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Direct-to-Home Satellite Broadcasting

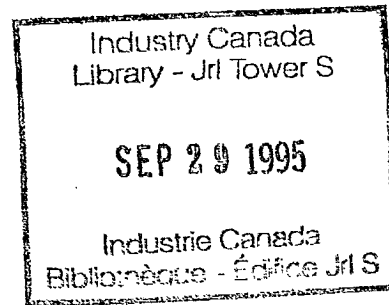
*Report
of the Policy Review Panel*



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April 1995

The Honourable Michel Dupuy
Minister of Canadian Heritage
Ottawa

The Honourable John Manley
Minister of Industry
Ottawa

Ministers,

We, the undersigned, members of the Direct-to-Home Satellite Policy Review Panel, respectfully submit the following report.

We are of the view that, given the rapid introduction of new communications technologies, Canada's broadcasting system is at a critical point in its history. In particular, the emergence of direct-to-home satellite broadcasting, both in North America and throughout the world, presents a major challenge to traditional policy instruments at the national level.

The Government of Canada has indicated that the Canadian broadcasting system should increasingly rely on market forces while at the same time adhering to the fundamental objectives of the *Broadcasting Act*.

While the objectives of competition and cultural policy are often difficult to reconcile, the Panel is convinced that the effective assertion of regulatory jurisdiction over new broadcasting technologies makes this reconciliation possible. Indeed, we strongly endorse the broad consensus that we believe exists in Canada on the vital importance of Canadian broadcasting policy objectives. In this report, we propose specific recommendations as to the most appropriate means to achieve those objectives.

As you know, this policy review was built on a two-phase process of written submissions. We wish to express our gratitude, through you, to all those hundreds of persons or organizations who submitted briefs.

We are grateful to the many officials in the Department of Canadian Heritage and Industry Canada who assisted our Secretariat in its work. We would like to thank the Government's legal advisers in the Department of Justice for their assistance. We would also like to note the cooperation of the staff of the Canadian Radio-television and Telecommunications Commission in providing information that was useful for our deliberations.

Finally, we owe very special thanks to Matthew Fraser, who has so ably served as Secretary to the Panel. Without his contribution this report could literally not have been written in the short time available.

In closing, we hope that this report and the recommendations we have submitted will assist the Government in making an effective policy response to a matter of great importance for all Canadians and for Canada's broadcasting system.

Yours truly,



Gordon Ritchie,
Chairman



Robert Rabinovitch



Roger Tassé

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Technological Context: A Viewer's Perspective

Direct-to-home satellite broadcasting (DTH) has attracted a great deal of public attention in recent months, especially as a new and exciting alternative to cable television. Consumers will ultimately determine the market success of satellite TV, which has enjoyed tremendous success in the United Kingdom and is currently taking off in the United States.

In truth, satellite TV is but the latest step along the path of the broadcasting revolution.

The first television broadcasts were terrestrial, relying on **off-air reception** by antennae, commonly-known as "rabbit ears". Terrestrial television was restricted to transmissions from local stations broadcasting local programming and the feed from the public and private networks. As signals did not travel very far and picture quality was variable, the Canadian broadcasting system was built on a vast network of retransmission stations. Only Canadians living along the southern border could receive American television signals.

With the advent of **cable television**, a much wider range of choices was brought into the home via the coaxial cable. Installed by local cable distributors, these included local programming as well as Canadian and, under strict rules, American network programming. Cable companies take U.S. signals directly over the air and from American satellites before retransmitting them to their subscribers. For additional fees, households can receive a broader range of **pay TV channels** if their television sets are equipped with a special decoding box. These channels include American "superstations" and

commercial-free re-runs of feature-length movies through a special decoder. The desire for American programs and enhanced quality were the driving force behind the expansion of the Canadian cable industry.

Recently, a new kind of service was provided in the form of "**pay-per-view**" (PPV) movies. One firm was licensed to provide these services in Western Canada and another was granted the licence for Eastern Canada. These services, because of limited channel capacity on cable, are currently limited to four or five channels each with its own schedule of feature movies and special events. To receive these movies and special events through the pay decoder, viewers are required to call their local cable company to authorize payment for a single showing at the scheduled time.

Direct-to-home satellite broadcasting (DTH) offers much the same services through a different technological pipeline. Instead of the coaxial cable, TV signals are

received by small "dish" antennae which are aligned to pick up transmissions from one or more satellites in geo-stationary orbits over North America. Using **digital video compression (DVC)**, this delivery system can broadcast several hundred channels with very high quality picture and sound into the homes across the continent. In order to unscramble signals via DTH satellite transmission, the household is required to pay a monthly fee to the DTH distributor. Since the same transmissions reach homes across the continent, local stations are not included.

DIRECT-TO-HOME SATELLITE BROADCASTING (DTH)

Direct-to-home satellite broadcasting (DTH) offers much the same services through a different technological pipeline. Instead of the coaxial cable, TV signals are received by small "dish" antennae which are aligned to pick up transmissions from one or more satellites in geo-stationary orbits over North America.

Satellite TV systems have room, over and above the standard fare of cable and pay television, to carry one hundred or more pay-per-view channels. Typically, such a service may simultaneously transmit, say, ten of the most popular recent films each at 10 minute intervals. To receive the movie of choice at the selected time, the household must dial up the pay-per-view service to authorize payment. Experience in the United States has found that this greater range of choice and convenience makes this form of pay-per-view a competitive alternative to renting videos from the local store.

The next step down the path is expected to be **video-on-demand (VOD)**. This

system, which is still in the trial phase, would permit the home to call up the movie of choice from a huge selection of available titles to be transmitted, for a fee, to the set-top box for a single showing at a time convenient to the viewer. The telephone companies are promoting this system to compete directly with the services offered by the cable companies and the DTH distributors. Cable may well be forced to respond with a competing service.

This report recommends the policy framework which should govern the provision of DTH services, including DTH pay-per-view services, to Canadian households.

DIGITAL VIDEO COMPRESSION (DVC)

DVC is a technology that compresses video signals from an analog signal into digital form. The goal is to reduce the amount of channel space required to transmit TV pictures. Thus, as many as ten times more channels can be transmitted to the home through digital compression. This significantly reduces the distribution costs of television channels.

Introduction

This report contains advice to the Government of Canada on a matter of importance for Canada's broadcasting system.

In establishing this policy review, the Government recognized that, in a context of rapid technological change, appropriate policies must be implemented in a timely fashion so that the Canadian broadcasting system can readily adapt to these changes. This report must be situated in the wider context of a general review of Canada's broadcasting policies and institutions. At the same time, the Government is in the process of establishing a policy framework for the emerging era of technological convergence and the information highway.

The arrival of direct-to-home (DTH) satellite television will have a profound effect on all components of the Canadian broadcasting system. High-powered satellites can now simultaneously beam identical television signals across the entire North American continent to households equipped with small "dish" receivers. More important, digital compression technology now makes it possible to deliver five to ten times the number of channels now available — hence the so-called "500-channel universe". As Canadian Heritage Minister Michel Dupuy and Industry Minister John Manley stated when announcing this policy review, satellite TV "will affect the evolution of the Canadian broadcasting system and become a component of the emerging information highway." The Ministers added that a review of DTH broadcasting policies "has become necessary due to the imminent introduction of these services in Canada."

On 30 August 1994, the Canadian Radio-Television and Telecommunications Commission (CRTC) announced that it had decided to exempt

DTH satellite distribution undertakings from licensing. This Exemption Order, pursuant to Section 9(4) of the *Broadcasting Act*, sets out terms and conditions defining a new class of distribution undertaking that would not have to meet certain regulatory requirements normally imposed on other distribution undertakings. There was no public hearing prior to this CRTC exemption. There was no possible appeal to the Government under the *Broadcasting Act*. The most immediate effect of the exemption was to facilitate the market launch of one particular Canadian DTH operator.

On 12 September 1994, the Government announced its intention to undertake a review of DTH satellite policies. On 26 November 1994, the Government published in the *Canada Gazette* a notice seeking public comment on Direct-to-Home Satellite Distribution Undertakings. The Government identified a number of issues to be addressed in the context of the policy review. Three days later, Ministers announced the creation of a three-member panel to undertake the DTH policy review based on written submissions responding to the *Gazette* Notice.

Broadcasting is more than an industry driven by business considerations, but also a vehicle for cultural expression whose ultimate aim is to foster a shared sense of belonging.

Public Response to Policy Review: 468 Submissions

The report that we are today submitting to the Government is the result of that policy review. The Panel's review was undertaken in two phases. During the first 45-day phase, the Government accepted submissions until 10 January 1995. The second phase, during which interested parties could submit supplementary briefs commenting on first-phase submissions, terminated on 23 February 1995.

The Panel received 468 submissions over the two-phase process. More than 350 of these came from private individuals who took the time to write to express their views on the role of satellite TV in the Canadian broadcasting system. We were particularly pleased to have received so many responses from individual Canadians, who gave us the direct benefit of their opinions as citizens and consumers without the intermediary of the interest groups who so often claim to represent the national interest on their behalf. We were also pleased that groups representing creators – actors, directors, producers, and recording artists – submitted briefs to this policy review. Their views were a refreshing reminder that broadcasting is more than an industry driven by business considerations, but also a vehicle for cultural expression whose ultimate aim is to foster a shared sense of belonging.

In general, we have been most impressed by the quality of submissions, which have helped us identify the key issues that must be taken into account in formulating policy advice with respect to DTH satellite broadcasting.

The specific nature of the Panel's mandate determined the procedures we have followed. The Panel has undertaken this policy review on the basis of the written submissions. (We also authorized our Secretary to contact interested parties to seek additional clarification of some points in the submissions, putting on the public record any written materials received from interested parties.)

A number of interested parties requested from the outset of this policy review that the Panel hold formal public hearings. Some of these parties asked that they be allowed to subpoena and cross-examine witnesses, which is the practice for telecom licensing hearings before the CRTC. In replying to these requests, we reminded parties that the Panel was not a licensing body. The Panel's mandate is to advise Ministers on an appropriate policy framework for DTH satellite broadcasting. Decisions will be taken, if deemed appropriate, by the Government and communi-

cated by appropriate means to the federal broadcasting regulator.

Establishing an Effective Policy Framework

In drafting this report, we have been acutely aware of the complexity of the issues and the magnitude of the stakes involved. Certain reports in the media have portrayed this policy review as an instrument for choosing between two rival entities: Expressvu (a consortium made up of BCE, Tee-Comm Electronics, Western International Communications and Cancom) and Power DirecTv (a partnership between Power Broadcasting and DirecTv). This view corresponded neither to the mandate we received from the Government nor to the Panel's own sense of its responsibilities. The Panel's goal has not been to pick winners. Our sole objective has been to advise Ministers on an effective policy framework for satellite TV in the context of rapid technological change.

We above all have been guided in undertaking this policy review by an acute sense of urgency. The need for the Government to take decisive action on DTH broadcasting is all the more pressing since an effective regulatory response to this issue has been delayed for more than a decade. The first substantive notice published by the CRTC on DTH satellites dates back to 1984, after a Government report on the issue. During the following decade, the Commission issued a number of public notices on DTH broadcasting, but did little to facilitate the development of satellite TV as an alternative delivery system to cable. It was only after spillover TV signals from high-powered American satellites were being received by Canadians that the Commission finally decided, in the early 1990s, to contemplate regulatory clearance for Canadian DTH broadcasters as a response to this perceived threat. Due to these delays, valuable time was lost. Opportunities may have been missed.

The penetration by unauthorized American satellite signals is now a source of major concern

for the broadcasting industry, policy-makers, and regulators alike. It is a particularly pressing concern given that the originators of these signals make no contribution to Canadian programming objectives as set out in the *Broadcasting Act*. If the DTH satellite market in Canada is not expeditiously brought under the jurisdiction of federal authorities, the negative impact on the entire Canadian broadcasting system could be irreparable.

By taking appropriate actions in a timely fashion, the Government will be impressing this sense of urgency on other parties, including the federal broadcasting regulator.

