15 July 2015

Mr. John Traversy
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Traversy:

Re: 2015-0336-8 Application to amend the conditions of licence of Corus Entertainment Inc.'s television programming undertaking Oprah Winfrey Network (OWN) pursuant to policy changes announced in *Broadcasting Regulatory Policy CRTC 2015-86* (BRP 2015-86) *"Let's Talk TV"*
Further Comments

"*We were pleased with the CRTC's decision to basically dispense with the Terms of Trade*."
Doug Murphy, CEO, Corus Entertainment Inc.[1]

1. In a letter dated 3 July 2015, the Commission announced that all parties that submitted comments in response to the above-noted application by Corus Entertainment Inc. (Corus) would have until 15 July 2015 to submit further comments limited to matters related to Terms of Trade in the originally-filed application.

2. Corus seeks to be relieved of the condition of licence (COL) which currently requires OWN to adhere to the Terms of Trade Agreement (the Agreement) entered into between the CMPA and Corus (the Terms of Trade COL)[2] effective as of 29 April 2016.

3. The Canadian Media Production Association (CMPA)[3] submitted comments in response to this part of the Corus application on 25 May 2015.

[1] Quoted in *CTAM Canada: "It's a complicated world we live in," says Corus CEO Murphy*, Greg O'Brien, cartt.ca, 23 June 2015, https://cartt.ca/article/ctam-canada-%E2%80%9Cit%E2%80%99s-complicated-world-we-live-in%E2%80%9D-says-corus-ceo-murphy.

[2] For the purposes of this submission, "Agreement(s)" refers to the Terms of Trade Agreement between the CMPA and Corus as, as well as the identical agreement between the CMPA and the other broadcasters (Bell Media Inc., Rogers Media Inc. and Shaw Media Inc.) Similarly, the Terms of Trade COL refers to the COL imposed on all broadcasters to abide by their Agreements.

4. In these further permitted comments we submit that, should the Commission approve this part of Corus's application, it should amend the effective date such that the Terms of Trade COL will expire at the same time as the Agreement itself, namely 31 August 2017.[4]

EXECUTIVE SUMMARY

ES1 The Commission's stated rationale for concluding that it could relieve broadcasters of their Terms of Trade COL was that it "considers that broadcasters and producers now have the clarity and experience they need to negotiate any future agreement among themselves."

ES2 The Commission has thus set out a clear expectation that the broadcasters will not only continue to abide by their current Agreements in good faith, but will also employ the clarity and experience they have gained from working with their current Agreements to negotiate a new agreement notwithstanding the absence of a COL requiring them to do so.

ES3 In the CMPA's view, before the Terms of Trade COL should be removed, Corus and the other vertically integrated broadcasters must demonstrate that they will not engage in anti-competitive behaviour through, for example, the imposition of unreasonable program licensing terms. Such behaviour would jeopardize the Commission's goal of a partnership-based, robust Canadian production sector.

ES4 In this regard, we note that Corus has provided no assurance in its current application that, absent the Terms of Trade COL, it will negotiate fair and commercially reasonable program licensing terms. In addition, Corus's conduct and recent public statements by its CEO would suggest that, without some form of regulatory safeguards governing the producer-broadcaster relationship, the Canadian production industry will end up as mere service providers to the vertically integrated broadcasters, contrary to the Commission's policy objectives as set out in BRP 2015-86.

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[3] The CMPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA's member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing, producing and distributing original content for Canadian and international audiences.

[4] *Terms of Trade Agreement*, http://www.cmpa.ca/sites/default/files/documents/terms-of-trade/2011-04-26-Terms-of-Trade-Agreement-Astral-Bell-Rogers-Shaw.pdf. Article 13 a) provides that "This Agreement…shall remain in force with respect to each Broadcaster until the expiry of the longest of the next issued licence terms of the Broadcasters". Note that while Corus signed a separate Terms of Trade agreement, it contains no substantive differences from the agreement signed with the other broadcasters. At paragraph 7 of BRP 2015-86, the Commission announced that "For the private television sector, licence renewals will take place by 31 August 2017 for the large ownership groups".

