



Broadcasting Decision CRTC 2015-474

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Reference: 2015-152

Ottawa, 22 October 2015

NMTV Inc.
Across Canada

Application 2014-0751-0, received 1 August 2014

NMTV Inc. – Change in ownership and effective control

*The Commission **denies** an application by NMTV Inc. to change its ownership and effective control.*

The transaction as proposed would have allowed a non-Canadian as defined in Direction to the CRTC (Ineligibility of Non-Canadians) to control the licensee.

Introduction

1. The Commission received an application by NMTV Inc. (NMTV) for authority to change its ownership and effective control pursuant to section 10(4) of the *Specialty Services Regulations, 1990* (the Regulations). The Commission did not receive any interventions in connection with this application.
2. NMTV is the licensee of Nuevo Mundo Televisión, a national, third-language general interest ethnic specialty Category B service. Nuevo Mundo Televisión has been on the air since 2008.
3. In Broadcasting Decision 2014-397, the Commission renewed the licence granted to NMTV for Nuevo Mundo Televisión for a one-year term, until 31 August 2015, because of numerous instances of non-compliance. In Broadcasting Decision 2015-285, the Commission administratively renewed the service's licence for a six-month term, until 29 February 2016.

Proposed transaction

4. On 1 August 2014, NMTV filed an application requesting that the Commission approve a transaction that took place on 15 May 2014. The transaction, which was carried out without the Commission's prior approval, consisted of transferring 82% of the issued and outstanding shares of NMTV as follows:
 - 6% of the voting shares were acquired by Ms. Nimar Cedeño, a non-Canadian;

- 76% of the voting shares were acquired by Nuevo Mundo TV Holdings Inc. (Holdco), a company incorporated under the federal laws of Canada and whose voting interests are held in equal parts by Ms. Cedeño and two Canadians, Mr. Marc Côté and Mr. Peter Jaimes. Ms. Cedeño holds all Holdco participating shares.

The remaining shares of NMTV continue to be held by Cedel Entertainment Productions LLC (Cedel) (14%), a foreign corporation, and Ms. Ada Belfort (4%). Ms. Cedeño is the daughter of the Chief Executive Officer of Cedel, Mr. Eligio Cedeño.

5. Pending the Commission's decision and without the Commission's prior approval, Holdco's voting shares were temporarily entrusted to a trust. Mr. Jaimes is acting as trustee.
6. The Commission's analysis shows that the acquisition of the voting shares of NMTV by Holdco and Ms. Cedeño is part of a series of transactions that began in May 2012. The steps in the series are set out below.

Step 1: Purchase of shares by Cedel Entertainment Productions LLC and share purchase option agreement with Ms. Cedeño

7. On 7 May 2012, Cedel acquired 14% of NMTV's shares. On the same day, several NMTV shareholders concluded a share purchase option agreement with Ms. Cedeño, ending in May 2014, to enable her to acquire 82% of NMTV's shares.
8. On 5 October 2012, NMTV notified the Commission of its transaction with Cedel, but did not mention the purchase option agreement with Ms. Cedeño. The Commission approved the transaction with Cedel on 7 February 2014 by letter decision. In that decision, the Commission drew attention to five instances of non-compliance due to changes in effective control without prior approval between 2005 and 2012, and reminded NMTV to comply with Commission regulations at all times.

Step 2: Purchase of shares by Ms. Cedeño and Holdco

9. On 23 April 2014, Holdco was incorporated and its voting shares were divided into three equal parts between Ms. Cedeño, Mr. Côté and Mr. Jaimes. Participating shares were held exclusively by Ms. Cedeño. On 24 April 2014, Ms. Cedeño exercised her purchase option without the Commission's prior approval. On 15 May 2014, Holdco and Ms. Cedeño acquired respectively, 76% and 6% of NMTV's shares.
10. According to NMTV, this transaction allowed Holdco's board of directors to exercise effective control of NMTV.

Step 3: Transfer of voting shares from Holdco to a trust

11. Pending the Commission's decision, the voting shares of Holdco were temporarily entrusted to a trust under a voting trust agreement signed on 15 May 2014. Mr. Jaimes acted as trustee.
12. According to NMTV, the trust was created because NMTV was unable to obtain the Commission's prior approval for the transfer of 82% of NMTV's shares to Holdco and Ms. Cedeño.

Regulatory framework

13. Section 5(1) of the *Broadcasting Act* (the Act) confers upon the Commission the mandate to regulate and supervise all aspects of the Canadian broadcasting system in accordance with the public interest.
14. Reviewing ownership transactions in accordance with the public interest is an integral part of the Commission's regulatory and supervisory mandate under the Act. To that end, section 10(4) of the Regulations requires a licensee to obtain the Commission's prior approval for all actions, agreements or transactions that would directly or indirectly cause a change in effective control.
15. When reviewing an ownership transaction, the Commission must first ensure that the proposed licensee is owned and controlled by Canadians. The *Direction to the CRTC (Ineligibility of Non-Canadians)* (the Direction) sets out the criteria for determining whether effective control is exercised by Canadians and, in regard to non-Canadians, orders the Commission not to issue, amend or renew broadcasting licences.¹ To determine effective control, the Commission looks at legal control and control in fact:
 - Legal control concerns conformance with one of the various ownership structures described in the Direction. The Direction sets out the criteria for determining whether a company can be designated a qualified corporation, for example, by virtue of a minimum percentage of voting shares of a licensee and of its parent corporation that are owned by Canadians.
 - Control in fact is based on "the ongoing power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of an enterprise."² To determine whether control in fact is exercised by Canadians, the Commission can review personal, financial, contractual or business relations or any other considerations relevant to determining control.³ It could therefore determine that a company is non-Canadian, even if it complies with one of the ownership structures described in the Direction.

