this would be impossible if repayments were imposed.
47. In regards to the Commission questioning about loans that have not yet been reimbursed, the licensee stated that it is prepared to provide an update on reimbursed amounts, twice a year.

Late payment

48. Some of the requirements for script and concept development expenditures (under condition of licence 8), were paid late for the 2015-2016 and (under conditions of licence 7 and 8) for the 2016-2017 broadcast years.

Positions of the parties and licensee's reply

49. The CMPA and On Screen Manitoba requested that the Commission find that Allarco failed to achieve condition 8 relating to script and concept development for the broadcast years 2015-2016 and conditions 7 and 8 for broadcast year 2016-2017 because payments were made past the required date according to the licensee's annual returns. The licensee also confirmed this in its replies to the request for information letters.
50. The licensee stated that during the 2016-2017 broadcast year, it operated under creditor protection pursuant to the CCAA. It explained that it immediately informed the Commission⁸ that it would not be able to meet its script and concept development obligations.

⁸ In a letter dated 30 May 2016

51. Allarco argued that the fulfillment of the condition of licence 8 spending obligations via its payments in the 2017-2018 broadcast year was the best possible outcome that was achievable under the circumstances and that the compliance with the Commission's expectation to expend the \$6 million was fully achieved.

Commission's analysis and determinations

52. As noted above, expenditures allocated by broadcasters, particularly for Canadian programming, have long been considered by the Commission as essential to helping the broadcasting system achieve the policy objectives related to the creation of Canadian programming as outlined in section 3(1) of the Act.⁹ In 2006, when the Commission approved Allarco's application to operate a new national pay service,¹⁰ it was partly due to Allarco's proposal to expend a specific amount on script and concept development. Allarco's commitments at the time, and its meaningful contribution to the objectives outlined in the Act also provided distribution privileges for Super Channel by virtue of its Category A (formerly Category 1) designation; a designation it has maintained until today.
53. When the Commission imposed conditions of licence on Super Channel relating to script and concept development expenditures, both on an ongoing basis and in order to pay arrears from a finding of non-compliance, the Commission was explicit in its definition. In particular, in the conditions of licence outlined in Super Channel's most recent licence renewal decision, as provided in Appendix 1 to the 2013 renewal decision, the Commission defined "script and concept development expenditures" as "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". The Commission added further precision in that same document and appendix by noting that, for the purpose of Super Channel's conditions of licence, "'expend' and 'expenditure' means actual cash outlay".
54. According to the CPE policy, loans can be claimed neither as CPE, nor as an expense. Furthermore, according to accounting standards, a loan should be calculated as an account receivable, not an expense. At the hearing, the President and CEO of Allarco Entertainment 2008 Inc, Mr. Don MacDonald, who self-identified as a chartered professional accountant, confirmed that he fully understood that.¹¹

⁹ 3 (1) It is hereby declared as the broadcasting policy for Canada that

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, [...]

¹⁰ Broadcasting Decision 2006-193

¹¹ Paragraphs 257 and 258 of the Transcript.

55. The Commission only learned of the licensee's systematic use of loans for the purpose of meeting its conditions of licence as a result of the current licence renewal process. The Commission has no record of the licensee ever having approached the Commission over the course of its licence term to seek guidance as to whether loans could be used to meet its conditions of licence. Additionally, the licensee did not provide the granular details to the Commission, either in its annual returns or in reporting the payments required under condition of licence 8, to demonstrate that loans were being accounted for as expenses toward meeting the requirement of the Super Channel conditions of licence related to script and concept development.
56. Apart from the very specific definitions of expenses contained in the licensee's own conditions of licence, the Commission has published long-standing guidance on what is or is not eligible for the purposes of accounting for CPE. In the CPE policy, published in 1993, the Commission was explicit in noting that "Loans by broadcasters to assist in the financing of Canadian productions are not eligible expenses for purposes of the formula". Moreover, these instructions are provided to licensees as a part of the guidance to be followed when completing their annual returns. With respect to Super Channel, the Commission is of the view that the instructions with respect to the ineligibility of the use of loans to meet CPE requirements are not ambiguous.
57. The purpose of the Commission's CPE policy is to ensure that all licensees subject to a CPE requirement, irrespective of their class of licence, have clear guidance on the Commission's approach to eligible CPE-related expenditures and the appropriateness of certain accounting practices. In particular, concerning the eligibility of loans, the CPE policy provides, under the subheading "Loans": "Loans by broadcasters to assist in the financing of Canadian productions are not eligible expenses for purposes of the formula." Further, the appendix of the same policy specifies: "For purposes of the conditions of licence or expectations applied by the Commission with respect to expenditures on Canadian programming by the licensees of English-language private television undertakings, 'expend on Canadian programming' means: [...] f) Expenditures on script and concept development, excluding overhead costs."
58. The licensee's own conditions of licence, the content of the CPE policy and generally accepted Canadian accounting principles inform the Commission's view that loans are not eligible to be counted as expenditures for the purpose of meeting Allarco's conditions of licence. This interpretation is consistent with the manner in which the Commission has determined the eligible production costs for compliance reasons since the publication of the CPE policy. Moreover, it is consistent with the definitions of expend, expenditure, and script and concept development expenditures provided in Broadcasting Decision 2006-193 and the 2013 renewal decision.
59. The Commission therefore finds that, for the purpose of assessing the licensee's compliance with its script and concept development related conditions of licence, the amounts accounted for by the licensee as being loans will not be taken into account as expenditures.
60. It is a licensee's responsibility to adhere to its conditions of licence. The Commission is of the view that a responsible licensee, in determining what are or are not eligible

activities that may be used in meeting its conditions of licence, should consult all relevant documentation, including those definitions provided for in its specific conditions of licence as well as relevant Commission policies and related guidance. In cases where a licensee perceives ambiguities or contradictory provisions that could otherwise impede its ability to meet its conditions of licence, such a licensee could and should approach the Commission for clarification. Licensees are freely able to consult Commission staff in that regard and may always avail themselves of the opportunity to file a formal application with the Commission either for clarification or for the amendment of their conditions of licence.