Licensing DTH Satellite Undertakings

This report is divided into three chapters. Chapter I underscores the crucial importance of broadcasting policy objectives such as Canadian program production, and discusses the challenges and opportunities presented by the DTH satellite market. In Chapter II, the Panel puts forward a model of competition for DTH broadcasting, and then addresses the specific questions raised in the *Canada Gazette* Notice of 26 November 1994. In Chapter III, the Panel discusses the suitability of licensing as a regulatory instrument for DTH broadcasting.

It is the Panel's conclusion that, given the importance of satellite TV in the Canadian broadcasting system, DTH broadcasting undertakings should be formally licensed, not exempted from licensing. In addition, the Panel recommends to the Government a series of appropriate conditions of licence for both DTH distributors and DTH pay-per-view programming services. To facilitate the implementation of its recommendations, the Panel has included a draft direction that the Governor in Council should issue to the CRTC pursuant to Section 7 of the *Broadcasting Act*. The proposed direction requires the Commission to proceed in a timely fashion with a public licensing procedure and sets out the conditions that should be attached to any such licences.

Finally, annexed to this report is a list of all interested parties and members of the general public who made submissions to this policy review.

Chapter I: Canadian Culture and DTH Satellite Broadcasting

The Canadian broadcasting system is widely regarded as a remarkable success. This success is owed to the longstanding practice of implementing pragmatic policy responses to the demographic, cultural and technological constraints imposed by Canada's close proximity to the powerful influence of American culture.

Canada has a small population next to a demographic giant of more than 250 million people. Many Canadians speak the same language and share the same basic values as their American neighbours to the south. Even in parts of Canada where distinctive French-language television programs are popular, the massive influence of American culture has had an impact on formats, habits, and viewing choices.

The rapid introduction of new communications technologies is merging geographical regions throughout the world. Broadcast satellites permit trans-border signal spillover that does not discriminate between viewers from one country to another. As a result, businesses active in the communication sector are adopting trans-national commercial strategies by forging corporate alliances with foreign partners.

Given Canada's proximity to the United States, Canadian broadcasting is on the front line of this global phenomenon. Direct-to-home satellite technology in particular has the potential to influence the evolution of the Canadian broadcasting system. It will touch the very heart of Canada's national identity – the ways in which Canadians define themselves through discourse with their fellow citizens. As such, DTH broadcasting must be subject to the special considera-

tions which govern national policies toward Canadian cultural industries.

Cultural Policy Imperatives

Canadians recognize that their cultural industries are not like other commercial sectors, but are subject to unique national imperatives. For most products and services, Canadians consumers demand world standards of quality, choice, and competitive prices. For most industries, these goals are best achieved through opening markets to competition – within Canada, within North America, and on a world scale. This has been done through international treaties – including GATT and its successor, the World Trade Organization, and the Canada-USA Free Trade Agreement and its successor, NAFTA – which set out the rules for open international competition for goods and services. Canadian consumers thus benefit from the freest possible access to the widest range of goods and services at

internationally competitive prices. Canadian producers gain from serving markets much broader than the Canadian population alone, permitting them to reduce costs and increase wages and profits. This strategy has served Canada well in the past half century.

In the cultural sector, new technologies have expanded possibilities for access to entertainment products from around the world, and in particular from the United States. Canadians clearly do not believe in erecting electronic barriers to cultural influences from beyond their borders. Canadians indeed have demonstrated, by their consumer choices, that they want access to the "best the world has to offer".

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But cultural industries are recognized as special. Canadians insist on being able to hear uniquely Canadian voices that resonate with their own distinct national experience. **Canadians have shown over the years that they are prepared to accept some restrictions on imports of foreign cultural products, in whatever form, in order to protect Canadian creators and producers. Canadians also accept that government intervention may be necessary to ensure the viability of Canada's cultural industries.** The American "entertainment industry", which seeks only to remove barriers to market entry for its products, often has misunderstood and misrepresented this Canadian desire for balanced choice of both foreign and indigenous products.

The new broadcasting technologies pose major challenges for policy-makers. Governments today are confronted with more complex social and market dynamics whose impact and outcomes are less predictable. While the trans-border spillover of satellite TV signals has opened up new windows on the world for citizens in all countries, globalization threatens to attenuate national, regional and local identities.

In this context, Canadian policy-makers must not lose sight of certain fundamental objectives, which have been pursued over time by a variety of means that have evolved with technological change. Broadcasting policy in Canada traditionally has been guided by the following objectives:

- First, to ensure that the largest possible number of Canadians have access to Canadian broadcasting services – or extension of service.
- Second, to ensure that Canadian programming is given substantial exposure on all components of the Canadian broadcasting system.
- Third, to ensure that significant funds are reinvested in the development and production of quality Canadian programming.
- Fourth, to ensure that broadcasting entities in Canada are owned and effectively controlled by Canadians.

- Fifth, to promote both choice and competition while at the same time ensuring that they are balanced with cultural goals.

While these objectives are widely supported, cultural protectionism has its limits. When governments have sought to be too restrictive, Canadians have resisted and forced the removal of unwarranted measures, such as the tariff on English-language books in the 1980s. When protected industries have seemed to act in an arrogant and high-handed manner – as in the recent fiasco over the introduction of specialty channels on cable – Canadian consumers have expressed their indignation in the strongest possible terms.

The submissions to this policy review confirm that there is a broad Canadian consensus on the policy objectives described above. There may be serious disagreement about how to achieve them; but there is no disagreement on the objectives themselves.

The Panel believes that, in the pursuit of these fundamental objectives, Canadians are willing to pay a significant price in order to sustain and support their cultural industries.

Regulatory Models

In the past, spectrum scarcity and the high cost of universal service in broadcasting and telecommunications justified a regulatory approach that sanctioned the creation of monopolies, oligopolies, and the privileged status of certain delivery systems. The trade-off for those who benefited by these policies was that they contribute to the achievement of the broad cultural objectives of the *Broadcasting Act*. The Canadian Broadcasting Corporation was set up as the affirmation of that policy. Later, private and public broadcasters were protected from advertising competition by border U.S. stations through the simultaneous substitution of their signals and tax benefits. The CRTC also imposed minimum quotas for Canadian music on radio stations. In the 1970s, the

Commission designated cable as the privileged "gatekeeper" of the Canadian broadcasting system. Cable TV offered the Government a means of effective regulatory control over the Canadian broadcasting system, and moreover promised to produce significant profits to be rechannelled into Canadian programming.

Yet the overall results produced by this regulatory approach have been mixed. The spillover into Canada of off-air signals from the United States made American programs extremely popular with Canadians from the earliest days of television. Private broadcasters in Canada have been accused of showing more interest in purchasing American programs to attract viewers than in investing in distinctly Canadian programs. The cable-led policy has also led to increased penetration by American programs. New Canadian specialty channels have been created to be linked with the distribution of U.S. channels. In sum, while previous regulatory models have promoted the rapid extension of service throughout Canada and protected the earnings of Canadian broadcasters and cable companies, only modest commitments to Canadian programs – both financially and in exposure time – have been made.

The special status of cable also retarded the introduction of satellite TV as a competing delivery system. It was evident more than a decade ago that DTH satellite television was on the horizon. In 1984, the Department of Communications issued a report on DTH satellites that urged the Government to call on the CRTC to promote the development of this new distribution technology. The Commission resisted the introduction of satellite TV, however, apparently fearing that DTH broadcasting posed a long-term competitive threat to cable.

Technology Neutral Broadcasting Act

Two factors in the early 1990s made it necessary to reassess this regulatory approach. First, with the advent of new delivery technologies, the

Broadcasting Act of 1991 was "technology neutral". The Act thus favoured no one distribution system in particular, whether Hertzian spectrum, cable, or satellite facilities. The Act stated moreover that the Canadian broadcasting system "should be regulated and supervised in a flexible manner that is readily adaptable to scientific and technological change." Second, the launch of high-powered DBS satellites in the United States made signal spillover into Canada inevitable in the very short term.

The perceived threat of competition from American satellite TV has been based as much on economic as on cultural considerations. While much of the discourse about the imminent threat of American "death stars" is couched in the language of cultural nationalism, Canadian citizens themselves generally have not felt threatened by the penetration of foreign TV signals. On the contrary, Canadians – as many of the letters submitted to this policy review made evident – appear to be in favour of DTH satellite signals, whatever their origin, as an attractive alternative to cable TV. Those who have felt most threatened are certain stakeholders in the Canadian broadcasting system whose privileges could be undermined by competition from a new delivery system and the competing programming services they carry.

The DTH satellite market promises to be highly profitable, at least in the short term. Digital video compression will reduce distribution costs and greatly expand channel capacity, which in turn should lead to increased consumer demand. While the final market outcome remains uncertain, there is little doubt that other delivery systems will make a competitive response to DTH services. With the advent of video-on-demand – which will offer entire movie libraries ordered by remote control – satellite TV and pay-per-view could be severely undermined. Cable and telephone companies have made substantial investments in fiber optics and digital video compression, and are planning to offer fully

interactive service. It may well be that alliances will be forged between terrestrial and satellite broadcasting undertakings, as is already the case in Britain and the United States.

At present, business strategies in the satellite TV market are extremely fluid. Corporate alliances are in a state of constant flux due to the pervasive uncertainty over which distribution technology will eventually find the most favour with consumers. The only certainty is that competition between delivery systems and increased channel capacity should be of benefit above all to consumers, who will have greater choice and lower prices. Suppliers of cultural products should also benefit from expanded channel capacity, which will provide more outlets for their products. As the Government stated in its terms of reference for the CRTC convergence hearings: "Although new technologies and the information highway will pose challenges to the cultural sector, particularly in the form of foreign competition, it will also provide opportunities for Canadian cultural content providers to exploit markets for new services."

Historic Opportunity to Reassess Policies Tools

The advent of DTH satellites and other new delivery systems offers an historic opportunity to establish an effective policy framework for new broadcasting technologies. The legitimacy of monopoly privileges and micro-regulation has been seriously eroded, as governments recognize a pressing need to promote greater competition through deregulation. A new regulatory model must strike the right balance between encouraging competition and promoting Canadian cultural production.

At present, business strategies in the satellite TV market are extremely fluid. Corporate alliances are in a state of constant flux due to the pervasive uncertainty over which distribution technology will eventually find the most favour with consumers.

In its brief to this policy review, the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) asserted this position with particular eloquence:

"The dynamic growth of our cultural sector is due in large part to appropriate legislative and regulatory steps, taken by successive governments. We do not foresee a time when such measures will become unnecessary and while they must adapt to technological change, their underlying purpose will remain, as long as there is a Canada."

While fundamental questions regarding Canada's broadcasting policy must be revisited at this time in view of the introduction of new technologies, the basic objectives underlying Canadian cultural policy must not be compromised.

Public Reviews of Broadcasting Policy

Over the past year, the Government of Canada has initiated at least three public processes to establish a policy framework for new and emerging broadcasting technologies.

First, in April 1994 Industry Minister John Manley announced the membership of the Information Highway Advisory Council. Minister Manley set out three policy objectives for the Advisory Council's deliberations on the development and implementation of the information highway: the creation of jobs; the reinforcement of Canadian sovereignty and cultural identity; and universal access at a reasonable cost.

Second, on 11 October 1994 the Government instructed the CRTC to gather information, seek input and report on the issues related to the "convergence" of information technologies. The Government stated that the CRTC's public consultation would complement the ongoing

work of the Advisory Council. In establishing the CRTC's terms of reference, the Government set out its vision of competition and priorities concerning cultural policy objectives. With respect to competition, the Government's policy is "to foster fair competition and an increased reliance on market forces in the provision of facilities, products and services." With respect to cultural policy, the Government affirmed that "it is essential that all Canadians continue to have access to quality content services, both domestic and foreign." On 20 October 1994, the CRTC announced that it would conduct a two-phase written process and an oral public hearing as part of its public consultation, and issue a report to the Government by 28 April 1995.

Third, in the *Canada Gazette* Notice of 26 November 1994 seeking public comment on Direct-to-Home Satellite Distribution Undertakings, the Government reiterated its vision of competition and cultural policy objectives. The Government stated that a framework for vigorous competition should eliminate situations where "one group of competitors is in a privileged position, while others are disadvantaged." The Government also noted that, in the face of satellite TV spillover from the United States, one challenge is "to adjust current policies to take into account the North American reach of DTH distribution undertakings while respecting long-standing broadcasting policy objectives of ensuring that competitive Canadian programming is produced."