¹ Section 2 of the Direction.

² National Transportation Agency Decision No. 297-A-1993, 27 May 1993. This definition has been used by the Commission on numerous occasions, including in Broadcasting Decision 2008-69.

³ Section 3 of the Direction.

16. Since the Commission does not solicit competitive applications for changes in effective control of broadcasting undertakings, the onus is also on the applicant to demonstrate that the tangible and intangible benefits stemming from the proposed transaction are commensurate with the size and nature of the transaction.

Commission's analysis and decisions

17. After examining the public record for this application in light of applicable regulations and policies, the Commission considers that the issue it must address relates to the ownership and effective control of NMTV.

Legal Control

18. According to the application as initially filed, the ownership structure proposed by NMTV was intended to satisfy the requirements of the Direction. Specifically, the licensee aimed to comply with the definition of a "qualified corporation" in order to be considered Canadian. The definition, as set out in the Direction, reads as follows:

A "qualified corporation" means a corporation incorporated or continued under the laws of Canada or a province, where

(a) the chief executive officer or, where the corporation has no chief executive officer, the person performing functions that are similar to the functions performed by a chief executive officer, and not less than 80 per cent of the directors are Canadians;

(b) in the case of a corporation having share capital, Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80 per cent of all the issued and outstanding voting shares of the corporation and not less than 80 per cent of the votes; and

(c) In the case of a corporation that is a subsidiary corporation,

(i) the parent corporation is incorporated or continued under the laws of Canada or a province,

(ii) Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than $66 \frac{2}{3}$ per cent of all of the issued and outstanding voting shares of the parent corporation and not less than $66 \frac{2}{3}$ per cent of the votes, and

(iii) the parent corporation or its directors do not exercise control or influence over any programming decisions of the subsidiary corporation where

(A) Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, less than 80 per cent of the issued and

outstanding voting shares of the parent corporation and less than 80 per cent of the votes,

- (B) the chief executive officer of the parent corporation or, where the parent corporation has no chief executive officer, the person performing functions that are similar to the functions performed by a chief executive officer is a non-Canadian, or
- (C) less than 80 per cent of the directors of the parent corporation are Canadian.

19. According to NMTV, 80% of its voting shares are held by Canadians and 80% of the members on its board of directors, as well as its chief executive officer, are Canadian. NMTV added that 66.6% of the voting shares of Holdco, NMTV's parent corporation, are held by Canadians.

20. However, in accordance with this ownership structure, NMTV must also establish an independent programming committee in order to fully satisfy the definition of a qualified corporation since more than 20% of Holdco's voting shares are held by non-Canadians. The creation of such a committee was not included in the initial application.

Control in fact

21. According to the application as initially filed, several methods of control allow non-Canadians to exercise a determining influence on NMTV.

22. First, Holdco's and NMTV's shareholder agreements give Ms. Cedeño several methods for controlling the business operations of these corporations:

- Ms. Cedeño appoints most members of the NMTV's and Holdco's boards of directors;
- Ms. Cedeño has veto power over most of Holdco's financial decisions;
- Ms. Cedeño can force the other Holdco shareholders, Mr. Jaimes and Mr. Côté, to sell her their voting shares;
- quorum for meetings of Holdco's board of directors requires the presence of three directors, at least two of whom are appointed by Ms. Cedeño; and
- quorum for meetings of NMTV shareholders requires the presence of shareholders holding a total of 20% of issued and outstanding shares of NMTV: Ms. Cedeño (6%) and Cedel (14%) together hold a total of 20% of NMTV's shares.

23. In addition, Cedel, a foreign company, is NMTV's only source of funding. Under a promissory note signed by NMTV and Cedel, Cedel can require from NMTV full repayment of its debt upon demand.

24. Ms. Cedeño holds all participating shares of Holdco, which allows her to claim all profit made by Holdco, should NMTV show a positive return. Mr. Côté and Mr. Jaimes have a purchase option allowing them each to acquire, by 2016, a maximum of 16.6% of Holdco's participating shares and therefore, by combining those purchase options, to obtain up to a maximum of 33.3% of Holdco's potential profit. The Commission received no confirmation as to whether those purchase options have been exercised. According to the information provided by NMTV, 96% of NMTV's potential profit is currently owned by foreign interests, namely, Cedel (14%) and Ms. Cedeño (82%).
25. Finally, there appears to be a dependent relationship between the trust and Holdco. The trustee, Mr. Jaimes, is also president and shareholder of Holdco. Under the voting trust agreement, all potential profit is to be transferred to Holdco—that is, to Ms. Cedeño—as promptly as possible. Mr. Jaimes's independence is all the more questionable as the continuity of NMTV operations depends, in reality, on Cedel's funding.