ES7 It is therefore clear that absent some form of safeguard(s) requiring the broadcasters to negotiate program licensing terms in good faith, they will inevitably use their greater bargaining power to impose their own self-serving terms in their program licensing deals.

ES8 Accordingly, it may be worthwhile for the industry, outside of this proceeding, to explore the creation of a hybrid of Terms of Trade and an Independent Production Code, modelled after the Commission's Wholesale Code between BDUs and independent broadcasters, but which would be tailored to the producer-broadcaster relationship, or to explore yet other alternative safeguards.

ES9 The CMPA is fully prepared to work with the broadcasters respecting the method and scope of such safeguards and the means to resolve disputes in an effective and timely manner. The CMPA will report back to the Commission regarding the results of these discussions.

ES5 In the meantime, the CMPA submits that, should the Commission approve this application, it should amend the effective date such that the Terms of Trade COL will expire at the same time as the Agreement itself, namely 31 August 2017, rather than the 29 April 2016 date proposed in BRP 2015-86, as that date has no relationship to any of the terms in the actual Agreement. In this way, the Commission will avoid giving Corus an excuse to unilaterally walk away from its current contractual obligations before those obligations were intended to expire.

ES6 In the alternative, should the Commission approve Corus's application as filed, the CMPA requests that the Commission state its expectation that Corus must honour the Agreement for the full term during which it remains in effect and that, to do otherwise would constitute bad faith on Corus's part and the conferring on itself of an undue preference contrary to the applicable regulations.

A. Overview of Applicable Commission Decisions

5. In its policy decisions released in March 2015 arising out of its *Let's Talk TV* proceeding, the Commission announced a number of material changes to its regulatory approach to broadcasting regulation. For example:

- In BRP 2015-86, the Commission announced changes to the funding models for Canadian programming so as to support "[a] robust Canadian production sector better able to offer compelling high-quality content to Canadians and to global markets."[5]

- Also in BRP 2015-86, the Commission pointed out that "opportunities to create virtuous cycles of Canadian programming are diminished" when, for example, independent producers "are incented to operate as a service industry".[6]

- In Broadcasting Regulatory Policy CRTC 2015-96 (BRP 2015-96)[7], the Commission announced that it would strengthen its Wholesale Code, which was originally established "to deal more effectively with vertical integration issues and to prevent anti-competitive behaviour, which can ultimately have a negative impact on the ability of Canadians to receive diverse high-quality programming."[8]

6. In order to achieve a "robust Canadian production sector", the Commission stated that the independent production industry must "move towards building sustainable, better capitalized production companies capable of monetizing the exploitation of their content over a longer period, in partnership with broadcasting services that have incentives to invest in content promotion."[9]

7. In Broadcasting Decision CRTC 2013-465, the Commission stated that "a key purpose of Terms of Trade agreements is to level the playing field between independent producers

[5] Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV - The way forward - Creating compelling and diverse Canadian programming*, http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm. See immediately preceding par. 107.
[6] *Ibid*., at par. 117.
[7] Broadcasting Regulatory Policy CRTC 2015-96, *Let's Talk TV - A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, http://www.crtc.gc.ca/eng/archive/2015/2015-96.htm.
[8] *Ibid*., at par. 65.
[9] *Ibid*., above note 5, at par. 120.

and large broadcasting ownership groups, the latter of which frequently have greater bargaining power."[10]

8. Subsequently, in BRP 2015-86, the Commission observed that after nearly four years of working with the existing Agreements, the parties "have had the opportunity to evaluate the ways in which the current agreements have both succeeded and failed."[11] It then concluded that, in its view, it was no longer necessary for it to intervene in the producer-broadcaster relationship by requiring adherence to the Agreements, and invited broadcasters to apply to remove their Terms of Trade COL effective 29 April 2016.[12]

9. The Commission's stated rationale for concluding that it would consider relieving broadcasters of their Terms of Trade COL was that "broadcasters and producers now have the clarity and experience they need to negotiate any future agreement among themselves."[13]

10. Before arriving at this conclusion, however, the Commission made clear reference to the value and importance of Terms of Trade:

- It recognized that Terms of Trade in the U.K. "set a transparent basis for commissioning deals to mitigate the exercise of broadcasters' negotiating power" and "helped to stabilize and capitalize the independent production sector, facilitating its ability to compete globally, and to clarify digital rights."[14]