61. In light of all of the above, the Commission finds that the licensee has failed to comply with its conditions of licence 7 and 8 as included in Appendix 1 to the 2013 renewal decision.
62. In the 2013 renewal decision, the licensee was granted the ability to account for its expenses made under its script and concept development conditions of licence 7 toward meeting its Canadian programming expenditure condition of licence. Consequently, the licensee included these amounts as part of its expenditures on Canadian programming. As the Commission has deemed these reimbursed loans ineligible as expenditures on script and concept development, they will be deducted from the licensee's reported CPE, which would have an effect on the licensee's compliance with condition of licence 5.
63. According to the evidence filed on the record of this proceeding, the licensee's failure resulted in the following spending shortfalls with respect to its obligations related to conditions of licence 7 and 8:
 - \$2,243,520 for condition of licence 7
 - \$2,803,609 for condition of licence 8
64. The Commission considers that the licensee's instances of non-compliance are very serious and that the shortfalls are amounts that are owed to the broadcasting system. The Commission estimates that if the licensee wishes to enjoy the privilege of holding a licence for a new term, it must carry out all of its obligations to the broadcast system and considers that the licensee must pay the full amount of the shortfall for both conditions of licence. To ensure that these amounts are directed to supporting the broadcast industry, the Commission directs the licensee to pay these amounts to the Canada Media Fund (CMF).
65. Therefore, the Commission **directs** the licensee to pay the shortfall of \$2,243,520 and \$2,803,609 for a total of \$5,047,129, and **directs** the licensee to pay, on a twice-yearly basis, no later than 28 February and 31 August of the next four broadcast years, pre-determined amounts to the CMF. The Commission also **directs** the licensee to submit an affidavit confirming the payment no later than 30 days after the payment is made. This confirmation will be published on the Commission's website.
66. In addition, regarding the loans yet to be reimbursed and which total, as of 31 October 2019, \$1,452,871 (\$256,480 for condition of licence 7 and \$1,196,391 for

condition of licence 8), the Commission imposes a condition of licence requiring the licensee to pay to the CMF, by no later than 31 August of each broadcast year, the amounts of the loans reimbursed during that broadcast year. The Commission also **directs** the licensee to file an affidavit providing an update of these reimbursements and the confirmation of payment to the CMF at the same time as its annual returns. This yearly confirmation will be published on the Commission's website.

67. However, given the licensee's financial situation, the Commission allows Allarco to report, as part of its CPE, the payments made to the CMF that are required to cover the shortfall of \$2,243,520 related to the condition of licence 7. In regard to loans yet to be reimbursed, the Commission also allows Allarco to claim, as part of its CPE, any reimbursement it received with respect to loans relating to condition of licence 7 paid to the CMF.
68. Accordingly, **conditions of licence** reflecting these determinations are set out in Appendix 1 to this decision. The schedule of payments is set out in Appendix 3 to this decision.
69. The licensee's non-compliance with respect to its condition of licence 5 is discussed further below in this decision.

Re-imposition of the conditions of licence concerning the regional outreach program and script and concept development

70. CMPA, On Screen Manitoba, DGC and DOC requested that conditions of licence pertaining to regional outreach program and to script and concept development be re-imposed.
71. Allarco acknowledged the importance of these two conditions of licence and stated that it is prepared to keep them.

Commission's analysis and determinations

72. As stated above, the licensee has failed to meet its obligations which would normally be a cause for the Commission to re-impose such conditions of licence with additional clarity to ensure future compliance. However, these conditions of licence were imposed as a result of a competitive process, at a time when genre protection was still in effect. They were appropriate and ultimately contributed to the Commission determining that the licensing of Allarco, in the context of a competitive licensing hearing, was the most beneficial for the broadcasting system. Until now, the licensee was licensed as a Category A service benefiting from certain privileges that will not be carried into the next licence term. Furthermore, the Commission notes that going forward, Super Channel will be considered a discretionary service and this type of condition of licence is not part of the standard conditions of licence normally imposed on discretionary services.

73. Consequently, the Commission is not re-imposing the conditions of licence concerning the regional outreach program and the script and concept development expenditures.

Canadian programming expenditures

74. In addition to the other measures discussed above to ensure the licensee's continued support for investment in, and production of, Canadian programming consistent with sections 3(1)(e) and (s)(i), the Commission also imposed, as part of the 2013 renewal decision, the following CPE requirements (condition of licence 5 set out in Appendix 1 to the 2013 renewal decision):

The licensee shall expend, on the acquisition of, or investment in, Canadian programs, 30% of its revenue for the previous broadcast year.

75. In its application, Allarco requested that its CPE contributions be decreased from 30% to 25% of the previous year's gross revenue. The licensee reconsidered its request following the interventions and indicated that it would adhere to a 30% CPE obligation.

Apparent non-compliance with condition of licence 5 relating to Canadian programming expenditures.

76. According to the annual returns filed by the licensee over the course of the licence term, it appeared to the Commission that the licensee had experienced a shortfall of \$1,743,590 with respect to its CPE requirements.

77. In addition, the licensee clarified that in the debt it declared under the CCAA, there was an amount of \$1,967,316 it owed to some producers. When the licensee emerged from CCAA protection on 5 April 2018, the Court of Queen's Bench of Alberta approved a repayment plan of \$690,364 for this debt, leaving a total of \$1,276,952 unpaid to producers. The licensee, in response to a Commission letter,¹² indicated that it had nevertheless reported the entirety of the \$1,967,316 in operating expenses in its annual returns. Its response further implied that the licensee had claimed this amount toward fulfilling its CPE obligations captured in condition of licence 5. When questioned prior to the hearing as to whether this amount was indeed paid to producers, the licensee could not confirm that it was.

Positions of parties and licensee's reply

78. CMPA, On Screen Manitoba, WGC, DGC, DOC and Shaftesbury submitted that unpaid amounts to producers should not be counted as CPE. The interveners also submitted that the Commission should impose a condition of licence requiring that any shortfall be paid.

¹² Licensee's response, dated 20 August 2018, to the Request for information #8.