Against this background, two policy goals have guided this review: increased competition to serve Canadian viewers and the promotion of Canadian cultural production.

Against this background, two policy goals have guided this policy review: increased competition to serve Canadian viewers and the promotion of Canadian cultural production.

Contributions to Canadian Content Production

Satellite TV in its various forms will help to achieve the goal of universal broadcasting service to Canadians. It is also imperative that all distribution systems make a significant contribution to the achievement of other Canadian broadcasting objectives – notably the production and promotion of Canadian programs in both English and French. Satellite TV, which will be a critical element of the Canadian broadcasting system, must not be an exception in this regard.

Indeed, in an era of globalization, when much of the entertainment products made available to Canadians is foreign, it is crucial that distinctly Canadian programs be well financed, of high quality, and made accessible to all Canadians. As the National Film Board stated in its submission to this policy review:

"Regardless of competition within the Canadian broadcasting system of tomorrow, its guiding principle must be maintained: to ensure that programs reflecting Canadian issues and concerns reach Canadian audiences. All participants and operators of electronic, telephone, cable and satellite services will have to continue to recognize in a clear and tangible way that Canadian productions of all formats are desirable, cost-effective and popular."

This objective is set out in the *Broadcasting Act*, which states that "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming." The Act adds that broadcasting undertakings "shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources." The Act stipulates that the Canadian broadcasting system should "include a significant contribution from the Canadian independent production sector."

Before taking office in 1993, the Liberal Party reinforced these principles in its Red Book policy statement:

“Canadian culture embraces our shared perceptions and beliefs, common experiences and values, and diverse linguistic and cultural identities. Everything that makes us uniquely Canadian. Culture is the very essence of national identity, the bedrock of national sovereignty and national pride. At a time when globalization and the information and communications revolution are erasing national borders, Canada needs more than ever to commit itself to cultural development.”

DTH satellite broadcasting will, by its very nature, contribute to the “erasing” of national borders throughout the world. Given this fact, governments must find appropriate tools to ensure that satellite TV makes an acceptable contribution to the achievement of fundamental policy objectives.

The CRTC recognized the need for increased investment in program production in 1993, following the regulator’s public hearings into structural changes to the broadcasting system. The Commission stated:

“The Commission recognizes that the two major elements of the systems – program production and program distribution – must increasingly work in tandem to maximize the strength and vitality of the Canadian broadcasting system, and to increase the attractiveness of Canadian programming to audiences, particularly in an era of increasing choice and competition.”

The Panel believes that a Canadian policy framework for DTH distributors (and other competing delivery systems) must be based on three fundamental priorities:

- First, increased competition among distribution systems and among programming services

should result in greater choice for Canadian viewers.

- Second, competition and additional channel capacity should create increased space for the distribution of Canadian products, in French and English, both in Canada and in foreign markets.
- Third, increased competition and reliance on market forces should generate substantial financial returns of which a significant proportion should be rechannelled into Canadian production.

In an era of globalization, when much of the entertainment products made available to Canadians is foreign, it is crucial that distinctly Canadian programs be well financed, of high quality, and made accessible to all Canadians.

Policy Shortcomings of the Past

Several submissions to this policy review recalled past failures to extract significant financial contributions from the theatrical movie and video rental markets. Astral Communications, for example, decried the “movie theatre disaster”, pointing out that Parliament has not imposed on the theatrical movie sector Canadian-content percentages or investment obligations. Others noted that the Canadian video rental industry is likewise unregulated and hence makes no contribution to the Canadian film and television industry.

It must be noted, however, that the film industry is based on contractual agreements between private parties governed by what are essentially business practices. In broadcasting, on the other hand, the airwaves are public property. A broadcasting licence is not a right, but a privilege. The obligations on market participants therefore should be more onerous. Past policy and regulatory failures to harness sufficient funds from broadcasters for Canadian program production should be corrected.

DTH satellite broadcasting provides a historic opportunity to rectify these policy shortcomings of the past. The delivery of entertainment products to the home is currently undergoing a

phenomenal technological and commercial revolution. The shift towards direct-to-home delivery of movies, special events, specialty channels, conventional television channels, and new programming services has created conditions that allow effective mechanisms to be put in place in order to rechannel a greater contribution into Canadian cultural production.

As the Canadian Association of Broadcasters (CAB) argued before the CRTC convergence hearings on 9 March 1995, the time has come to impose mandatory financial contributions on broadcasting delivery systems and new transactional programming services. The CAB therefore called on the CRTC to endorse a mandatory financial contribution on all broadcasting distribution systems. The CAB added:

“Any new distribution undertakings must also be required to make equivalent monetary contributions for the production and exhibition of Canadian programming of at least 5% of the revenues of each service, or such higher level as is determined.”

The Panel agrees that it is imperative to put in place an appropriate policy instrument to rechannel significant financial benefits from all distribution undertakings, including DTH distributors, into Canadian program production.

Existing Program Production Funds

At present, a variety of funding mechanisms for Canadian program production are dispersed among private and public sources at both the provincial and federal level. Many of these funds disburse relatively modest sums to film and TV program producers. Two funds with considerable resources are the Cable Production Fund and Telefilm Canada.

The Cable Production Fund, whose budget over five years was originally expected to raise

some \$300 million over five years, goes into operation in the spring of 1995 with an initial annual allotment of approximately \$38 million. This fund, while it will undoubtedly make a contribution to Canadian program production, has been criticized for two reasons. First, the fund is financed through a CRTC-authorized increase on monthly fees for some Canadian cable subscribers and not for others. Second, the fund is effectively controlled by certain interests, notably the distribution system, which could use the funds for their own purposes. ACTRA made this point quite strongly in its brief to this policy review:

It is imperative to put in place an appropriate policy instrument to rechannel significant financial benefits from all distribution undertakings, including DTH distributors, into Canadian program production.

Our position on the ‘cable fund’ is a matter of public record. We do not believe its structure is appropriate. The fact that contributions are made on a voluntary basis, that the governance of the funds is vulnerable to abuse in that the corporate vertical integration of cable, programming and production interests is well under way, is disturbing.

The other major production fund is public: Telefilm Canada. Telefilm, with a total granting authority of more than \$100 million, has been – along with federal capital cost allowance and tax expenditure policy – the main engine of Canadian film and television production over the past decade. Telefilm, which is sometimes criticized by program producers as excessively bureaucratic and commercial in its approach to the broadcasting market, is financed by Canadians taxpayers. The federal agency’s budget comes directly from the Government’s general revenues. It should be noted that the Government is currently conducting a review of Telefilm Canada’s mandate.

Filling the Funding Gap

Despite the central role of Telefilm, the CBC, and the National Film Board in the financing of Canadian programs, there can be little doubt that, given limited government resources, future sources of production funds will come from the private sector. The Government recognized this fact in 1994 when it asked a parliamentary committee to review the CBC's revenue sources. In the present context of reduced public resources, the new broadcasting technologies present a formidable policy opportunity to generate funds directly from industry sources and across the entire broadcasting system. Fixed financial contributions could be applied to all distribution systems and new programming services such as pay-TV, pay-per-view and video-on-demand.

Indeed, the main engine of DTH broadcasting, at least in the short term, will be pay-per-view movies and special events. Pay-per-view, delivered via both satellite and cable, will compete with the video cassette rental market. In Canada, consumers spend approximately \$1.6 billion on video cassette rentals every year. The technology of pay-per-view – offering up to 100 channels of movies and special events on rotating time schedules – will introduce a degree of competition in this market. In the longer term, video-on-demand delivery of movies could capture market share from both video rentals and pay-per-view.

Many interested parties from the broadcasting industry have endorsed the idea of a fixed contribution imposed on new delivery systems and programming services. Cable companies, such as Rogers, proposed in their submissions to this policy review that DTH undertakings should be obliged to contribute 5% of revenues to Canadian production. They noted, correctly, that no financial

contribution was included in the CRTC's exemption order for DTH undertakings – and yet cable companies are obliged to invest 5% of revenues from basic service fees (approximately \$75 million a year) in community channels.

The positions of Canadian creators were particularly compelling on this point. ACTRA argued in its brief to this policy review that CRTC licensees should be required to make "greater contributions to production as a fixed percentage of revenues from all distribution undertakings, and that these resources be administered efficiently, and at arm's length from the distribution industry." The Association des Producteurs de Films et de Television du Québec recommended in its brief that, given that DTH distributors will offer largely pay-per-view movies, they should be required to make a financial contribution to a special fund designed specifically to finance the production of feature films.

In the current context of increased competition and fewer regulatory constraints, an industry-wide financial contribution would be a fair and effective means to guarantee investment in Canadian production. As the Government underscored in its terms of reference for the CRTC's conver-

gence hearings, the policy challenge in the context of technological innovation is "to modify the existing support mechanisms, if necessary, and develop new ones, which together will ensure that existing levels of support for the Canadian cultural industries and the availability of Canadian content is, at a minimum, maintained."

While a percentage financial contribution is not a new policy mechanism, it could be applied more effectively today to allow all market participants to assist in the development and maintenance of a quality broadcasting system.

In the current context of increased competition and fewer regulatory constraints, an industry-wide financial contribution would be a fair and effective means to guarantee investment in Canadian production.

The Panel believes that a financial contribution is the most appropriate policy instrument at a time of increased deregulation: it erects no barriers to market entry, but rather generates funds for industry-wide investments in the production and promotion of Canadian cultural products.

Furthermore, the Panel takes the view that funds generated for Canadian program production should be administered by bodies independent from those who contribute to them.

Canadian cultural policy is designed to benefit creators of cultural products and end-users who will seek them out for their amusement and enlightenment. In a word, Canadian content for Canadians. DTH satellite television can, if the right policy mechanisms are put in place, make a timely and significant contribution to growth and prosperity of Canadian programming.

Chapter II: DTH Broadcasting: A Model for Competition

The *Canada Gazette* Notice of 26 November 1994 identified several major issues to be examined in the context of the *Broadcasting Act* and the *Telecommunications Act*. Specifically, the Notice called on parties wishing to submit comments on DTH satellite broadcasting to respond to a series of specific questions within the context of these broad categories of issues.

This chapter reviews these questions and highlights salient points made by various parties with a view to underlining pertinent, if sometimes conflicting, views on particular issues. The Panel also indicates its own position on these questions.

In the *Gazette* Notice, the Government stated that its vision of competition is to “preserve and expand fair competition”. The Government added:

“This can best be accomplished by eliminating situations where one group of competitors is in a privileged position, while others are disadvantaged. The principle applies equally to established firms and new entrants, or carriers and content providers, or any other grouping. The regulatory framework must ensure that obligations and opportunities are shared equally, and allow each participant an equal opportunity to succeed or fail based on their efforts.”

Having reviewed a variety of options, the Panel puts forward a competitive model for DTH satellite broadcasting.

Competition is the best method of assuring a quality service and maximum choice for Canadians. The Panel’s competitive model thus rejects monopoly privileges in the new context of expanded channel capacity. Also, the model is

based on a conception of DTH broadcasting that separates distribution from programming services such as pay-per-view. **Pay-per-view services offered by DTH distributors should therefore be licensed separately from the distribution undertaking that carries them.**

The Panel’s competitive model, is based on the following imperatives:

1. The licensing of all competing DTH distribution undertakings which meet the conditions of licence set out in the Annex to this report.
2. The licensing of all competing DTH pay-per-view services which meet the conditions of licence set out in the Annex to this report.
3. No licence should be refused on the grounds that approval would be at the expense of competing services. Economic viability would be left to the judgment of commercial applicants and, ultimately, the market.
4. Each DTH distributor would be free to choose among competing pay-per-view services, and each DTH pay-per-view licensee would be free to offer its service to competing DTH distributors.

Clearly, one cannot forecast with any certainty how many – if any – applicants will qualify for licence as DTH distributors. This must be determined by the regulatory authority – the Commission – on the basis of specific applications from competing commercial interests. By the same token, it is impossible to prejudge how many DTH

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pay-per-view services will meet the licensing requirements. As a basic policy principle, however, the Panel recommends the CRTC should strongly favour competition, licensing more than one applicant in each category (DTH distribution and pay-per-view).