- It referenced its determination in 2007 that Terms of Trade agreements "would provide stability and clarity to all concerned" and that, at that time, it thus "encouraged the development of such agreements between broadcasters and independent producers" and announced that "[i]t expected licensees to provide draft or signed Terms of Trade agreements with independent producers as part of their licence renewal applications."[15]

- With respect to the Terms of Trade Agreements currently in place, the Commission noted that they "provide broadcasters and producers with the baseline obligations they require to ensure that the [*sic*] content is widely available and properly monetized."[16]

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[10] Broadcasting Decision CRTC 2013-465, *Various specialty Category A and B services – Licence renewals and modified group-based licensing approach* (Blue Ant), http://www.crtc.gc.ca/eng/archive/2013/2013-465.htm, at par. 29.
[11] *Ibid.*, above note 5, at par. 140.
[12] *Ibid.*, at par. 141.
[13] *Ibid*.
[14] *Ibid.*, at par. 133.
[15] *Ibid.*, at par. 134.
[16] *Ibid.*, at par. 140.

Appendix "A" attached summarizes the most important aspects of the Terms of Trade Agreement.

B. Expectations of the Commission

11. Based on the above, it is clear that the Commission did not invite the broadcasters to apply for the removal of their Terms of Trade COL because it no longer appreciated the value or importance of Terms of Trade. Rather, the CMPA submits that the Commission made its decision because the parties now have the clarity and experience they need to negotiate fair and commercially reasonable terms among themselves.

12. In the CMPA's view, the Commission further confirmed in BRP 2015-86 that, in the absence of fair and commercially reasonable terms, "opportunities to create virtuous cycles of Canadian programming are diminished" when, for example, independent producers "are incented to operate as a services industry."[17] Accordingly, in order to achieve a "robust Canadian production sector", the independent production industry must instead "move toward building sustainable, better capitalized production companies capable of monetizing the exploitation of their content over a longer period of time, in partnership with broadcasting services that have incentives to invest in content promotion." [18]

13. In order to become "sustainable and better capitalized", independent producers must be able to secure fair and commercially reasonable commercial licensing terms which provide them with the ability to exploit the rights to the very content they produce. As further described in a recent report which the CMPA commissioned from industry strategist Jonathan Olsberg[19], the ability of U.K. producers to exploit such rights was instrumental in helping foster a "golden age" of television in the U.K. and helped support the expansion of U.K. programs into international markets.

14. The Commission has thus set out a clear expectation that the broadcasters will not only continue to abide by their current Agreements in good faith, but will also employ the clarity and experience they have gained from working with their current Agreements to negotiate any future agreement notwithstanding the absence of a COL requiring them to do so.

[17] *Ibid.,* at par. 117.
[18] *Ibid*., above note 9.
[19] Oslberg SPI, *Impact of the 2003 Communication Act on U.K. Indie Producers*, 4 June 2015, http://cmpa.ca/sites/default/files/documents/terms-of-trade/CMPA%20Terms%20of%20Trade%20Report%20by%20Olsberg%20SPI%2004-06-2015.pdf.

C. The Corus Application

i) Corus Has Failed to Demonstrate that it will Meet the Commission's Expectations

15. Corus's sole stated rationale for this application is that it is consistent with paragraph 141 of BRP 2015-86.

16. In the CMPA's view, before the Terms of Trade COL should be removed, Corus and the other vertically integrated broadcasters must demonstrate that they will not engage in anti-competitive behaviour through, for example, the imposition of unreasonable program licensing terms. Such behaviour would jeopardize the Commission's goal of a partnership-based, robust Canadian production sector.

17. In this regard, Corus has provided no such assurance in its current application that, absent the Terms of Trade COL, it will negotiate fair and commercially reasonable program licensing terms that will allow for the mutual exploitation or sharing of rights according to the producer-broadcaster partnership model the Commission envisages for the future.