79. During the hearing, the licensee acknowledged it was aware of the potential shortfall of \$1,743,590 with respect to its CPE requirements. It also stated its view that it had not reported the \$1,967,316 amount as CPE.
80. Further to additional questioning, the licensee adjusted its answer, in a written undertaking following the hearing, indicating that a portion, without specifying the amount, had been included, based on the payment schedule of each licence agreement. The exact amount for each agreement was calculated on the basis of the number of months that had passed in order to determine the depreciation to claim for the rights of the program.
81. In the same written undertaking, the licensee acknowledged that the accounting for these expenses had caused confusion and proposed to allocate, in its next licence term, \$1,276,952 (representing the amount that was not paid to producers under the CCAA) in addition to its 30% CPE. It noted that this amount would not be to repay the affected producers under the CCAA plan, given that this is not permitted under the CCAA, but would be allocated towards CPE.

Commission's analysis and decision

82. The licensee's response to the Commission questioning with respect to the amounts of CPE that were or were not captured under the CCAA judgement and how those amounts were or were not reported as CPE to the Commission was greatly lacking in detail, despite numerous questions on the issue both in writing and at the oral public hearing. The Commission is therefore unable to determine whether part or the entirety of the \$1,967,316 amount was reported to the Commission as CPE.
83. However, based on annual returns filed by Allarco annually with the Commission, the Commission is able to make a clear finding based on the evidence that the licensee failed to expend \$1,743,590 in accordance with its condition of licence 5. The amount represents an accumulated shortfall incurred in broadcast years 2013-2014 and 2016-2017.
84. As noted above, Allarco was permitted to claim its expenses made under condition of licence 7 (script and concept development) towards its overall CPE requirements as outlined in condition of licence 5. When calculating the CPE amount in non-compliance, the \$2,243,520 resulting from the licensee's failure to comply with its condition of licence 7 must therefore be added to the amount of \$1,743,590.
85. The Commission finds the licensee to be in non-compliance in relation to its CPE requirements for a total of \$3,987,110. As mentioned above, the Commission requires that Allarco repay the shortfall related to its script and concept requirements under condition of licence 7 and 8 which includes the shortfall of \$2,243,520 that were reported as CPE.
86. In regards to the licensee's proposal to allocate \$1,276,952 to CPE, during its next licence term, in addition to its 30% CPE requirement, it appears to be contradictory with the licensee's firm refusal, when questioned at the hearing, to repay any potential

shortfall the Commission could ask it to repay. Moreover, the amount is insufficient to cover the entirety of its CPE shortfall.

87. Finally, regarding a 30% CPE obligation, the Commission is of the view that given the licensee's non-compliance, its historical expenses and its agreement to maintain the same CPE requirements, this requirement should be maintained. Consequently, in Appendix 1 to this decision, the Commission has set out a **condition of licence** requiring the licensee to expend, on the acquisition of, or investment in, Canadian programs, 30% of its gross revenue for the previous broadcast year.

Broadcast of Canadian content

88. In addition to monetary contributions to the creation of Canadian programming, Allarco was also required by condition of licence to contribute to the presentation of Canadian programming consistent with the policy objectives in subsections 3(1)(e) and (s)(i) by broadcasting a certain amount of Canadian content.
89. Specifically, condition of licence 3 set out in Appendix 1 to the 2013 renewal decision required Super Channel to devote a minimum of 30% of the time from 6:00 p.m. to 11:00 p.m. (Eastern time) and 25% of the remainder of the broadcast day to the distribution of Canadian programs. In certain instances, a 150% credit was to be awarded for the distribution of new Canadian programming.
90. In addition to its regular programming, the licensee broadcast promotional material to promote the Canadian and foreign programming in its schedule.
91. After an evaluation of the television logs submitted by the licensee, the Commission was initially of the view that the above-mentioned exhibition requirements did not appear to have been met. However, the monitoring of the programming was made difficult due in large part to numerous errors in reporting promotional material in the logs as filed by the licensee.
92. The licensee was provided with the Commission's data and findings, and was offered the opportunity to comment, to which it indicated that it implemented changes to ensure there are no longer errors in the filing of the television logs.

Positions of parties and licensee's reply

93. Based on the apparent non-compliance of the licensee pertaining to its Canadian programming exhibition requirements, CMPA and On Screen Manitoba requested that the Commission impose additional safeguards to ensure that the licensee fully conforms to its condition of licence in the new licence term. They suggested an additional condition of licence to limit Super Channel's use of promotional programming to 3% of its schedule. They also asked the Commission to impose a condition of licence to ensure that Super Channel's Canadian programs are scheduled evenly throughout the broadcast day.

94. Allarco argued that these proposals would be highly prejudicial to Super Channel, as there are no such requirements imposed on the vertically-integrated licensees with whom it has to compete.

Commission's analysis and decision

95. The Commission acknowledges that the licensee's reporting on its Canadian exhibition obligations could have been complicated by a number of factors including monitoring and system changes instituted midway through the licence term, as well as numerous errors in the logs submitted by the licensee.

96. After weighing these complicating factors, the Commission does not make a finding of non-compliance. However, it reminds the licensee that it is responsible for submitting full and accurate logs and records.

97. With respect to the intervenors' requests, the Commission is of the view that, due to a lack of firm evidence, the proposed approaches could be viewed as heavy-handed and arbitrary, given the more uniform approach to regulation the Commission has taken recently, particularly with respect to discretionary services. Given the above, the Commission is of the view that imposing non-standard Canadian content conditions of licence is unjustified and would be unfair to Super Channel.

Other Issues

Programs of National Interest

98. DGC and the WGC requested that the Commission add a condition of licence relating to programs of national interest (PNI).

99. The Commission finds that the imposition of such a condition of licence on an independent broadcasting service such as Super Channel is not warranted. Generally, PNI requirements are imposed on broadcasters whose services are regulated under a group-based framework and, as such, benefit from programming and other synergies. Super Channel does not benefit from such synergies and associated regulatory flexibilities.

100. The Commission must also be mindful of the other obligations it is imposing on Super Channel as a result of this decision and finds that the imposition of an additional requirement related to PNI expenditures would be unreasonably burdensome in this context. In light of all of the above, the Commission does not consider it appropriate to impose a condition of licence relating to PNI at this time.

Licence renewal and term

101. The licensee requested a four-year licence term. Several interveners argued that the Commission should not grant a licence term exceeding any more than three years.