Competition should thus be allowed at three levels:

- Among DTH distributors and other distribution systems such as cable.
- Among different DTH distributors.
- Among programming services, such as pay-per-view, that are carried by competing DTH distributors.

The competition model put forward here underpins the specific recommendations on questions addressed in the following sections.

1 ■ Origination and Packaging of Programming

What criteria should govern the origination and packaging of programming services by Canadian DTH satellite distribution undertakings to ensure fair competition with other distribution systems?

The *Gazette Notice* stated that, while the CRTC Exemption Order does not prevent competition, it limits the competitiveness of Canadian DTH distribution undertakings in several ways. For example, the Exemption Order prohibits DTH distributors from originating programming. Also, DTH distribution undertakings cannot provide any Canadian service other than authorized channels, and are limited to the same choice of U.S. programming as cable TV services. The *Gazette Notice* indicated that a further potential restriction on competition for all distribution systems is the CRTC's list of Eligible Satellite Services, which limits the carriage of U.S. services to those that figure on the list.

In the various submissions received, there was some disagreement on the definition of *program*

origination. Power DirecTv, for example, argued that DTH undertakings should be able to originate programming because cable companies are allowed to do so. Power DirecTv appeared to interpret program origination as applying to the distribution of a pay-per-view service. As cable companies pointed out, however, their program origination is a condition of licence that applies specifically to the provision of community channels. Cable companies are obliged

by regulation to contribute 5% of basic service revenues to community programming – or approximately \$75 million annually. Rogers argued in its brief to this policy review that, in view of cable's obligation to rechannel 5% of revenues to community programming, DTH undertakings should likewise contribute 5% of their revenues to a program production fund.

It is true that cable companies do not generally *originate* programming beyond the provision community channels. It should be noted, however, that cable companies – though by definition a distribution system –

do control program services indirectly. Rogers, for example, owns minority stakes in specialty channels such as YTV and in the pay-per-view service, Viewers Choice Canada. It should also be noted that the Commission has authorized telephone companies – which are also distribution systems – to enter the programming market through video-on-demand trials. Moreover, companies such as Bell Canada Enterprises, which is a major partner in ExpressVu, have set up multimedia programming subsidiaries.

The Panel takes the view that community programming by cable companies is a regulatory burden. The nature of satellite TV, however, makes it impossible for DTH undertakings to offer local programming. **For this reason, the Panel recommends that DTH distributors be obliged to contribute to Canadian program production. The contribution should be at least equivalent, in**

The Panel recommends that DTH distributors be obliged to contribute to Canadian program production.

percentage terms, to the financial contribution of cable companies to community channels.

While this is not a guarantee of a production fund's effectiveness, a guiding principle should be, as previously stated, that the administration of funds should be independent from the industry interests who contribute to them.

Flexibility in Program Packaging

Concerning *program packaging*, the Government noted in its *Gazette Notice* that "as we move into a competitive environment for the distribution of broadcasting services, consumers will select a distribution undertaking based on factors such as programming, price and terminal equipment – the most important factor being programming." New programming services provided by satellite TV are expected to be primarily pay-per-view – essentially movies and special events – which can make use of the large number of channels made available by DTH delivery.

To fully understand the role of pay-per-view services in the emerging broadcasting market, it is necessary to underscore the important distinction between pay-per-view and, on the other hand, pay-TV and specialty services.

Pay-TV Versus Pay-per-view Services

Pay-TV services, though they also tend to offer mainly movies to subscribers, cannot be compared with pay-per-view services for regulatory purposes. Pay-TV services are offered to subscribers as a package for a monthly fee. Pay-per-view, on the other hand, is strictly *transactional*: a subscriber orders a showing of a single movie or special event and pays only for it. Rightsholders (the owners of specific movies or programs) are paid pay-per-view revenues

on the basis of individual "buys", not on the basis of monthly subscriber fees. This means, in effect, that rightsholders (for example, Hollywood studios) have no interest in making their product available to only one pay-per-view service on an exclusive basis. On the contrary, as is already the established practice, rightsholders prefer to offer their product to as many pay-per-view services as possible to increase their revenues from individual buys. Thus those who hold the rights for pay-per-view product

clearly benefit from competition among distributors. Competition ensures that their product is assured a maximum degree of market exposure to as many separate subscriber bases as possible.

The Panel concludes therefore that the pay-per-view market is not a natural monopoly, and therefore should be subject to competition for the benefit of consumers.

Specialty Versus Pay-per-view Services

The CRTC protects Canadian specialty channels through its so-called "non-duplication" rule. The Commission blocks market entry in Canada of American specialty services where a similar Canadian service exists. Where there is no duplication, the Commission may authorize a U.S. channel for distribution in Canada by including it in its lists of Eligible Satellite Services.

The Commission amends these lists from time to time in order to allow maximum flexibility in the packaging, by cable companies and satellite signal resellers, of both Canadian and non-Canadian programs. In the past, the Commission sometimes has shown flexibility in what appears to be an arbitrary manner. The Panel has been advised that certain Canadian broadcasters have distributed services – for example, the Playboy

PAY-TV

Packages of movies, sporting events, and other programs for which viewers pay on a monthly basis at a set fee. When viewers subscribe to a pay-TV service, they receive all the programs in the package according to the pre-established broadcast schedules. Pay-TV is a discretionary service bought separately from basic cable.

Channel – that do not figure on the CRTC's authorized lists. While the Commission's lists for authorized foreign channels need to be enforced in a flexible manner, this should be done in an unimpeachable fashion.

For the purposes of this policy review, the question of the Commission's lists is a separate issue, for specialty channels cannot be compared with pay-per-view services. In Canada, specialty services produce and commission programs from independent producers, and by doing so make a direct contribution to the Canadian broadcasting system. Pay-per-view services are different: they do not produce their own programming, but merely package movies, "adult" films, and special events such as wrestling matches and rock concerts. Thus there is no sound policy reason for extending monopoly privileges to pay-per-view services.

The Panel takes the view that the policy logic of "non-duplication", as applied to protect Canadian specialty services, does not apply to pay-per-view services.

Some parties argued in their submissions to this policy review that DTH pay-per-view services – and notably the service offered by Power DirecTv – should seek authorization in Canada by obtaining a licence. The Canadian Cable Television Association (CCTA) made this point in its brief:

"CCTA strongly opposes allowing Power DirecTv, or any other DTH undertaking operating in Canada, to originate a programming service, such as a pay-per-view (or pay per series) service, without first seeking and obtaining a programming undertaking licence from the CRTC."

PAY-PER-VIEW (PPV)

Movies and special events are offered to viewers on a strictly transactional basis. Viewers order up a single showing of a movie or sporting event and pay for that showing only at the pre-established time of broadcast. With DVC, pay-per-view services on satellite TV can now offer as many as 100 channels of movies and events. Several channels broadcast the same movie or event on a rotating schedule.

The Panel agrees that all DTH pay-per-view services operating in Canada should be licensed. Only formal licensing ensures the necessary regulatory control to enforce programming obligations.

The Panel notes with satisfaction that the CRTC intends to licence a French-language pay-per-view service for cable before the end of 1995. Given satellite TV's expanded channel capacity, the carriage of a French-language pay-per-view service should be a condition of licence for all DTH distributors.

In conclusion, the Panel makes the following points:

- DTH distribution and the provision of pay-per-view programming must be treated as two distinct undertakings for licensing purposes.
- Competition among DTH pay-per-view programming services should be encouraged. All DTH pay-per-view services should be required to hold a programming licence.
- Like pay-per-view services licensed for cable distribution, DTH pay-per-view services should acquire product on a non-exclusive basis and meet regulatory requirements for the exhibition of Canadian content.
- All DTH distributors that offer pay-per-view services in Canada should be obliged to carry a French-language pay-per-view service when such a service is available for distribution.
- Like DTH distributors, DTH pay-per-view programming services should contribute at least 5% of revenues to a program production fund.

Estimates for Program Production Fund (annual basis)

Number of Subscribers: (average \$30 monthly bills)	Canadian Program Production Fund (contributions)
500,000 subscribers	\$ 18 million/year
750,000 subscribers	\$ 27 million/year
1 million subscribers	\$ 36 million/year

* Calculation based on combined contributions as 5% of gross revenues of DTH distributors and 5% of gross revenues of pay-per-view programming services.

According to the Panel's conservative estimates, combined contributions to a Canadian production fund by DTH distribution undertakings and pay-per-view services could generate, on the basis of roughly 1 million subscribers, approximately \$36 million annually.

2 ■ Overall Regulatory Burden

What regulatory requirements are appropriate for DTH undertakings to ensure that the overall regulatory burden is competitively neutral for all competitors?

This question, because of its general character, elicited a variety of responses from interested parties. Expressvu, for example, called for regulations that would allow DTH services to compete with cable without actually replacing cable. Thus, added Expressvu, Canadian DTH services "will add to the system while not severely disrupting other segments." Power DirecTv claimed that the Commission has subjected different DTH operators to different procedures for market entry, and by doing so is anti-competitive and discriminatory. Power DirecTv argued, moreover, that DTH satellite television is not a natural monopoly, and therefore more than one entity should be allowed to enter the market.

To ensure fair competition, rules should be broadly the same for DTH undertakings, cable, and other distributors, while allowing for the distinct characteristics of each delivery system.

The Panel takes the view that, to ensure fair competition, rules should be broadly the same for DTH undertakings, cable, and other distributors, while allowing for the distinct characteristic of each delivery system.

All distribution systems, for example, should be subject to the same rules governing priority carriage, preponderance of Canadian services in both English and French, and access for Canadian pro-

gramming in both official languages. Finally, as the Panel has indicated, all distribution systems should contribute equivalent percentages of revenues to a Canadian program production fund.

3 ■ Line-of-business and cross-ownership restrictions

What measures, transitional or otherwise, would be appropriate to ensure that DTH undertakings can develop as competitors to existing distribution undertakings? Such measures might include line-of-business or cross-ownership restrictions for existing distribution undertakings and carriers.

The CRTC makes cross-ownership regulations on a case-by-case basis. According to the Commission's "ben-

efits" approach, applicants for licences are obliged to demonstrate that they will meet the policy objectives of the *Broadcasting Act*, including the promise of benefits to overcome possible concentration objections. The Bureau of Competition Policy also has substantial powers pursuant to the Act, including the statutory right to bring an applicant before the Competition Tribunal. In the past, CRTC licensees have used the "regulated conduct" defence against potential anti-concentration actions taken by the Bureau of Competition. Given the regulatory trend towards deregulation and exemption, the effectiveness of this defence will likely be attenuated in the future.

Astral Communications argued in its brief to this policy review that no specific measures are required beyond those restricting DTH undertakings to Canadian ownership. The Canadian Cable Television Association likewise submitted that no special measures to safeguard against cross-ownership are required. Power DirecTv, on the other hand, criticized the cross-ownership within the Expressvu consortium.

The Panel accepts the Competition Bureau's assessment that, should competitive problems arise due to cross-ownership, merger and abuse of dominance provisions in the *Competition Act* would be sufficient to remedy these situations.

4 ■ Universal Service and Choice

Should DTH undertakings authorized to operate in Canada be required to make services available to all Canadians? In general, can DTH services best promote choice for Canadians and contribute to the objectives of the Broadcasting Act?

Virtually all parties agreed that universal service and maximum choice should be a fundamental policy objective that DTH undertakings could help to achieve.

Telesat Canada argued Canadian DTH undertakings should be encouraged to take advantage of DTH broadcasting's multi-point, cost-distance insensitivity to make services universally available to all Canadians. For this reason, Telesat added, it would make sense for DTH undertakings to use Canadian satellites, which unlike foreign satellites serve the entire domestic market. Several other parties asserted that the "footprint" of Power DirecTv's Hughes satellite does not cover the entire Canadian territory. Power DirecTv itself countered that its Hughes signals can reach 95% of the Canadian population. Power DirecTv added that the rest of the territory could be reached with gradually larger

satellite dishes, needed mainly because of the low power of Telesat's Anik E satellite.