18. It is quite clear that Corus has no desire to be subject to any agreement that would "provide broadcasters and producers with the baseline obligations they require to ensure that…content is widely available and properly monetized."[20] Instead, Corus wants to exploit its greater bargaining power (which has only increased in recent years[21]) to tilt the playing field even more in its favour by dictating its own program licensing terms. This is demonstrated by Corus's conduct and recent public statements by its CEO.

a. Corus's Conduct

19. Over the course of the past four years, the CMPA has respected the clear direction the Commission gave to the parties when it first imposed the Terms of Trade COLs: that we were to first resolve any disputes through the dispute resolution procedure provided in the Agreements (Dispute Resolution Procedure) and/or through the courts, before seeking any Commission assistance on matters within the Commission's jurisdiction.[22]

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[20] *Ibid*., above note 16.

[21] See Corus's purchase of TELETOON, TELETOON Retro and Cartoon Network, Broadcasting Decision CRTC 2013-737, http://www.crtc.gc.ca/eng/archive/2013/2013-737.htm.

[22] Broadcasting Decision CRTC 2011-411, *Group-based licence renewals for English-language television groups – Introductory decision,* http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm, at par. 119.

20. As a result, notwithstanding the multiple interpretational disputes that have arisen with the broadcasters, the CMPA has not once sought the Commission's intervention, but has instead relied on the Dispute Resolution Procedure to achieve commercially reasonable compromises. Perhaps just as importantly, the CMPA has also not used various Commission proceedings to publicly fight its interpretational battles with the broadcasters.

21. This is in notable contrast to Corus, for example, which made the following unsolicited observations in its submission for the Rogers licence renewal proceeding:

> *The interpretations sought by the CMPA have raised significant issues, and since the original signing of the document, the CMPA has engaged in ongoing efforts to change the terms of the deal. The industry is now gripped by incessant negotiations and is presently involved in an arbitration procedure all of which occurs outside of the actual programming process. It has become an expensive distraction for all concerned at a time when we should be focusing on providing consumers with the best and most appealing Canadian Content.*
>
> *Corus raised this matter in its reply comments for the Tangible Benefits policy review (Broadcasting Notice of Consultation CRTC 2013-558). We agreed with Rogers that the CMPA – through aggressive interpretations of the TofT agreement – are attempting, among other things, to limit and frustrate broadcasters' use of CMF* [Canada Media Fund] *funds in the commissioning of new programming and to effectively include additional terms into the agreement. We also agree that if such interpretations are upheld, the CMF will, among other concerns, be a less cost effective means of producing high quality Canadian Content.*[23]

22. Because the CMPA has not attempted to drag the Commission into the parties' interpretational disputes, but has instead abided by the Dispute Resolution Procedure, we may have done ourselves, and the Commission, a disservice. In declining to respond to Corus's misleading and one-sided characterization of various issues that have been in dispute, it has allowed Corus to paint a portrait of the CMPA as a serial aggressor who adopts unreasonable interpretations of key provisions of the Agreements, or even, as Corus alleges above, invents new ones – seemingly out of thin air.

[23] See Corus's intervention in response to Broadcasting Notice of Consultation CRTC 2014-26.

23. The CMPA does not intend in this submission to summarize the various interpretational disputes that have arisen over the four year lifespan of the Agreements. In fact, what is notable is that with one exception, all disputes with the broadcasters have so far been resolved without recourse to either the mediation or arbitration provisions provided under the Dispute Resolution Procedure of the Agreements. Rather, reasonable compromises were amicably achieved through a Working Committee that was established for the purposes of resolving interpretational differences.

24. Given that these Agreements represent the first incarnation of Terms of Trade, which contains several innovative provisions that had never been applied before, interpretational disputes were inevitable. It is therefore a testament to the Working Committee, which included Corus representatives, that pragmatic solutions were found on virtually every issue in dispute.

25. The one and only matter that could not be resolved by the Working Committee related to the interpretation and application of the so-called "Super Licence Fee" provision of the Agreements. It is this dispute that Corus, in its above-noted submission for the Rogers licence renewal proceeding, felt compelled to opine on, stating that the CMPA was attempting "to limit and frustrate broadcasters' use of CMF funds in the commissioning of new programming and to effectively include additional terms into the agreement."[24]

26. For the record, the two Super Licence Fee issues in dispute were:

    (a) Whether or not the broadcasters could use their CMF production envelope money towards the calculation of the Super Licence Fee threshold (the CMF Issue); and,

    (b) The treatment/recoupment of the independent producers' provincial and federal tax credits (the Tax Credit Issue).