102. The Commission has made several findings of non-compliance with respect to the licensee's inability to meet its regulatory obligations over the course of two

consecutive licence terms. In this decision, the Commission has imposed several obligations on the licensee in an effort to ensure that its regulatory requirements are met going forward, as well as obligations to remedy the previous non-compliance, including the repayment of various shortfalls. The imposition of such requirements are not undertaken without regard to the licensee's operating context, including its financial situation and its future viability.

103. The Commission is also concerned with the licensee's attitude towards its obligations and the Commission's authority. In particular, the Commission notes Allarco's statement at the hearing that it would not repay any shortfall even if ordered to do so.¹³ Statements such as this raise questions as to the willingness and ability of a licensee to bring itself into compliance and to comply with its regulatory obligations going forward.
104. At the same time, the Commission recognizes the contribution that Allarco makes to the Canadian broadcasting system both as an independent programming undertaking and in terms of its contributions to the production of Canadian content. In particular, the Commission notes that the supporting interveners stated that Super Channel was a significant supporter of the Canadian production industry, and the interveners that submitted comments requesting that the licensee comply with its obligations also recognized its contribution.
105. As such, in spite of the Commission's concerns about Allarco's willingness and resolve to fully comply with its regulatory obligations, it has determined that the licence should be renewed.
106. In determining the appropriate licence term in light of the non-compliance and the Commission's concerns with Allarco's disregard for its responsibilities as a licensee and the Commission's authority, the Commission also must consider what licence term would best serve the Canadian broadcasting system. This includes consideration of the appropriate length of time for the repayment of the shortfalls. Considering the circumstances of the licensee, the Commission finds that the repayments could reasonably be made over the course of four years. A four-year licence term would also grant the licensee a degree of stability it will need in order to continue operating Super Channel and give it sufficient opportunity to demonstrate its willingness and ability to comply with its regulatory obligations. Furthermore, the additional measures that will be imposed on the Super Channel licence, as described below, offer additional safeguards to ensure the licensee's compliance with its requirements over the course of this new licence term.
107. Accordingly, the Commission **renews** the broadcasting licence for the English-language discretionary service Super Channel for a four-year period.

¹³ See Undertaking #13, pp. 13 and 14 of document "DM#3752668 - Allarco - Allarco Entertainment Response to Undertakings Nov 14 2019.pdf" available on the Commission's website, *Public record: 1011-NOC2019-0303*, under the "Undertakings by applicant" tab.

Additional regulatory measures

108. Despite the Commission's decision to renew the licence, its concerns remain. In particular, the licensee was found to be in serious non-compliance during its first licence term, and is now again being found in multiple instances of non-compliance during its second term. Further, the manner in which the licensee has interpreted and implemented some of its conditions of licence reveals a blatant disregard for its regulatory obligations. There is also a lack of a firm commitment to correct the situation and, as noted above, the Commission is particularly concerned with Allarco's stated intention not to fulfill the repayment of arrears. In light of these concerns, and the Commission must take the appropriate steps to ensure that Allarco takes its regulatory obligations seriously and the non-compliance does not reoccur.
109. Considering all of the above, the Commission is imposing the following additional regulatory measures, which are further described below:
- a suspension of the licence;
 - a mandatory order to reinforce the CPE requirement; and
 - the requirement to file an annual production report.

Suspension of the licence

110. Section 9(1)(e) of the Act provides the Commission with the authority to suspend a licence in furtherance of its objects. These objects, as set out in section 5(1) of the Act require the Commission to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1), including sections 3(1)(e) and *s(i)*, and with regard to the regulatory policy set out in section 5(2). Failures to comply with regulatory obligations undermine the integrity of the Canadian broadcasting system and, therefore, suspension may be an appropriate regulatory measure in certain cases to ensure compliance.
111. When asked to comment on the potential impact of an obligation to pay arrears on Allarco's business strategy, Mr. McDonald stated emphatically "We are not prepared to pay any repayments."¹⁴ This sentiment was again reflected in a later exchange seeking additional clarity on the point¹⁵ and also in its response to the possibility of the imposition of a mandatory order.¹⁶ By stating that it would not adhere to a requirement to repay any shortfall even if directed to, Allarco intentionally flouts its current regulatory obligations and has demonstrated that it is prepared to continue to do so. Based on Allarco's history, it is apparent to the Commission that simply imposing regulatory obligations and expecting Allarco to comply with such measures will not yield a different result. The Commission must therefore take stronger

¹⁴ Paragraphs 243 to 246 of the Transcript.

¹⁵ Paragraphs 269 to 272 of the Transcript.

¹⁶ Undertaking 13 (see footnote 13).

measures against Allarco to ensure that any further breaches of its regulatory obligations will have serious and immediate consequences for the licensee. As a result, the Commission considers it appropriate to impose additional measures to ensure that the shortfalls identified above are repaid.

112. Furthermore, the Commission is also concerned by the impact that Allarco's entry into creditor protection has had on the broadcasting system. Allarco has sought creditor protection twice over the course of its two licence terms. These actions have had a significant impact on the broadcasting industry. In particular, the licensee's financial instability following its two creditor protections affected the Canadian production industry since many producers received only a small percentage of the amounts that were owed by the licensee and creates uncertainty about its capacity to participate in the creation and promotion of Canadian programming going forward. As noted, the Commission has a responsibility to regulate and supervise the Canadian broadcasting system and actions which undermine the integrity of the system must be addressed.
113. In light of all of the above, the Commission considers that an appropriate additional regulatory measure to ensure Allarco's compliance in the next licence term is a suspension of its licence which will be triggered by certain identifiable actions or inactions. This type of regulatory measure ties the licensee's ability to operate its service to its compliance, such that a failure to comply results in an inability to broadcast, until such time as the licensee brings itself back into compliance with its obligations.
114. Accordingly, the Commission hereby **suspends** Allarco's broadcasting licence for Super Channel. However, this suspension will only come into effect if:
- the licensee fails to make a payment in accordance with condition of licence 9, 10 or 12, as set out in Appendix 1 to this decision. The licence suspension will automatically take effect from the moment at which any of these obligations has not been met and will remain in effect until the payment in question has been made and the licensee has provided appropriate proof thereof to the Commission;
- or
- the licensee obtains protection under the CCAA or the *Bankruptcy and Insolvency Act*. The licence suspension will automatically take effect from the moment at which the licensee is under such protection and will remain in effect until the licensee is no longer under such protection and has provided appropriate proof thereof to the Commission.
115. The suspension will be automatic, without any further public proceeding, on the occurrence of either of these events and will be lifted only once the event is remedied and the licensee has provided appropriate proof that the payment has been made or it is no longer under creditor protection.