The Panel shares the goal of universal broadcasting services in Canada. It would appear that, with respect to DTH broadcasting, differences between potential suppliers are more apparent than real. The "footprints" of satellites owned by Telesat, Hughes, AT&T and other companies can reach nearly the entire Canadian population. The reach of these satellites goes well beyond that of existing off-air and cable systems. It should be recalled that, while universality has always been a goal, strict 100% universality has never been imposed as a condition of licence on other distribution systems such as cable and off-air broadcasters.

On the question of *choice*, there can be little doubt that, at present, satellite TV offers significantly more programming choices than both cable and off-air television. Individual Canadians addressed this particular question with some eloquence in the more than 350 letters sent to this policy review. Overwhelmingly, respondents clearly favoured the introduction of satellite TV. Many private citizens expressed frustration with cable monopolies and the CRTC in the strongest terms. The message was virtually unanimous: Canadians want more choices. The preference for a "pick-and-pay" system was a recurrent theme in the letters received. For example, Randy Alfred from Oakville, Ontario, wrote: "We have been held hostage by cable companies long enough! Let's bring television entertainment in Canada into the 1990s. There is a lot of entertainment on satellite out there for an affordable price. I demand access to it. Do not hold back any longer. Get on with it and legalize them." F.J. Collins of Baie d'Urfe, Quebec, stated: "I want maximum satellite competition for the cable system, with pick-and-pay options and price and supply competition."

Choice must be balanced with another policy objective: encouraging the production of Canadian programs so that distinctly Canadian choices are part of the entire range of choices available.

The Panel believes that increased program choices for Canadians is an appropriate policy objective. At the same time, choice must be balanced with another policy objective: encouraging the production of Canadian programs so that distinctly Canadian choices are part of the entire range of choices available.

5 ■ Foreign Ownership

Canadian ownership requirements under the Broadcasting Act prohibit foreign DTH services from being licensed in Canada. Is there merit in considering ways of authorizing the distribution of these services in Canada?

Current statutory rules stipulate that Canadian broadcasting undertakings must be "effectively owned and controlled by Canadians." This requirement is further defined by a 1978 Direction to the CRTC (Eligible Canadian Corporations) setting an 80% Canadian ownership threshold for corporations.

The federal Government is currently reviewing ownership provisions for broadcasting undertakings. On 8 October 1994, the Government issued a notice in which it stated:

"Canada is now propelled into the development of a full-fledged information highway and, as international boundaries are disappearing, it has become critical to examine our broadcasting system ownership regulatory structure to assess whether it meets the needs of the Canadian broadcasting industry and the Canadian consumer."

With respect to DTH services, several submissions by parties allied to the Expressvu consortium called into questions the ownership structure of Power DirecTv. Astral Communications, for example, portrayed Power DirecTv as a "Trojan Horse" that is controlled by foreign interests — namely its

U.S.-based GM Hughes Electronics partner which owns DirecTv. Others dismissed Power Corporation as merely the Canadian "marketing agent" of DirecTv.

Power DirecTv responded to these charges by insisting that it is "an *independent* entity with full authority to control what is distributed as part of its service." Power DirecTv, moreover, "would operate in Canada. It would be subject to the Canadian ownership and control rules. It would be legally required to observe Canadian content, linkage and tiering rules; to deliver only authorized services; and would be subject to the enforcement methods of the *Broadcasting Act*."

The Panel takes the view that foreign ownership rules should be enforced and any licence applicant before the CRTC must comply with these and other Canadian rules, including effective control.

6 ■ Fair Access to Canadian Programming

Is there a need for legislative or regulatory intervention to ensure fair access to Canadian programming services by competing distribution undertakings, and their subscribers? If so, what instruments could be considered?

The Government indicated in the Gazette Notice that its goal is the "widest possible access to Canadian programming in a way that interferes as little as possible with market forces." The CRTC indicated in its Exemption Order that it "expects" program and network undertakings to make their services available to DTH distributors with conditions comparable to those offered to cable licensees.

The issue of access to programming is crucial because the capacity of any distribution or programming undertaking to compete effectively is

Foreign ownership rules should be enforced and any licence applicant before the CRTC must comply with these and other Canadian rules, including effective control.

largely determined by its ability to procure and attractively package programs. In the United States, this issue posed a problem when it appeared that U.S. cable companies were using their market influence to block access to programming under their control, particularly for competing satellite TV services. In 1992, the U.S. Congress passed a law, the Cable Television Consumer Protection and Competition Act, which prevents cable companies from blocking access to programming.

In Canada, by indicating that it "will expect" program and/or network undertakings to make their services available to DTH undertakings at fees comparable to those offered to cable, the CRTC stopped short of using its statutory authority to make equitable treatment in this regard mandatory. The Commission has the legal authority, pursuant to Section 10(1)(h) of the *Broadcasting Act*, to adjudicate disputes between interested parties in this area.

Several parties suggested in their briefs to this policy review that the Commission should use these powers to intervene when necessary to settle disputes of this nature. Expressvu recommended that a third-party arbitration body be set up to arbitrate such disputes. The Canadian Cable Television Association noted, on the other hand, that so far there have been no problems regarding access to Canadian programs by competing distribution undertakings. In case of disputes, the CCTA concluded, the Commission could act as an arbitrator. In its submission, Stentor – which plans to enter the program delivery business – said it opposed exclusive rights deals because they could limit the ability of certain distribution systems to compete with others. Stentor recommended that all licensed broadcasting undertakings and networks should be required to allow distribution of their services on a non-discriminatory basis.

The Panel is concerned that some distribution systems and companies possess considerable market power in their negotiations with program providers. Certain large cable companies have financial stakes in specialty and pay-per-view services. For this reason, it is imperative that the CRTC take appropriate steps to ensure that DTH distribution undertakings are not prevented by other distribution systems from obtaining the right to distribute programming services.

It is imperative that the CRTC take appropriate steps to ensure that cable and other distribution systems currently distributing Canadian and foreign services in Canada do not use their market power to prevent DTH undertakings from obtaining distribution rights for those services.

7 ■ North American rights

What will be the impact of the concept of "North American" rights on the Canadian broadcasting industry and independent program producers? What action, if any, should be taken in this regard?

The *Gazette Notice* pointed out that, traditionally, rights are usually required with respect to local, regional or national markets; but that the retransmission of distant signals by cable operators eroded this concept of local exclusivity. U.S. and Canadian regulators consequently established measures to help protect the commercial value of the local broadcasters' distribution rights. For example, in Canada the CRTC imposed "simultaneous substitution" rules. The introduction of DTH services will present new challenges, because DTH undertakings are "North American" due to the continent-wide "footprint" of their signals. This technological reality could alter the way in which broadcasting programming rights are acquired for the Canadian market.

At present, TV programs are sold mainly on an exclusive basis to increase the value of a sale to a program service. This should not change. The merit of exclusive versus non-exclusive rights is

more pertinent, however, with respect to the pay-per-view market, for pay-per-view concentrates mainly on the delivery of filmed entertainment to the home. Power DirecTv stated in its brief to this policy review:

“Power DirecTv is prepared to make all its film purchases for Power DirecTicket (our pay-per-view program service) on a non-exclusive basis for the pay-per-view window involved, so as to remove any threat to competing pay-per-view services of being unable to acquire programming from sources supplying Power DirecTv – provided the other pay-per-view services act in a similar manner. This is entirely in keeping with our view that all distribution systems should have assured access to program services.”

Existing Canadian pay-per-view services have said that competition could seriously undermine their ability to stay in business because bigger services could acquire exclusive “North American” rights and hence impede their access to product. Astral Communications, which owns the Viewers Choice Canada pay-per-view service, said bluntly: “The impact of ‘North American’ rights would lead to the rapid annihilation of the Canadian broadcasting system.”

These concerns would be valid if rights for pay-per-view exhibition were acquired on an *exclusive* basis, and if competing pay-per-view services operating in Canada were *foreign* and hence *unlicensed*. However, the Panel has clearly recommended that DTH pay-per-view services in Canada should be licensed, and should, as a condition of licence, acquire pay-per-view rights on a *non-exclusive* basis.

In sum, the logic of exclusive rights does not apply to the pay-per-view market. The CRTC has recognized this fact in making non-exclusivity a condition of licence for existing Canadian pay-per-view services. In issuing a licence renewal for Astral’s Viewers Choice pay-per-view service on 28 January 1995, the

Commission said it “expects Viewers Choice Canada to adhere to its commitment not to purchase films or events on an exclusive basis.”

The Panel takes the view that non-exclusivity must be made a firm condition of licence, not merely a promise. Non-exclusive DTH pay-per-view rights for Canada will ensure that all pay-per-view services are guaranteed access to product. Moreover, in a market with competing distributors, rightsholders will be able to make two or more sales.

The logic of exclusive rights does not apply to the pay-per-view market.

8 ■ Export Opportunities

How can DTH satellite distribution undertakings – domestic and foreign – best contribute to the export of Canadian programming?

The *Gazette* Notice observed that Canadian programming has recently enjoyed increased access to the U.S. market, due largely to the expanded channel capacity of terrestrial and DTH distribution systems, which have created increased demand for original and alternative programming. The Government suggested that consideration should be given to ways in which DTH undertakings, both domestic and foreign, can contribute to the export of Canadian programs.

Power DirecTv has underscored the export advantages that its service, if authorized in Canada, would bring for Canadian programs through the carriage of Canadian channels. Already, Power Corporation has sold distribution rights of three Canadian channels – MuchMusic, Newsworld International, and Trio – to DirecTv in the United States. Power DirecTv’s critics argue however that export opportunities are a red herring. Allarcom Pay Television, for example, said in its submission that the “upside” of export via Power DirecTv would be negatively compensated by what Allarcom says would be the detrimental impact of allowing Power DirecTv into Canada. The Canadian Film and Television Production Association (CFTPA) argued that satellite TV is

not the solution for export potential for Canadian movies and programs. The CFTPA said producers export their products on their own, and indeed have doubled their foreign sales over the past five years without satellite TV.

It should also be noted that, in the pay-per-view market for feature films, there is a critical difference between "shelf space" and "buy rates". It is one thing to offer Canadian movies to Americans in the U.S. market, but quite something else to ensure that these films are given sufficient promotion to incite DTH subscribers to order them. It is unlikely, for example, that market exposure of French-language Canadian movies would generate significant "buy rates" on a satellite TV service in the United States. In short, a market "window" in pay-per-view is not enough to generate "buys" for a particular movie.

Even if Canadian films and TV programs were immensely popular in the United States and abroad, there is another danger that comes with making production decisions on the basis of foreign sales. As the Commission noted in June 1993:

"While greater access to foreign funding may result in the ability to produce more programming, it has been argued that this may also lead to increased pressure to alter the content of a program to appeal to foreign markets, while potentially rendering the programming unrecognizable as Canadian."

The Panel shares this concern, and therefore reiterates its position that, if competition is to be encouraged, DTH and pay-per-view undertakings must contribute to a fund for the production of quality Canadian programs.

The Panel agrees that only quality Canadian films and TV programs will find success, critically and commercially, in foreign markets. The Panel would hope that, with increased funding,

the result would be a significant boost to exports of Canadian productions.

The Panel does not have sufficient evidence, however, to support the claims of Power DirecTv that its distribution service would significantly increase the export of Canadian programs. The CRTC should assess any such export benefits when considering the licence applications of DTH pay-per-view programming services.

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programming
services.**

9 ■ Technical Standards

In addition to the public consultation currently under way with respect to a DVC standard, what further Government support can be provided to the industry's efforts to establish common and interoperable technical standards for advanced broadcasting services?

What impact would the use of different technologies by Canadian DTH service providers have on their ability to compete with foreign systems?

Industry Canada has expressed support, in a Canada Gazette Notice, for the efforts of Advanced Broadcasting Systems of Canada (ABSOC) towards open, non-proprietary system solutions for digital television, and sought comments on recommendations put forward by ABSOC for a DVC standard. It appears that Canadian-based DTH undertakings will use technology similar to, but not compatible with, American DTH undertakings.