27. The CMPA is not proposing to re-litigate the above two issues in this submission since, in any event, the parties ultimately settled both of them. Rather, the CMPA would only note the following.

28. First, Corus's claim that the CMPA was attempting to "effectively include additional terms in the agreement" relates to the Tax Credit Issue. Far from constituting a CMPA-imposed "additional term", the Tax Credit Issue actually formed a key part of the ultimate settlement of the Super Licence Fee dispute: the broadcasters agreed, on a without prejudice basis, not to impose their interpretation of the Tax Credit Issue on producers in future licence agreements. In fact, Corus went yet further, agreeing to effectively "read out", on a go-forward basis, any provision in existing licence agreements that had previously included Corus's unfavourable tax credit language. This

[24] *Ibid.*

is because, to the CMPA's knowledge, Corus was the only broadcaster to have imposed this language on producers. Indeed, it was Corus's behaviour that led the CMPA to trigger the Dispute Resolution Procedure in the first place.

29. Second, the CMPA was not alone in objecting to Corus's position on the Tax Credit Issue. Attached at Appendix "B" are letters from virtually every major funder across the country expressing the same view. These letters were provided to the CMPA and shared with the broadcasters when the Super Licence Fee dispute first arose. They were also included as part of the CMPA's submission for the purposes of the arbitration.[25]

30. The CMPA's intention in pointing out the above is not to argue who was 'right' or 'wrong' with respect to the issues in dispute. In fact, the settlement that was reached was a classic saw-off: the CMPA effectively conceded on the CMF Issue and the broadcasters did the same regarding the Tax Credit Issue. The point, rather, is that it is simply inappropriate and inaccurate for Corus to suggest that somehow the CMPA has been behaving unreasonably in its interpretation of the Agreements. The views of the wider industry, and the terms of the ultimate settlement, suggest a very different picture.

31. What the above also demonstrates is that the Dispute Resolution Procedure of the Agreements works, and thus the Commission's involvement in interpretational disputes arising under the Agreements has never been necessary. The importance of the Terms of Trade COL has been, rather, to ensure that the Broadcasters are sufficiently incentivized to comply with the Dispute Resolution Procedure, and are prevented from walking away from the Agreements that they, presumably in good faith and in their capacity as sophisticated commercial actors, signed.

32. Most disturbingly, despite the fact that both the Agreement and the Terms of Trade COL remain firmly in place, Corus has already begun in some instances to remove language from its standard licence agreements that acknowledges such agreements with producers are subject to Terms of Trade.

b. Recent Statements by Corus's CEO

33. The CMPA submits that, in the absence of enforceable Terms of Trade, Corus would have been able, in virtually every case, to impose its interpretation of how to apply the Super Licence Fee on producers. Individual producers simply lack the negotiating power to reach the commercially fair terms that the CMPA was able to achieve through the settlement negotiations. This is particularly the case for more junior producers,

[25] It should be noted that in attaching these letters, the CMPA is not implying or suggesting that the funders concerned oppose Corus's application to have the Terms of Trade COL for OWN be deleted. We further note that the Canada Media Fund declined to take a position on the Super Licence Fee dispute.

who frequently come to broadcasters with great projects, but who lack the experience or capacity to negotiate fair terms.

34. It is therefore hardly surprising that, after Corus filed its application, its CEO publicly stated his preference for working with "young producers", as they are the most vulnerable to broadcaster pressure and most likely to agree to a deal that is great for Corus, but leaves them with no rights and reduces them to the level of service producers.

35. Finally, since Corus filed its application, its CEO has publicly expressed his delight "with the CRTC's decision to basically dispense with the Terms of Trade".[26] This statement makes it clear that contrary, to the Commission's expectations, Corus intends to unilaterally do away with Terms of Trade altogether.