116. **Conditions of licence** 13 and 14, set out in Appendix 1 to this decision, reflect these determinations.

117. The Commission reminds Allarco that a suspension of the licence means it will not be able to broadcast Super Channel on any distribution undertaking. Should Allarco continue to broadcast the programming service while its licence is suspended, it will be broadcasting without a licence, contrary to section 32(1) of the Act, and may be subject to other regulatory action, including revocation of the licence, or prosecution for this contravention.

Issuance of a mandatory order

118. The Commission notes that the licensee indicated that it would adhere to a 30% CPE requirement and is mindful that it has determined that a portion of the licensee's shortfall may be used to meet this requirement.

119. As noted above, the licensee was found to be in severe non-compliance with its CPE requirements as well as with its requirement to expend on script and concept development as per its CPE condition of licence. In addition, based on Allarco's history, the Commission is not convinced that simply imposing regulatory obligations and expecting Allarco to comply with such measures is sufficient to ensure its compliance. The Commission reminds Allarco that CPE requirements are essential to maintaining a balanced Canadian broadcasting environment.

120. Section 12(2) of the Act states:

The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part, under any regulation, licence, decision or order made or issued by the Commission under this Part or under any of sections 42 to 44 of the *Accessible Canada Act* and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part, to any such regulation, licence, decision or order, to section 34.1 or to any of sections 42 to 44 of the *Accessible Canada Act*.

121. In light of Allarco's history in respect of its CPE requirements and the Commission's concerns with its willingness and ability to comply going forward, the Commission finds it appropriate, pursuant to section 12(2) of the Act, to impose a mandatory order requiring the licensee to comply at all times with condition of licence 2 set out in Appendix 1 to this decision, which requires that 30% of the previous broadcast year's gross revenues be devoted to CPE.

122. This mandatory order is set out in Appendix 2 to this decision. Pursuant to section 13 of the Act, this mandatory order will be filed with the Federal Court and be made an order of that court.

Production report

123. Certain interveners questioned the business relationship practices exhibited by Super Channel in its dealings with independent producers. DOC and DGC asked the Commission to add a condition of licence to impose standard business practices between Super Channel and independent producers to facilitate payment arrangements.
124. Because of the apparent severe non-compliance, the licensee was questioned about its payment practices.
125. Allarco confirmed that it was not its common practice to start paying licence fees before the production is delivered. The licensee explained that it used several payment schedules which are normally spread over the term of the licence fee. The licensee was then questioned about the possibility of the Commission requiring that it submit a production report, as is the case for large ownership groups and services that benefit from a mandatory distribution order.
126. DOC and DGC maintained that the licensee's payment practice is not an industry standard and that it affects producers financially, especially small producers, which must finance 100% of the production until delivery.
127. CMPA, On Screen Manitoba, DGC and DOC were in favour of requiring such a report, which would, according to them, allow for greater transparency with respect to the licensee's Canadian production expenditures.
128. The licensee agreed to submit a production report similar to the one imposed on the large groups but requested that production information concern only original first-run programs. The licensee also requested that some information remain confidential, such as licence fees and production budgets.

Commission's analysis and decision

129. Section 10(1)(i) of the Act authorizes the Commission to make regulations requiring licensees to submit such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify. Pursuant to this provision, the Commission has enacted section 9(2) of the *Discretionary Services Regulations* which requires licensees to respond to requests for information from the Commission regarding, among other things, programming they originate or distribute and their adherence to their regulatory obligations.
130. In light of the concerns expressed on the record of this proceeding by certain interveners, in particular those regarding the licensee's fulfillment of its CPE requirements, the Commission considers that the filing of a production report will ensure that the licensee provides a full and transparent account, both to the Commission and the public, of its activities with respect to its CPE obligations. Therefore, the Commission **directs** the licensee to file a production report annually,

similar to the one required from the large groups, with the addition of an extra column indicating the percentage of the total amount of productions paid to producers at the time of the report.

131. With regard to the licensee's request that production information concern only original first-run programs, the Commission notes that the licensee's approach to fulfilling its CPE obligations will include both original first-run programming and other programming expenses. Furthermore, additional information would allow both the Commission and third parties to have a more complete view of where CPE are being allocated and whether the Commission's policies and conditions of licence are achieving their objectives efficiently. Accordingly, the Commission is of the view that the licensee's reporting should include all of its expenses on Canadian programming. The Commission will publish this report, in an abridged version, in line with applicable rules on the confidentiality of such information as detailed in Broadcasting Information Bulletin 2019-304.
132. Accordingly, a **condition of licence** reflecting these determinations is set out in Appendix 1 to this decision. The production report is set out in Appendix 4 to 9. The template is also available in Excel, and the Excel version should be used when filing reports.

Conclusion

133. In light of all of the above, the Commission **renews** the broadcasting licence for the national, English-language discretionary service, Super Channel, from 1 July 2020 to 31 August 2024. This licence is also suspended; however, the suspension will only take effect if the licensee fails to make a payment as set out in conditions of licence 9, 10 or 12 set out at appendix 1 of this decision, or obtains protection under the CCAA or the *Bankruptcy and Insolvency Act* as set out in condition of license 14.
134. The licensee shall adhere to the **conditions of licence** set out in Appendix 1 to this decision and abide by the mandatory order set out in Appendix 2 to this decision.