The issue of technical standards is complex. Past experience indicates that market participants tend to be reluctant to adopt standards compatible with potential competitors. The result often leads to confusion and higher prices for consumers in the short term while one technology establishes market dominance. Good examples of this are the rivalry between the VHS and Betamax video cassette recording standards, and the rival DOS and Macintosh computer operating standards.

The Commission has said that it encourages industry participants to adopt common digital video compression standards, but has not issued guidelines to ensure such standards are adopted. Unfortunately, it appears that there is little solid agreement within ABSOC on industry-wide standard for Canada. The opposite appears to be the case. The lack of agreement appears to be, at least in part, due to corporate strategies and a concern about developments in the U.S. market.

Lack of compatibility will impede true competition, because once consumers make an initial layout for hardware equipment, it is unlikely they will make another investment to switch to a competing service. As a result, competition will be limited – unless a rental market is developed for satellite receiver-decoder units – to the pre-purchase marketing phase of the business, not in the provision of programming services.

The Panel notes that Industry Canada has the authority to establish technical standards intended to further the policy objectives of the *Telecommunications Act* and to require the CRTC to give them effect.

10 ■ Use of Canadian Satellite Facilities

What are the advantages and disadvantages of requiring the exclusive use of Canadian satellites for services made available in Canada?

Are current policies governing the use of domestic satellite facilities for domestic and trans-border traffic still appropriate in the context of DTH satellite distribution undertakings?

In both Canada and the U.S., long-standing policies seek to ensure the use of domestic satellite facilities for domestic traffic. Canada and the U.S. have in place agreements, however, whereby cross-border satellite traffic may be carried on satellites from either country, with arrangements

to be negotiated by satellite operators in each country. Telesat has a mandate to ensure that Canadian satellite facilities obtain an equitable share of cross-border traffic.

The *Gazette Notice* stated that, in the increasingly competitive, integrated North American market,

“Canadian service providers, including program creators, should have access to a number of competitive and cost-effective means of delivering their products to Canadians and abroad. From a business perspective, the means of distribution should be as efficient, effective and economical as possible, and competition is the best way of achieving this objective.”

Section 7(e) of the *Telecommunication Act* stipulates that a Canadian telecommunications policy objective is “to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada.” Section 7(f) of the *Telecommunications Act* refers to the necessity “to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective.”

The Panel notes that Canadian cable companies use Canadian satellites to receive and distribute Canadian signals, but may and do use foreign satellites to import foreign signals authorized for distribution in Canada. The Panel also notes that, in the early 1980s when cable companies asked for regulatory permission to receive U.S. signals directly from American satellites, the Commission authorized this against the expressed wish of Telesat Canada. It is therefore surprising that, in 1994, the CRTC Exemption Order obliged DTH undertakings to use Canadian satellite facilities for *all* their signals.

Telesat Canada, perhaps the party most affected by this issue, argued in its brief to this policy review

Canadian cable companies use Canadian satellites to receive and distribute Canadian signals, but may and do use foreign satellites to import foreign signals authorized for distribution in Canada.

that, as a minimum condition, Canadian channels should be obliged to use Canadian satellites. Telesat added that, as a "logical extension" of this principle, Canadian satellites should be the required feeds for Canadian cable TV, DTH and other distribution systems seeking to distribute authorized U.S. and foreign signals in Canada. It should be noted that Telesat stopped short of insisting on exclusive use of Canadian satellites for all signals, as is set out in the CRTC Exemption Order. Neither do Canadian cable companies agree with the provision in the Exemption Order making exclusive use of Canadian satellites mandatory.

The Canadian Cable Television Association, for example, supports mandatory use of Canadian satellites for *Canadian* programming.

The Panel notes that established policy requires broadcast distributors to use Canadian satellite facilities for *Canadian-originated* programming. The Panel therefore recommends that, to the extent that foreign signals, specialty services and superstations may be received by cable systems directly from foreign satellites, the Commission shall apply the same rules to DTH distributors.

SPECIALTY SERVICES

Specialty services reflect the trend towards "narrowcasting" with special-interest channels devoted to niche areas such as music, sports, news, or arts programming. Specialty channels are usually offered by cable companies on a discretionary basis at an additional cost to subscribers. Canadian viewers have access to licensed Canadian and authorized American specialty channels.

Chapter III: Licensing for DTH Broadcasting Undertakings

Licensing authority is the principal instrument to give effect to the broadcasting policy of the Parliament of Canada. For this reason, it should be a fundamental principle that broadcasting undertakings whose impact on the Canadian broadcasting system may be significant should be subject to a formal licensing procedure.

This is not now the case with the CRTC's exemption of DTH satellite distribution undertakings. As the Panel noted in the Introduction to this report, the Commission's Exemption Order (CRTC 1994-111) effectively exempted DTH satellite services from licensing requirements normally imposed on other broadcasting distribution undertakings.

Some hold the view that exemptions issued by the Commission represent a necessary form of deregulation. Until recently, forbearance from licensing was limited to broadcast undertakings whose impact on the broadcasting system was deemed minor or peripheral. Exemptions were thus accorded to closed-circuit video programs in hotels, master antenna television systems for multiple dwelling buildings, low-power radio services, and the like. This approach has been in strict accordance with the Broadcasting Act, which states in Section 9(4) that the Commission can exempt from licensing broadcasting undertakings where compliance with licensing "will not contribute in a material manner to the implementation of the broadcasting policy" of Canada.

There has been, however, a very recent tendency on the part of the Commission to proceed by way of exemption. Many observers have called into question the CRTC's increased recourse to exemption.

Indeed, CRTC exemptions in the recent past have provoked considerable controversy and public debate. The CRTC's exemption of DTH undertakings was followed by two other exemptions. First, on 7 November 1994 the Commission issued an exemption for TV advertising "infomercials". Second, on 13 January 1995 the regulator issued an exemption for video games.

Many interested parties have expressed the view – both to the CRTC convergence hearings and to this policy review – that this recent regulatory tendency towards exemption is troubling. Some have argued that it reveals an abdication of regulatory responsibility on the part of the Commission to deal effectively with new technologies and services whose impact on Canadian society remain uncertain. Others have noted that exemptions can create situations where exempted undertakings are accorded unfair advantages over broadcasting undertakings which must meet onerous licensing obligations. These concerns raise serious questions about the chosen mode of operation of Canada's broadcasting regulatory authority.

These questions are exacerbated by another fundamental problem: CRTC exemptions are not subject to appeal to the Governor in Council.

Some parties have argued that exemptions should be preceded by full and open public hearings. Others insisted that CRTC exemptions should not be a substitute for licensing, for licensing by exemption is a denial of natural justice. It was also suggested that only those services that do not fulfill a cultural mandate and cannot benefit from Canadian content rules should be subject to

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implementation
of the
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policy" of
Canada.*

exemption. The Competition Bureau warned, moreover, that increased recourse to exemption would likely lead to challenges as new technologies proliferate and questions related to fair competition become paramount. This would be particularly relevant – as was the case with DTH undertakings – where one supplier benefits from the exemption while a potential competitor is denied market access except through licensing.

The Commission itself was of the view, when DTH satellites were first envisaged nearly a decade ago, that licensing was the proper way to proceed. When announcing a regulatory policy for DTH undertakings in 1987, the Commission stated that DTH undertakings must apply for a licence and that the method of regulation for these undertakings would be by condition of licence. At that time, the Commission was evidently sensitive to the concerns of the cable industry that DTH could pose a commercial threat to existing cable television, especially if DTH undertakings were left unregulated.

When the Commission issued its proposed DTH exemption order on 2 March 1994, it apparently had reversed its position on this matter. Instead of licensing DTH undertakings, the Commission was now clearly contemplating an exemption from licensing for such undertakings. While the Commission recognized the importance of DTH broadcasting in the Canadian broadcasting system, the regulator said it still felt confident that an exemption was justified. The Commission stated:

“Establishing exemption criteria may provide an appropriate degree of regulation for Canadian DTH distribution undertakings, while ensuring that such DTH services contribute to achieving the objectives of the Act. To the extent that an exemption approach may facilitate the development of new Canadian DTH undertakings by removing such licensing requirements,

such undertakings may also...offer) an attractive Canadian alternative to emerging non-Canadian direct broadcast satellite services.”

In issuing its Exemption Order, the Commission set only minimal obligations for DTH undertakings. While DTH undertakings were obliged to offer a preponderance of Canadian channels, no financial contributions to Canadian program production were required. The

Commission moreover demurred from using its statutory authority to guarantee fair access to programming by DTH distributors. DTH undertakings were also permitted to offer their services to cable companies. DTH undertakings were limited, however, to channels authorized for distribution in Canada and were also not allowed to originate their own programming. The Exemption Order also stipulated exclusive use of Canadian satellite facilities for the Canadian DTH market. The effect of the Exemption Order was effectively to exclude one potential Canadian DTH distributor, Power DirecTv, while favouring the market entry of another operator, Expressvu.

The Panel believes that licensing, if used properly, does not have to constitute a barrier to expeditious market entry. In the past, the Commission has shown, in certain cases, great flexibility by proceeding expeditiously with licensing.

Exemption should not be a substitute for regulation. The Panel therefore concludes that, for the following reasons, a formal licensing procedure is the appropriate instrument for DTH undertakings:

- The *Broadcasting Act* envisages that formal licensing should, as a general rule, apply to broadcasting undertakings whose economic and cultural impact may be significant. DTH

The effect of the Exemption Order was effectively to exclude one potential Canadian DTH distributor, Power DirecTv, while favouring the market entry of another operator, Expressvu.

broadcasting is a new distribution technology that will constitute an important part of the Canadian broadcasting system.

- The *Broadcasting Act* envisages that, through formal licensing, the basic test of fairness for all applicants is met. Full and open licensing procedures ensure the integrity of the regulatory system.
- The *Broadcasting Act* accords the Governor in Council powers of review over CRTC licensing decisions. When the Commission proceeds by way of exemption, the Governor in Council is deprived of this fundamental power.
- Formal licensing sets specific conditions of performance. Exemption orders do not impose the same degree of regulatory burden. Thus when some applicants are licensed and others are exempted, the

resulting uneven regulatory burden may put licensees at an unfair competitive disadvantage.

- With formal licensing, licensees are obliged to come before the CRTC on a regular basis for licence renewals. Licences cannot be revoked if licensees meet their conditions of licence and abide by appropriate regulations.
- Formal licensing can be used efficiently to expedite market entry while applying the same conditions on all applicants, thus avoiding the claim that one or more suppliers were unfairly excluded.

The Panel concludes, therefore, that given the importance of DTH satellite distribution in the Canadian broadcasting system, a formal licensing procedure is the appropriate regulatory instrument for DTH satellite undertakings.

The Panel believes that licensing, if used properly, does not have to constitute a barrier to expeditious market entry.

Conclusion and Recommendations

The Panel takes the view that, while the long-term impact of DTH broadcasting on the Canadian broadcasting system is difficult to predict, satellite TV will likely have an important effect on Canadian television in the coming years.

The emergence of DTH broadcasting comes at a time of dramatic technological change, which is stimulating competition and increases the possible ranges of choices for viewers. Indeed, Canadians clearly have expressed an interest in satellite TV as a competitive alternative to other delivery systems such as cable.

By fostering competition in the broadcasting market while at the same time ensuring continued funding of Canadian programs, a DTH policy framework can maintain the delicate balance between the objectives of competition and the objectives of cultural policy. Competition must take place among DTH distributors and among pay-per-view programmers. Licensing procedures and conditions must reflect this.

The DTH Policy Review Panel therefore makes the following recommendations, which can be found in the attached Annex.

First, the Panel recommends that:

- DTH satellite distribution undertakings and DTH pay-per-view programming services should each be subject to a formal licensing procedure.