D. <u>The Continued Need for Safeguards to Address Imbalances in Bargaining Power</u>

36. It is clear that absent some form of safeguard(s) requiring the broadcasters to negotiate program licensing terms in good faith, they will inevitably use their greater bargaining power to impose their own self-serving terms in their program licensing deals. This will undermine any opportunities for independent producers to build sustainable and well-capitalized companies that can truly partner with broadcasters to make and distribute diverse, high-quality and globally-attractive programming.

37. Given their limited number and gatekeeper role, the large broadcasters will always have and exploit their substantial market power if given free rein to do so. And whether large or small, independent producers will always be beholden to the large broadcasters as long as those broadcasters remain the primary buyers of Canadian programming and the primary triggers to access important funding sources.

38. For these reasons, we submit that safeguards are still needed in order to continue to promote a level playing field between independent producers and the large broadcaster ownership groups.

39. In this respect, we note that, in BRP 2015-96, the Commission announced new proposed measures to promote fairness in the relationships between the large vertically-integrated broadcasting distribution undertakings (BDUs) and independent broadcasters – namely a strengthened Wholesale Code. In doing so it stated:

> *In a world of greater subscriber choice, programming services have much more incentive to create high-quality, original content that is compelling and attractive to audiences. Moreover, in this competitive environment, it becomes even*

[26] *Ibid*., above note 1.

> *more important to ensure a fair playing field in order to foster continued diversity and innovation within the system.*
>
> *The fair conduct of negotiations is key to achieving this intended outcome. Specifically, the negotiation of fair and reasonable terms allows BDUs to compete more equitably in the retail market with other BDUs and online content providers. Programmers must also be able to negotiate fair and reasonable terms for their services in order for them to continue to create and show programming of high quality and value to Canadians.*[27]

40. The parallels between the Commission's rationale for the Wholesale Code and an argument for safeguards to govern the vertically integrated broadcaster-independent producer relationship are obvious and numerous.

41. Accordingly, it may be worthwhile for the industry, outside of this proceeding, to explore the creation of a hybrid of Terms of Trade and an Independent Production Code, modelled after the Commission's Wholesale Code between BDUs and independent broadcasters, but which would be tailored to the producer-broadcaster relationship, or to explore yet other alternative safeguards.

42. The CMPA is fully prepared to work with the broadcasters respecting the method and scope of such safeguards and the means to resolve disputes in an effective and timely manner. The CMPA will report back to the Commission regarding the results of these discussions.

E. Conclusion

43. In light of all of the above, the fears expressed by the CMPA in 2011, when we first requested the Terms of Trade COL, remain the same.[28] Absent a regulatory safeguard preventing it from doing so, Corus will unilaterally impose commercially unreasonable terms onto producers who will have little or no recourse but to accept them, creating "an environment [that] incents independent producers to behave like production contractors operating in a service industry".[29] Over time, "this project-by-project system hinders growth and does not support the long-term health of the industry as a whole".[30]

44. **The CMPA accordingly submits that, should the Commission approve this application, it should amend the effective date such that the Terms of Trade COL will expire at the**

[27] *Ibid*., above note 7, at pars 63 and 64.
[28] CMPA Letter to the CRTC dated 3 April 2011.
[29] *Ibid*., above note 5 , at par 119.
[30] *Ibid*.

same time as the Agreement itself, namely 31 August 2017, rather than the 29 April 2016 date proposed in BRP 2015-86, as that date has no relationship to any of the terms in the actual Agreement. In this way, the Commission will avoid giving Corus an excuse to unilaterally walk away from its current contractual obligations before those obligations were intended to expire.

45. Presuming that Corus indeed intends to honour its Agreement in good faith, amending the effective date in this way will not prejudice Corus in any way. In fact, any opposition by Corus to this reasonable request would only confirm its intent to abandon the Agreement altogether.

46. **In the alternative, should the Commission approve the Corus application as filed, the CMPA asks the Commission to state its clear expectation that Corus will honour its Agreement for the full period during which that Agreement remains in effect, and that to do otherwise would constitute bad faith on Corus's part and the conferring on itself of an undue preference contrary to the applicable regulations**.

Sincerely,

original signed by

Jay Thomson, LL.B, LL.M
Vice President, Broadcasting Policy & Regulatory Affairs

Attach.

cc. Sylvie Courtemanche, Corus Entertainment Inc., sylvie.courtemanche@corusent.com

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