Reminders

135. Section 8 of the *Discretionary Services Regulations* requires that except as otherwise provided under a condition of its licence, a licensee shall provide to the Commission, within 30 days after the end of each month, the program log or record of its programming for the month. The Commission reminds the licensee that the program logs must be accurate and must be kept in a form acceptable to the Commission.
136. The Commission recognizes that the licensee has made late payments in the past and reminds the licensee that it must respect the payment schedule outlined in its conditions of licence and in Appendix 3 to this decision in the next licence term.
137. The Commission also emphasizes the importance it places on a licensee's fulfillment of its regulatory obligations and expects the licensee to comply at all times. The Commission reminds Allarco that holding a licence is a privilege, not a right. The

Commission notes that it may consider recourse to additional measures, including further mandatory orders, short-term renewals, suspension, non-renewal or revocation of the licence if Allarco again fails to comply with its regulatory obligations.

Secretary General

Related documents

- *Super Channel – Administrative renewal*, Broadcasting Decision CRTC 2019-424, 17 December 2019
- *Production Report to be completed annually by large English- and French-language ownership groups*, Broadcasting Information Bulletin CRTC 2019-304, 29 August 2019
- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2019-303, 28 August 2019
- *Super Channel – Administrative renewal*, Broadcasting Decision CRTC 2019-134, 8 May 2019
- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2019-127, 3 May 2019
- *TVA Groups Inc. – Non-compliance*, Broadcasting Decision CRTC 2019-109, 18 April 2019
- *Various television stations and services – Administrative renewals*, Broadcasting Decision CRTC 2018-317, 24 August 2018
- *Various pay television and specialty services and television stations – Administrative renewals*, Broadcasting Decision CRTC 2016-463, 24 November 2016
- *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016
- *Let's Talk TV: The way forward – Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86, 12 March 2015
- *Various independent pay and specialty Category A services – Licence renewals*, Broadcasting Decision CRTC 2013-468, 30 August 2013
- *Administrative renewals*, Broadcasting Decision CRTC 2011-417, 12 July 2011
- *Applications for new pay television services*, Broadcasting Decision CRTC 2006-193, 18 May 2006
- *The reporting of Canadian programming expenditures*, Public Notice CRTC 1993-93, 22 June 1993

This decision is to be appended to the licence

Appendix 1 to Broadcasting Decision CRTC 2020-205

Terms, conditions of licence, expectations and encouragements for the national, English-language discretionary undertaking Super Channel

Terms

The licence will take effect 1 July 2020 and expire 31 August 2024.

Conditions of licence

1. The licensee shall adhere to the standard conditions of licence for discretionary services set out in Appendix 2 to *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016, as well as to the conditions set out in the broadcasting licence for the undertaking.
2. The licensee shall, in each broadcast year, devote not less than 30% of the previous year's gross revenues of the undertaking to the acquisition of, or investment in, Canadian programming.
3. Subject to condition of licence 4, the licensee may claim, in addition to its expenditures on Canadian programming:
 - a. a 50% credit against its Canadian programming expenditure requirements for expenditures made on Canadian programming produced by an Indigenous producer and claimed as Canadian programming expenditures during that broadcast year;
 - b. a 25% credit against its Canadian programming expenditure requirements for expenditures made on Canadian programming produced by an official language minority community producer and claimed as Canadian programming expenditures during that broadcast year. The licensee may claim the credit if:
 - i) the programming is produced in the province of Quebec and the original language of production is English; or
 - ii) the programming is produced outside the province of Quebec and the original language of production is French.
4. The licensee may claim the credits calculated in accordance with condition of licence 3 until the expenditures made on Canadian programming produced by Indigenous producers and by official language minority community producers, including credits, reach a combined maximum of 10% of the Canadian programming expenditure requirement for the undertaking.
5. In regard to Canadian programming expenditures:

- a) In each broadcast year of the licence term, excluding the final year, the licensee may expend an amount on Canadian programming that is up to 5% less than the minimum required for that year calculated in accordance with condition of licence 2; in such case, the licensee shall ensure that the service expends in the next broadcast year of the licence term, in addition to the minimum required expenditure for that year, the full amount of the previous year's under-expenditure.
 - b) In each broadcast year of the licence term, where the licensee expends an amount for that year on Canadian programming that is greater than the minimum required expenditure calculated, excluding the final year, the licensee may deduct that amount from the total minimum required expenditure in one or more of the remaining years of the licence term.
 - c) Notwithstanding articles 5a) and 5b) mentioned above, during the licence term, the licensee shall ensure that the service expends on Canadian programming, at a minimum, the total of the minimum required expenditures calculated in accordance with condition of licence 2.
6. The licensee may claim, as part of its Canadian programming expenditure obligations, the payments made to the Canada Media Fund that are required pursuant to:
 - condition of licence 9;
 - condition of licence 12 (only reimbursements with respect to loans it granted to fulfill condition of licence 7 set out in *Various independent pay and specialty Category A services – Licence renewals*, Broadcasting Decision CRTC 2013-468, 30 August 2013 (Broadcasting Decision 2013-468) with regard to required script and concept development expenditures).
 7. In the two years following the end of the previous licence term, the licensee shall report and respond to any Commission enquiries relating to the expenditures on Canadian programming made by the licensee for that term.
 8. The licensee shall be responsible for any failure to comply with the requirements relating to expenditures on Canadian programming that occurred during the previous licence term.
 9. To pay the shortfall the licensee accumulated during the previous licence term with regard to required script and concept development expenditures pursuant to condition 7 set out in Broadcasting Decision 2013-468, the licensee must make periodic instalments to the Canada Media Fund for a total of \$2,243,520, according to the schedule set out in Appendix 3 to this decision.
 10. To pay the shortfall the licensee accumulated during the previous licence term with regard to required script and concept development expenditures pursuant to condition 8 set out in Broadcasting Decision 2013-468, the licensee must make periodic

instalments to the Canada Media Fund, for a total of \$2,803,609, according to the schedule set out in Appendix 3 to this decision.