With respect to *DTH satellite distribution undertakings*, the Panel recommends that the Government advise the CRTC that a number of conditions of licence should apply to such undertakings, including the following:

- Competition should be encouraged among DTH distribution undertakings. No arbitrary limitation should be put on the number of licensees, provided they meet the conditions stated in the attached Annex;

- DTH distribution undertakings should be subject to the same overall rules as cable with respect to Canadian ownership and effective control and the distribution of Canadian and non-Canadian programming services;
- DTH distribution undertakings should be required to contribute 5% of gross revenues, or at least the same level as cable, to a government-designated, independently administered Canadian program production fund;
- DTH undertakings should be governed by the same rules as cable regarding the particular programming services and satellites that may be used for distribution of DTH services to subscribers, and in particular, no DTH undertaking should be prohibited from distributing a licensed pay-per-view service for the sole reason that the pay-per-view service may be using a foreign satellite for distribution of its service;
- DTH distribution undertakings should be assured fair and equitable access to program services distributed by other distribution undertakings, such as cable, and should be required to give fair access to program services.
- DTH distribution undertakings should be required to conform to established policy requiring them to use Canadian satellite facilities for Canadian-originated programming;
- With respect to pay-per-view services, DTH distribution undertakings should be restricted to carrying services supplied by pay-per-view programming undertakings licensed for DTH purposes;
- DTH distribution undertakings should be eligible to apply for a licence to supply DTH-specific pay-per-view services on the same terms and conditions as other DTH pay-per-view licensees;

- DTH distribution undertakings should be required to carry at least one French-language pay-per-view programming service when such a service is licensed for DTH distribution;

With respect to *DTH pay-per-view programming services*, the Panel recommends that the Government advise the CRTC that a number of conditions of licence should apply to such services, including the following:

- Competition should be encouraged among DTH pay-per-view programming services. No arbitrary limitation should be put on the number of licensees, provided they meet the conditions stated in the attached Annex;
- DTH pay-per-view programming services should be required to contribute 5% of gross revenues to the designated Canadian production fund, and meet the same conditions of licence as those applicable to pay-per-view programming services on cable;
- DTH pay-per-view programming services should be required, as a condition of licence, to acquire any rights for pay-per-view programming in Canada on a strictly non-exclusive basis.

Finally, to give effect to all the preceding conditions, the Panel recommends that the Government direct the CRTC:

- to take, immediately upon the coming into force of this Direction, all necessary and appropriate steps to ensure that no person be

authorized to carry on a DTH undertaking by any means other than by being licensed for that purpose.

In order to give effect to the Government's order, the Panel has attached draft directions to the CRTC, pursuant to Section 7 of the *Broadcasting Act*, setting out specific licensing criteria for DTH satellite distribution undertakings and DTH pay-per-view programming services. The criteria specified in the attached Annex are not intended to be exhaustive or to limit the CRTC's discretion to impose further requirements or conditions of licence in regard to both DTH distribution undertakings and DTH pay-per-view programming undertakings. In fact, the Panel is favourably disposed towards various conditions attached to the operation of DTH undertakings specified by the CRTC in its Exemption Order, such as the application of specific minimum video and audio and close-captioning standards to DTH pay-per-view programming and the application of cable tiering and linkage rules to DTH operations. The Panel considers that these kinds of conditions and criteria should be left to the CRTC to fashion and impose, in its discretion, in the context of issuing licences for DTH undertakings.

Annex I: Proposed Policy Directions to the CRTC

1. Proposed Direction Concerning DTH Satellite Distribution Undertakings.

WHEREAS all classes and types of satellite broadcasting undertakings play a significant role in the implementation of the broadcasting policy for Canada set out in subsection 3(1) of the Broadcasting Act;

WHEREAS Direct-to-Home Satellite Distribution Undertakings will become an increasingly important primary and alternative means for the distribution of Canadian programming services, in both official languages, as well as of foreign programming services to subscribers in all parts of Canada;

WHEREAS Direct-to-Home Satellite Distribution Undertakings can, if appropriately regulated, develop into an important vehicle for the distribution of Canadian pay-per-view services as well as other new video services and thereby make significant contributions to the development of independently-produced Canadian programming;

WHEREAS such Direct-to-Home Satellite Distribution Undertakings should be allowed unrestricted market entry through licensing, subject to appropriate requirements, including their contribution to the development of programming, in order to provide pay-per-view services and other Canadian and foreign programming services in competition with each other and with other distribution undertakings that provide programming services to Canadians;

AND WHEREAS it is in the public interest to have DTH distribution undertakings licensed in Canada as soon as possible;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Communications, pursuant to section 7 of the Broadcasting Act,* is pleased hereby to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of Direct-to-Home (DTH) Satellite Distribution Undertakings.

* S.C. 1991, c. 11

ORDER ISSUING DIRECTIONS TO THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RESPECTING POLICY FOR THE LICENSING OF DIRECT-TO-HOME (DTH) SATELLITE DISTRIBUTION UNDERTAKINGS

Short Title

1. This Order may be cited as the Directions to the CRTC (*Direct-to-Home (DTH) Satellite Distribution Undertakings*) Order.

Interpretation

2. In this Order,

“Class 1 cable licensee” means a holder of a Class 1 cable licence within the meaning of paragraph 8(a) of the *Cable Television Regulations, 1986*; (*télédiffuseur de classe 1*)

“CRTC” means the Canadian Radio-television and Telecommunications Commission; (*CRTC*)

“DTH distribution undertaking” means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (*entreprise de distribution par SRD*)

“DTH pay-per-view television programming undertaking” means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (*entreprise de programmation de télévision à la carte par SRD*)

“other distribution undertakings” includes cable distribution, Satellite Master Antenna Television (SMATV) and radiocommunication distribution undertakings that are licensed or exempted by the CRTC from the requirement for a licence under section 9 of the *Broadcasting Act*; (*autres entreprises de distribution*)

“pay-per-view television programming undertaking” means a pay television programming undertaking that provides a general interest pay-per-view service. (*entreprise de programmation de télévision à la carte*)

Directions

3. The CRTC is hereby directed to ensure, by appropriate means, that, with respect to the operation of a DTH distribution undertaking,

(a) the same rules that are in effect for other distribution undertakings govern the selection of particular Canadian and foreign programming services that are offered by the undertaking to its subscribers;

(b) the undertaking’s subscribers are able to receive signals distributed by the undertaking directly from any satellite the program-carrying signals of which may be received directly by other distribution undertakings for redistribution to their subscribers;

(c) the undertaking is subject to the same rules as other satellite broadcasting undertakings in respect of the use of Canadian satellites for the distribution of Canadian programming services to its subscribers;

(d) the undertaking contributes financially, on an annual basis, to the independent production of Canadian programming to the same extent that Class 1 cable licensees are required to contribute to community programming;

(e) the undertaking is not prevented from or impeded in distributing to its subscribers the same or equivalent programming services offered by other distribution undertakings as a result of contracts or arrangements entered into by other licensees for the acquisition of rights to the distribution or exhibition of such programming services via other distribution undertakings within Canada;

(f) the undertaking is prohibited from distributing any pay-per-view service other than that offered by a DTH pay-per-view television programming undertaking;

(g) the undertaking is not prohibited from distributing a pay-per-view service referred to in paragraph (f) for the sole reason that a foreign satellite is to be used for the delivery of part of that pay-per-view service;

(h) where the undertaking decides to distribute English-language pay-per-view services, the undertaking is required to distribute French-language pay-per-view services; and

(i) the undertaking is prohibited from originating any programming.

4. In order to give effect to this Order, the CRTC is hereby directed

(a) not to authorize any person or class of persons to carry on a DTH distribution undertaking other than by means of a licence issued by the CRTC for that purpose; and

(b) to take, immediately on the coming into force of this Order, all necessary and appropriate steps to ensure that no person is authorized to carry on a DTH distribution undertaking by any means other than a licence.

5. The CRTC is hereby further directed not to refuse to issue a license to an applicant to carry on a DTH distribution undertaking for the sole reason that the applicant holds a license to carry on a DTH pay-per-view television programming undertaking.

6. The CRTC is hereby further directed to call for applications for a licence to carry on a DTH distribution undertaking within 90 days after the day on which this Order comes into force and, thereafter, to schedule a public hearing to consider those applications at the earliest time practicable.

2. Proposed Direction Concerning Pay-per-view Television Undertakings.

WHEREAS pay-per-view services will become an increasingly important vehicle for the exhibition of feature films and other television programming and an increasingly important source of financial contribution to the development of independently-produced Canadian programming;

AND WHEREAS pay-per-view television programming undertakings should be allowed unrestricted market entry through licensing, subject to appropriate requirements, including their contribution to the development of programming, in order to provide to their subscribers, in competition with each other, the widest range of Canadian and foreign feature films and other programming;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Communications, pursuant to section 7 of the Broadcasting Act*, is pleased hereby to make the annexed Order issuing directions to the Canadian Radio-television and Telecommunications Commission respecting policy for the licensing of pay-per-view television programming undertakings that provide services through Direct-to-Home (DTH) Satellite Distribution Undertakings.

* S.C. 1991, c. 11

**ORDER ISSUING DIRECTIONS TO THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION RESPECTING POLICY FOR THE LICENSING OF
PAY-PER-VIEW TELEVISION PROGRAMMING UNDERTAKINGS THAT PROVIDE SERVICES
THROUGH DIRECT-TO-HOME (DTH) SATELLITE DISTRIBUTION UNDERTAKINGS**

Short title

1. This Order may be cited as the *Directions to the CRTC (Direct-to-Home (DTH)) Pay-Per-View Television Programming Undertakings Order*.

Interpretation

2. In this Order,

“CRTC” means the Canadian Radio-television and Telecommunications Commission; (*CRTC*)

“DTH distribution undertaking” means a Direct-to-Home (DTH) Satellite Distribution Undertaking; (*entreprise de distribution par SRD*)

“DTH pay-per-view television programming undertaking” means a pay-per-view television programming undertaking licensed to provide pay-per-view services for distribution to subscribers through a licensed DTH distribution undertaking; (*entreprise de programmation de télévision à la carte par SRD*)

“other pay-per-view television programming undertakings” means pay-per-view television programming undertakings that provide general interest pay-per-view television programming via satellite to cable affiliates; (*autres entreprises de programmation de télévision à la carte*)

“pay-per-view television programming undertaking” means a pay television programming undertaking that provides a general interest pay-per-view service. (*entreprise de programmation de télévision à la carte*)

Directions

3. The CRTC is hereby directed to establish a class of licences in respect of the carrying on of a pay-per-view television programming undertaking.

4. The CRTC is hereby further directed, in the exercise of its authority to issue, amend, renew, suspend or revoke any licence of the class of licences, referred to in section 3, in respect of the carrying on of a pay-per-view television programming undertaking

(a) to prohibit, by appropriate means, the undertaking from acquiring exclusive rights to pay-per-view distribution of feature films and other programming within Canada;

(b) to require, by appropriate means, the undertaking to contribute financially, on an annual basis, to the independent production of Canadian programming in the same manner and to the same extent as that required of other pay-per-view television programming undertakings, which financial contribution shall be not less than 5% of gross annual revenues;

(c) taking into consideration the total number of channels over which the undertaking's service is offered, to apply rules that are comparable or equivalent to those rules in effect in respect of other pay-per-view television programming undertakings and that pertain to the annual exhibition ratios of Canadian to foreign films and events, the annual minimum numbers of Canadian films and events to be exhibited and the remittances to be paid by the undertaking to rights holders for the Canadian films and events it exhibits;

(d) to apply the CRTC rules governing sex-role portrayal and the depiction of violence to the programming exhibited by the undertaking;

(e) to ensure, to the same extent as for other pay-per-view television programming undertakings, that the Canadian films and video programming exhibited by the undertaking have been produced by independent production companies; and

(f) not to prohibit the utilization of foreign satellites for the distribution of part of the undertaking's programming to subscribers through a DTH distribution undertaking; and

(g) not to refuse to issue a licence to an applicant for the sole reason that the applicant holds a licence to carry on a DTH distribution undertaking.