NMTV's clarifications

26. As part of the clarification process, NMTV committed to:
- delete the formal mechanisms of control by Ms. Cedeño from Holdco's and NMTV's shareholder agreements;
 - amend the promissory note to ensure that NMTV is funded by Cedel until May 2019 and to give six months' notice for the reimbursement of NMTV's debt; and
 - create an independent programming committee.
27. However, arguing financial insecurity, NMTV chose not to file the documents necessary to support its commitments (copies of the amended promissory note and Holdco's and NMTV's shareholder agreements; by-laws and composition of the independent programming committee; etc.). NMTV agreed to file signed copies of these documents 30 days following a favourable decision by the Commission.

Commission's analysis

28. Determining the control of an undertaking goes beyond formal mechanisms (veto, quorum, process for appointing directors, etc.) and compliance of an ownership structure that satisfies the definition of a qualified corporation as set out in the Direction.
29. In regard to legal control, NMTV does not comply with the definition of qualified corporation at the present time. However, if NMTV is able to adhere to its commitment regarding the creation of an independent programming committee, it could then comply with the definition.

30. In regard to control in fact, several factors indicate that the licensee's effective control is exercised by non-Canadians. First, funding is a significant method of control. Although Cedel has agreed to provide funding for NMTV until 2019, the Commission is still concerned that NMTV's operations depend entirely on foreign investment.
31. Second, NMTV's debt to Cedel is substantial, even exceeding the total value of NMTV's shares. This situation makes it possible for Cedel to influence NMTV's management and operations. Given NMTV's difficulty in finding other sources of funding, the Commission is concerned over NMTV's capacity to continue operating its service if Cedel were to require the repayment of that debt, notwithstanding the six-month notice proposed by NMTV and Cedel.
32. Third, the vast majority (96%) of NMTV's potential profits are to be transferred to non-Canadians. Together with NMTV's dependence on Cedel for funding, this situation gives foreign interests (Ms. Cedeño and Cedel) control of all of the potential capital required for the recovery and growth of the undertaking.
33. The Broadcasting Policy for Canada states that the Canadian broadcasting system must effectively be owned and controlled by Canadians.⁴ Ensuring that broadcasting undertakings are under Canadian control is the purpose of the Direction. Although Holdco was specifically created for the purpose of satisfying the definition of a qualified corporation, the transaction proposed by NMTV, which occurred without the Commission's prior approval, would mean that control of the licensee would be exercised by a non-Canadian, as defined in the Direction.⁵
34. Given the personal, financial and contractual relationships revealed during its analysis of the transaction, the Commission is of the view that the proposed transaction would allow non-Canadians to exercise a determining influence on NMTV, despite the latter's commitments to delete certain formal control mechanisms and to create an independent programming committee.
35. Furthermore, because of the strong dependent relationship between the trust and Holdco, the Commission considers that the existence of a trust does not ensure NMTV's compliance with the Direction. Mr. Jaimes is still accountable to Ms. Cedeño (with respect to the distribution of potential profits) and Cedel (which funds NMTV's operations).
36. This transaction also provides few advantages for the Canadian broadcasting system. At least 96% of NMTV's potential profit currently belongs to foreign interests. In addition, NMTV has reiterated on several occasions in its application and during the clarification process that it refuses to pay tangible benefits, citing its negative

⁴ Section 3(1)(a) of the *Broadcasting Act*

⁵ In accordance with section 3 of the Direction, where the Commission determines that an applicant is controlled by a non-Canadian, the applicant is therefore deemed to be a non-Canadian.

financial situation. This refusal demonstrates a mitigated commitment to reinvesting in the Canadian broadcasting system in the short or medium term.

Conclusion

37. In light of all of the above, the Commission **denies** the application by NMTV Inc. to change its ownership and effective control.
38. In accordance with the Direction, a broadcasting licence cannot be issued, amended or renewed if the application is submitted by a non-Canadian. Consequently, NMTV has the option to transfer ownership and control of its service to an eligible person, subject to the Commission's prior approval by 29 February 2016 (expiry date for the current licence). Otherwise, NMTV's licence will expire with no possibility for renewal.

Reminder

39. Non-Canadians are not eligible for the exemptions from licensing requirements, such as those authorized pursuant to Broadcasting Order 2015-88, which will take effect shortly.

Secretary General

Related documents

- *Nuevo Mundo Television – Administrative renewal*, Broadcasting Decision CRTC 2015-285, 26 June 2015
- *Exemption order respecting discretionary television programming undertakings serving fewer than 200,000 subscribers*, Broadcasting Order CRTC 2015-88, 12 March 2015
- *Nuevo Mundo Television – Licence renewal and amendment*, Broadcasting Decision CRTC 2014-397, 30 July 2014
- *Transfer of effective control of BCE Inc. to a corporation to be incorporated and a consequential change in ownership of CTVglobemedia Inc.*, Broadcasting Decision CRTC 2008-69, 27 March 2008