11. No later than 30 days following the payment of each instalment pursuant to conditions 9 and 10, the licensee must send a confirmation of payment to the Commission by affidavit. These confirmations will be published on the Commission's website.
12. On or before 31 August of each broadcast year of the licence term, the licensee must pay to the Canada Media Fund any reimbursement it received during that broadcast year with respect to loans it granted to fulfill conditions 7 and 8 set out in Broadcasting Decision 2013-468 with regard to required script and concept development expenditures. The licensee must report these payments to the Commission by affidavit on or before 30 November of each subsequent broadcast year. These reports will be published on the Commission's website. For the 2019-2020 broadcast year, the licensee must pay to the Canada Media Fund any reimbursements it received after 31 October 2019.
13. The suspension of the licence will automatically take effect, without any further public proceeding, if the licensee fails to make a payment as set out in conditions of licence 9, 10 or 12. The licence suspension will take effect from the moment at which any of these obligations has not been met and will remain in effect until the payment in question has been made and the licensee has provided appropriate proof thereof to the Commission.
14. The suspension of the licence will automatically take effect, without any further public proceeding, if the licensee obtains protection under the *Company Creditors' Arrangement Act* or the *Bankruptcy and Insolvency Act*. The licence suspension will take effect from the moment at which the licensee is under such protection and will remain in effect until the licensee is no longer under such protection and the licensee has provided appropriate proof thereof to the Commission.
15. On or before 30 November of each year, the licensee must submit to the Commission, as set out in Appendices 4 to 9 of this decision, a Production Report on its expenditures on Canadian programming during the previous broadcast year.

Definitions

For the purposes of these conditions:

Independent production company: a Canadian company carrying on business in Canada, with a Canadian business address, owned and controlled by Canadians, whose business is the production of film, videotape or live programs for distribution and in which the licensee or any company related to the licensee owns or controls, directly or indirectly, in aggregate, less than 30% of the equity. (Referenced in the 2011 group-based licensing decisions).

Indigenous producer: means an individual who self-identifies as Indigenous, which includes First Nations, Métis or Inuit, and is a Canadian citizen or resides in Canada, or an independent production company in which at least 51% of the controlling interest is held by one or more individuals who self-identify as Indigenous and are Canadian citizens or reside in Canada. For the purposes of the definition of “Independent production company”, “Canadians” include any individual who self-identifies as Indigenous and resides in Canada, whereas “Canadian company” includes a production company in which at least 51% of the controlling interest is held by one or more individuals who self-identify as Indigenous and reside in Canada.

Official language minority community producer (OLMC): means a company that meets the definition of “independent production company” and that:

- a. if operating in the province of Quebec, produces original English-language programming; or
- b. if operating outside of the province of Quebec, produces original French-language programming.

Clarification for OLMC producer:

To be considered an OLMC producer in Canada, a production company must:

- (a) if it produces original programs in English, have its head office in Quebec and be owned and operated by a resident of Quebec;
- (b) if it produces original programs in French, have its head office outside Quebec and be owned and operated by a resident outside of Quebec.

Expectations

The standard expectations applicable to this licensee are set out in Appendix 2 to *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016.

Encouragements

The standard encouragements applicable to this licensee is set out in Appendix 2 to *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016.

Appendix 2 to Broadcasting Decision CRTC 2020-205

Broadcasting Mandatory Order CRTC 2020-206

Pursuant to section 12(2) of the *Broadcasting Act*, the Commission hereby orders Allarco Entertainment 2008 Inc., the general partner, as well as limited partner with C.R.A. Investments Ltd. (the limited partners), carrying on business as Allarco Entertainment Limited Partnership, licensee of Super Channel, to comply with the requirements set out in the condition of licence 2 in Appendix 1 to *Super Channel – Licence renewal and issuance of mandatory order*, Broadcasting Decision CRTC 2020-205, 29 June 2020, which reads as follows:

The licensee shall, in each broadcast year, devote not less than 30% of the previous year's gross revenues of the undertaking to the acquisition of, or investment in, Canadian programming.

Appendix 3 to Broadcasting Decision CRTC 2020-205

Schedule of Payments

1. The payments set out in conditions of licence 9 and 10 in Appendix 1 to this decision must be made on or before the following dates in accordance with the following schedule:

Date	As per condition of licence 9	As per condition of licence 10	Total
28 February 2021	\$280,440	\$350,451	\$630,891
31 August 2021	\$280,440	\$350,451	\$630,891
28 February 2022	\$280,440	\$350,451	\$630,891
31 August 2022	\$280,440	\$350,451	\$630,891
28 February 2023	\$280,440	\$350,451	\$630,891
31 August 2023	\$280,440	\$350,451	\$630,891
28 February 2024	\$280,440	\$350,451	\$630,891
31 August 2024	\$280,440	\$350,452	\$630,892

Appendix 4 to Broadcasting Decision CRTC 2020-205

Instructions

Please note that these instructions refer to the Excel version of the report, which will be provided to the licensee.

1. This report must be filed with the Commission by 30 November of each year. Upon receipt, the Commission will post the abridged version of the report on its website.
2. All financial information should be reported in thousands of dollars (\$000).
3. This report should be filed in both abridged and confidential versions in both Excel and PDF formats.
4. Ensure that information provided in this document is consistent with other CRTC filings when and where applicable (e.g. aggregate returns, annual return forms).
5. This report must include all Canadian Programming Expenditures (CPE) categories except news and sports.
6. CPE should be reported on the basis of accrual accounting.
7. Any eligible credits for CPE (such as OLMC and Indigenous productions) should not be applied in this report. The report should only include actual expenditures.

Program details by service (Appendix 9)

8. Use the dropdown menus in the “Details per program” tab where applicable.
9. The CPE devoted to independent and affiliated productions must be reported on a project-level basis. The columns related to budget information may be reported on an aggregate level for *in-house productions only*.
10. For certified productions, First and Second Lead Performers reported in the “Program Details” tab must align with the Canadian Audio-Visual Certification Office (CAVCO) and CRTC Program Certification definitions.
11. With respect to reporting on “showrunner,” ensure that any person holding the title of showrunner in a production is identified as such and reported in the “Production Information” section of the “Program Details” tab. This data point should only be reported if applicable. Any form of duplication within the roles should be identified when they occur.

Appendix 5 to Broadcasting Decision CRTC 2020-205

Definitions

The following definitions should be used when completing this report.

Official language minority community (OLMC) producer: a company that meets the definition of “independent production company” and that, if operating in the Province of Quebec, produces original English-language programming, or if operating outside of the Province of Quebec, produces original French-language programming. (Broadcasting Decision CRTC 2017-148).