Annex II: Contributors

PUBLIC SUBMISSIONS PHASE 1

Closing date:

January 10, 1995

- | | | |
|--------------------------------------|---|-------------------------------|
| 1. J. Van Hoom | 39. John Newland | 84. Unreadable name |
| 2. R. Baldwin | 40. Jan Uhde | 85. Matthew Bazoian |
| 3. T.I. Millen | 41. Marilyn Parsons | 86. Jane Millgate |
| 4. Dorothy & A.H. Carruthers | 42. John Paul Watman | 87. Mike Merriam |
| 5. Don E. Rogalsky | 43. Michael Z. Seals & Dr. Lois Etherington | 88. Mrs. J. Clappison |
| 6. Phillip Wallis | 44. John R. Boon | 89. John Buckton |
| 7. Kathie Kinisky | 45. Peter T. Miller | 90. Eric Van Velzen |
| 8. Perry Morin | 46. Alan G Laughlin | 91. Edna M. Ralston |
| 9. Jerzy Jastrzebowski | 47. M. Fenwick | 92. Len Tobias |
| 10. Richard Vincent | 48. Robert Slaven | 93. Michael D. Bovaird |
| 11. Gordon & Dorothy Anderson | 49. Don A. Panttila | 94. R.C. McLeod |
| 12. Michael Dinnick | 50. Paul Richardson | 95. Harry J. Waisglass |
| 13. Robert Kobenter | 51. Ed Bernacchia | 96. Werner Eisele |
| 14. Daren Janes | 52. Allan E. Paul | 97. Sydney E. Woolnough |
| 15. Mike Waterman | 53. R. Kyle Friesen | 98. Harold F.G. Stevens |
| 16. David Ormandy | 54. Peter Reid | 99. Maurice Francen |
| 17. John van den Hoven | 55. Barry D. Lewis | 100. John Sutherland |
| 18. J.A. Chadha & Elizabeth Paterson | 56. Rick Harvey | 101. Thomas F.C. Cole |
| 19. Anthony Charles Dyson | 57. Ian Brodie | 102. Mark Di Felice |
| 20. Patrick A. Vice | 58. Todd Jeffrey Weiler | 103. Stan Cummings |
| 21. Keith Edwards | 59. Jean-Daniel Begin | 104. George E. Cutler |
| 22. Marc Seeman | 60. Stephen Tanny | 105. Michael Klupsch |
| 23. W.R. Church | 61. Dick Huddleston | 106. Marilyn & Bill McGilvray |
| 24. Graeme Hill | 62. A. Lomaga | 107. Thomas D. Lord |
| 25. David Cross | 63. Bob Kyryliuk | 108. John Robson |
| 26. Albert Galpin | 64. Peter B. Dent | 109. Dee & Tony Phillips |
| 27. Allan Barsky | 65. Frank Jackson | 110. M.J. Marriott |
| 28. Murray J. Notkin | 66. Riva Flexer | 111. Ross Vipond |
| 29. Gary B. Rollman | 67. Hap Stelling | 112. W. Vandersanden |
| 30. Peter A. Taylor | 68. Tom Brownrigg | 113. Frederick Bowers |
| 31. Geoff Lane | 69. J.D. Randall | 114. Roderick J. MacLennan |
| 32. Frank Kuschnerreit | 70. J.R. Swift | 115. Thomas E. Palmer |
| 33. Chuck Ingerman | 71. Richard J. Thomas | 116. George Leigh |
| 34. Mark Nahimy | 72. Philip M. Stolze | 117. Tom Monaghan |
| 35. Heather Hood | 73. Beverly Lawson | 118. K. Hobby |
| 36. Helen Guest | 74. J. Bradford | 119. R.Wm. C. Stevens |
| 37. D. Simon | 75. H. Boas | 120. Ian Murray |
| 38. Jake Bamford | 76. Jack Bode | 121. K.R. Smith |
| | 77. Patricia Meadows | 122. E.M. Gillespie |
| | 78. Lloyd Larson | 123. Tom Brooks |
| | 79. Lee Lester | 124. Edward C. Hillard |
| | 80. Jef Turchinsky | 125. Greg Hills |
| | 81. Norman Klenman | 126. Fred D. Dolbel |
| | 82. Mary A. Mayo | 127. Daniel Noonan |
| | 83. A. Hanna & M.D. Fein | 128. Bob Delaney |
| | | 129. Shawn C. Sanson |

130. M. Shougee
131. Phillip, Margaret & Joan Groff
132. Brian Gronley
133. Gary A. Potts
134. Andrew Gory
135. Grace Hartleib
136. Paul Green
137. D. Gallagher
138. George & Audrey MacLellan
139. Ian MacNabb
140. Paul F. Williams
141. Jim Kullman
142. Bill & Marg Beam
143. Mr. & Mrs. Anthony Andres
144. Boyde Gill
145. W.F. Reid
146. R.A. Wislon
147. Jon D. Sagfeld
148. Joan Erskine
149. Susan Moger
150. Garry Smith
151. Donna E. Eden
152. Bruce H. Reid
153. David Harris
154. Doug Bum
155. Stanley O'Brien
156. W.H. Eatock
157. William A. Parish
158. Cyril Kalfin
159. Alan R. Willis
160. Bob Ruggles
161. Anne L. Brewster
162. Neil A. & Shirley Macdougall
163. J.H. & D.M. Wenman
164. Heinz G. Homell
165. Carolyn Stifanson
166. W.B. Ettie
167. J.R. Crust
168. John C.C. MacIntosh
169. Philip Fites
170. William J. Conner
171. Dimitri Vekris
172. Dr. & Mrs. J.G. Lenard
173. Jack Gray
174. Terry Jones
175. Allan Hammond
176. Wallace Halladay
177. George Zurakowski
178. Dayle Hogg
179. Marcis Esmits
180. Herb J. Moor
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182. Genia
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288. Drew Williams
289. Barrie Wallace
290. Raymond Rodgers
291. Chris Skene
292. Audrey J. White
293. Stephen L. Ross
294. A. G. Moreton
295. Ronald B. Dewhurst
296. R.J. Todd
297. Chum Limited
298. Craig S. Fleisher
299. SOCAN
300. TVOntario
301. Stanley Y.T. Wan
302. Canadian Independent
Record
Production Association
303. Superior Communications
Ltd.
304. Radio Advisory Board
305. Canadian Film & TV
Production
Association
306. Global Television Network
307. Shaw Communications
308. Molson Breweries
309. ASTRAL
310. Telesat Canada
311. Competition Bureau -
Industry Canada
312. Canadian Recording
Industry
Association
313. Canadian Cable Television
Association
314. Expressvu Inc.
315. CANCOM
316. Canadian Satellite Users
Association
317. Pat Kiernan
Communications
318. Satellite Communications
Association of Canada
319. Super Channel
320. Union des Artistes
321. Rogers Cablesystem
Limited
322. Directors Guild of Canada
323. George Tiviluk
324. Jim McHugh
325. Leslie B. Benson
326. Martin Janzen
327. Linda Leon
328. A. Melikian
329. S. Currie
330. W.B. Downey
331. Peter Kohl
332. Stentor
333. Fifth Dimension
Communications
334. James Bodi
335. Petition - Don Carmichael
336. Tim Foley
337. Jean & S. Chadder
338. Connie Parsons
339. Power DirecTV
340. Cogeco Inc.
341. ADISQ
342. Consumers' Association of
Canada
343. Mrs. Lynda Morozuk
344. W.G. De Hart
345. Randy Alfred
346. G.D. Pattison
347. Glenn Janse
348. Beryl & Vern Castle
349. R.J. Daniells
350. Alexander & Rosalind
Slider
351. W.H. Biggs
352. Showcase Television Inc.
353. Friends of Canadian
Broadcasting
354. YTV Canada Inc.
355. Labatt Communications
Inc.
356. Wall Communications
Inc.
357. G.C. Blair Baillie
358. Francis Lemieux
359. Edward A. Walker
360. Tammy Scott
361. Richard & Elaine Price
362. Marjorie Meloche
363. E. Garrod & W. Hayfield
364. The Canadian Association
of Broadcasters
365. Canadian Conference of
the Arts
366. Association des
Producteurs de
Films et de Télévision du
Québec
367. Metropolitan Life
368. F.J. Wolfram
369. Petition - Keith Angove
Mr. Ludrey
C. Balkis
David Steinback
Troy Marklin
R. Radith
370. Canadian Association of
Film Distributors and
Exporters
371. Petition - T. Kinna

- A. Jack
 Craig Arheson
 Wally Glawind
 J.R. Harrison
 Julie Weigner
 Tara Dobby
 Rolf J. Wagner
 372. Me. Francine Côté
 (CFCF TV)
 374. Matt Morris
 376. R. Palmer
 377. Pelmorex
 Communications Inc.
 378. Tee-Comm Electronics
 Inc.

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| Brian O'Connell | RVH Equip. | 64. ADISQ |
| T.E. Arsenault | Patricia Winter | 65. Power DirectTV |
| U.A. Crawford II | B. Townend | 66. Shaw Communications |
| A. M. Gafan | G.C. Peters | 67. Atlantis |
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| Dave Gordon | 46. Warren McKay | Limited |
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| L. Meloin | Producteurs de Films | Canada |
| M. Bray | et de Télévision du | 76. Production La Fête |
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| Lori Norris | 55. National Film Board of | Television and Radio |
| Isaac Chung | Canada | Artists |
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| Bernie O'Connor | Policy | Film |
| Albert Kaphepgst | Industry Canada | Distributors and Exporters |
| John Fretwell | 58. Stentor | 89. YTV |
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| Mary & John Baird | Inc. | Communications |
| Leo Heffernan | 60. Stanley Y.T. Wan | Corporation |
| Terry Debono | 61. Expressvu | |
| J.R. Hamel | 62. Astral Communications | |
| D.W. Vollmershausen | Inc. | |

About the Authors

Gordon Ritchie, *Chairman*

Gordon Ritchie is Chief Executive Officer of Strategico Inc., a consulting firm offering strategic advice on public policies to leading private corporations, industry associations and governments.

Mr. Ritchie served in the Government of Canada for over two decades, as a deputy secretary, deputy minister and ambassador. He was one of the principal architects of the Canada-U.S. free trade agreement.

Mr. Ritchie is a director of Télémédia Inc., Laidlaw Inc. and Cambior Inc. He chairs the board of the Ottawa Heart Institute Foundation, and is also a member of the North American Committee and the C.D. Howe Institute.

Mr. Ritchie was trained in economics, administration and business at Carleton University, l'Ecole nationale d'administration publique, and the Harvard Business School.

Robert Rabinovitch

Robert Rabinovitch is Executive Vice President and Chief Operating Officer of Claridge Inc. He is also Treasurer of the CRB Foundation and the Samuel and Saidye Bronfman Family Foundation.

Mr. Rabinovitch previously was Deputy Minister of Communications and Under-Secretary of State. Prior to that, Mr. Rabinovitch held several positions within the Government of Canada, including Deputy Secretary to the Cabinet for Planning and Assistant Secretary to the Cabinet for Priorities and Planning.

Mr. Rabinovitch has served on several cultural boards, and is currently a director of the KPMG Centre for Government Foundation. He is also a member of the Nunavut Trust financial advisory committee and an officer of the Canadian Jewish Congress (Quebec). Mr. Rabinovitch is a member of several corporate boards, including Cineplex Odeon Corporation.

Mr. Rabinovitch is a graduate of McGill University and the University of Pennsylvania, where he earned an MA and a Ph.D in Economics and Finance.

Roger Tassé, O.C., Q.C.

Roger Tassé practices law in Ottawa as Counsel with the firm Fraser & Beatty. He was Deputy Minister of Justice and Deputy Attorney General of Canada from 1977 to 1985.

As Deputy Minister of Justice, Mr. Tassé was closely involved in all the federal-provincial discussions that led to the patriation of the Canadian Constitution. Previously, Mr. Tassé was Assistant Deputy Minister of Consumer and Corporate Affairs and Deputy Solicitor General.

Mr. Tassé retired from the public service in 1985 to practice law with the firm, Lang Michener Lash Johnston in Toronto and Ottawa, and with Noël Décary Aubry & Associés in Hull, Quebec. From 1988 to 1991, Mr. Tassé was Executive Vice-President (Legal and Environmental Affairs) of Bell Canada.

Mr. Tassé is a graduate of the Collège Ste-Marie in Montreal, the Université de Montréal, (LL.L.), and the University of Ottawa (D.E.S.D.). He is a member of the Quebec Bar, the Ontario Bar, and the Canadian Bar Association. He chairs the Foundation of the Université du Québec à Hull (UQAH).