Clarification for OLMC producer:

To be considered an OLMC producer in Canada, a production company must:

- (a) if it produces original programs in English, have its head office in Quebec and be owned and operated by a resident of Quebec;
- (b) if it produces original programs in French, have its head office outside Quebec and be owned and operated by a resident outside of Quebec.

Indigenous producer: an individual who self-identifies as Indigenous, which includes First Nations, Métis or Inuit, and is a Canadian citizen or resides in Canada, or an independent production company in which at least 51% of the controlling interest is held by one or more individuals who self-identify as Indigenous and are Canadian citizens or reside in Canada. (Broadcasting Decision CRTC 2017-148, footnote 5).

Independent production company: a Canadian company carrying on business in Canada, with a Canadian business address, owned and controlled by Canadians, whose business is the production of film, videotape or live programs for distribution and in which the licensee or any company related to the licensee owns or controls, directly or indirectly, in aggregate, less than 30% of the equity. (Referenced in the 2011 group-based licensing decisions).

Affiliated production company: a Canadian company carrying on business in Canada, with a Canadian business address, owned and controlled by Canadians, whose business is the production of film, videotape or live programs for distribution and, in which, the licensee, or any company related to the licensee owns, in aggregate, a 30% or greater (voting) equity interest. (Referenced in *Guide to the CRTC Canadian Program Certification Application Process*).

Original, first-run program: original exhibition of a program that has not been broadcast or distributed by another licensed broadcasting undertaking (*Discretionary Services Regulations, Television Broadcasting Regulations*).

Appendix 6 to Broadcasting Decision CRTC 2020-205

Production Report (Sample form only, do not complete)

Overview

Service: _____

Broadcast Year: 20xx-20xx _____

Canadian Programming Expenditures by region, by language

Location of Principal Photography	Language	Number of Projects	Total Number of Hours Produced (in broadcast hours)	Total Production Budget (\$)	Total Licence Fees (\$)	Total Eligible Canadian Programming Expenditures (\$)
British Columbia & Territories	All languages English language French language Other languages					
Prairies	All languages English language French language Other languages					
Ontario	All languages English language French language Other languages					
Quebec	All languages English language French language Other languages					
Atlantic	All languages English language French language Other languages					
All Regions	All languages English language French language Other languages					

**All reported Canadian Programming Expenditure programs in
20XX-20XX broadcast year**

Broadcast Year	Language	Total Eligible Canadian Programming Expenditures (excludes tangible benefits expenditures)		Eligible Canadian Programming Expenditures Allocated to Independent Producers		Eligible Canadian Programming Expenditures Allocated to Affiliated Producers and In-house Productions	
		\$	%	\$	%	\$	%
20XX-20XX	All languages English language French language Other languages	-		-		-	

Budget information for individual projects are granted confidentiality, and confidentiality for aggregate regional data will only be granted where **less than three projects** are involved.

Please use the space provided below to supply any comments, explanations, methodological notes, qualifiers or other important information about the data you have supplied on this form.

Appendix 7 to Broadcasting Decision CRTC 2020-205

Programming produced by OLMC producers (Sample form only, do not complete)

Please provide the information requested below.

Overview

Language	Number of Projects	Total Number of Hours Produced (in broadcast hours)	Total Production Budget (\$)	Total Licence Fees (\$)	Total Eligible Canadian Programming Expenditures (\$)
All languages English language (Quebec) French language (outside Quebec)					

Budget information for individual projects are granted confidentiality, and confidentiality for aggregate regional data will only be granted where **less than three projects** are involved.

List of projects

Project Title or Program Name	Language	Project Status	Total Production Budget (\$)	Total Eligible Canadian Programming Expenditures (\$)
Total				

Note: List of projects should only reflect the project status for the reported broadcast year.

Other details

Number of OLMC producers the licensee has met with during the broadcast year: _____

Please use the space provided below to supply any comments, explanations, methodological notes, qualifiers or other important information about the data you have supplied on this form.

Appendix 8 to Broadcasting Decision CRTC 2020-205

Programming produced by Indigenous producers (Sample form only, do not complete)

Please provide the information requested below.

Overview

Language	Number of Projects	Total Number of Hours Produced (in broadcast hours)	Total Production Budget (\$)	Total Licence Fees (\$)	Total Eligible Canadian Programming Expenditures (\$)
All languages English language French language Indigenous languages					

Budget information for individual projects are granted confidentiality, and confidentiality for aggregate regional data will only be granted where **less than three projects** are involved.

List of projects

Project Title or Program Name	Language	Project Status	Total Production Budget (\$)	Total Eligible Canadian Programming Expenditures (\$)
Total				

Note: List of projects should only reflect the project status for the reported broadcast year.

Other details

Number of Indigenous producers the licensee has met with during the broadcast year: _____

Please use the space provided below to supply any comments, explanations, methodological notes, qualifiers or other important information about the data you have supplied on this form.

Appendix 9 to Broadcasting Decision CRTC 2020-205

Service Name (Sample form only, do not complete)

Program information

Program Title	Year Commissioned / First Year of Broadcast	Telecast/ non-telecast	Original First-run Program	Certification # (CRTC or CAVCO)	CRTC Program Category	PNI (Y/N)	Hours Produced	Language of Program EN/FR/O	Original Language of Production
Total									

Producer information

<u>Production Company</u>	<u>Ind., Aff. or In-house</u>	<u>Location of Principal Photography</u>	<u>Region</u>	<u>Percentage of the total cost of a production that was paid to the producer</u>	<u>OLMC Producer (Y/N)</u>	<u>Indigenous Producer (Y/N)</u>
Total						

Budget information

Total Production Budget	Licence Fees	Total Eligible Canadian Programming Expenditures
Total		

Production information

Producer (#)	Director (#)	Showrunner (#) (if applicable)	Writer (#)	Cinematographer (#)	Editor (#)
Total					

Women occupying the role of:

Producer (#)	Director (#)	Showrunner (#) (if applicable)	Writer (#)	Cinematographer (#)	Editor (#)
Total					

First Lead Performer (Y/N)	Second Lead Performer (Y/N)

Please use the space provided below to supply any comments, explanations, methodological notes, qualifiers or other important information about the data you have supplied on this form.