



Broadcasting Decision CRTC 2010-782

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Canwest Global Communications Corp., on behalf of its licensed broadcasting subsidiaries

Across Canada

Application 2010-0550-5, received 31 March 2010

Public Hearing in Calgary, Alberta

21 September 2010

Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries

*The Commission **approves** an application by Shaw Communications Inc. (Shaw), on behalf of Canwest Global Communications Corp. (Canwest Global), for authority to change the effective control of Canwest Global's licensed broadcasting subsidiaries, which will henceforth be exercised by Shaw. This change will be effected through a wholly-owned subsidiary of Shaw known as 7316712 Canada Inc.*

Introduction

1. The Commission received an application by Shaw Communications Inc. (Shaw), on behalf of Canwest Global Communications Corp. (Canwest Global), for authority to change the effective control of Canwest Global's licensed broadcasting subsidiaries so that it will henceforth be exercised by Shaw. This change would be effected through a wholly-owned subsidiary of Shaw known as 7316712 Canada Inc. (7316712 Canada).
2. On 6 October 2009, Canwest Global, along with its operating subsidiary Canwest Media Inc. (CMI) and certain other subsidiaries, filed for creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (CCAA).
3. At the beginning of November 2009, Canwest Global, with the assistance of RBC Capital Markets, initiated an equity solicitation process to identify potential new Canadian investors.
4. On 19 February 2010, after arm's length negotiations between Shaw, Canwest Global and the Ad Hoc Committee (comprised of holders of over 70% of the 8% senior

subordinated notes issued by Canwest Investments Co. (CWI), due 2012), Canwest Global's board approved Shaw's offer.

5. On 31 March 2010, Shaw filed an application with the Commission for approval of its acquisition of effective control of the conventional and specialty television undertakings indirectly owned by Canwest Global. Under that original offer, Shaw was to subscribe for Class A Voting shares representing a 20% equity and 80% voting interest in Restructured Canwest (see paragraph 8 below) for a minimum \$95 million in the aggregate.
6. On 3 May 2010, Shaw acquired from Goldman Sachs & Co. affiliates (Goldman Sachs entities) 29.9% of the voting shares and 49.9% of the common non-voting shares in the capital of CWI. The Commission notes that this transaction was subject to the notification requirement pursuant to the *Specialty Services Regulations, 1990*.
7. On 4 May 2010, Shaw advised the Commission that, pursuant to an amendment to the 31 March 2010 application, Shaw's indirect equity interest would be 100% of Restructured Canwest. Shaw also advised that, in addition to acquiring the shares of CWI indirectly held by Canwest Global, it would acquire, by way of an option, the remaining shares in the capital of CWI, held by Goldman Sachs entities, immediately following Commission approval of the application.
8. On 18 May 2010, Canwest Global filed an application (2010-0854-0) for authority to effect a multi-step corporate reorganization for restructuring purposes, as contemplated in the document entitled "Plan of Compromise, Arrangement and Reorganization" (the Plan), of the Canwest Global licensed broadcasting subsidiaries pursuant to the CCAA, resulting in the issuance of new broadcasting licences. This application was also considered during the present proceeding. In Broadcasting Decision 2010-781, also issued today, the Commission approved the application by Canwest Global leading to Restructured Canwest (referred to as "Newco" in that decision).
9. Finally, on 28 July 2010, at the end of the CCAA Proceedings, the Ontario Superior Court of Justice rendered an Order approving the Plan.
10. Upon the closing of the proposed transaction, Shaw, through its wholly-owned subsidiary 7316712 Canada, will become the sole owner of Restructured Canwest and of CWI, and will acquire control of all broadcasting undertakings currently controlled by Canwest Global.
11. Shaw ascribed a total value of \$2.005 billion for the acquisition of all broadcasting assets controlled by Canwest Global and initially proposed a tangible benefits package in the amount of \$23 million.
12. The Commission received numerous interventions in support of this application, several interventions offering general comments, as well as an intervention in opposition from the Documentary Organization of Canada. The interventions and

Shaw's replies can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Commission's analysis and determinations

13. After examining the application in light of applicable regulations and policies, and taking into account the interventions received and Shaw's replies, the Commission considers that the issues to be determined relate to the following:

- the interpretation and application of the benefits policy;
- the value of the transaction;
- the proposed tangible benefits package;
- the diversity of voices;
- vertical integration; and
- programming exclusivity.

Interpretation and application of the benefits policy

14. In Public Notice 1989-109, the Commission established that the purpose of the benefits policy was to allow the market to govern the transfer of broadcasting licences as part of ownership transactions while recognizing that broadcasting licences allow licensees to benefit from the use of public property.

15. The purpose of the policy is to ensure that the applicant has filed the best overall proposal under the circumstances in order to compensate for the absence of a public call for applications. The Commission determined that the benefits to the broadcasting system should be commensurate with the size and nature of the transaction and set the value of the tangible benefits to be equal to 10% of the value of the transaction.

16. In its initial application filed on 31 March 2010, Shaw stated that the Commission's general policy with respect to requiring clear and unequivocal tangible benefits should not apply to this transaction, and advanced three arguments in this regard:

- Canwest Global is experiencing financial hardship and operates certain unprofitable undertakings;
- the intangible benefits proposed offset the need to impose tangible benefits; and
- the solicitation process that led to the transaction is equivalent to a public call for applications, and as such is sufficient to remove the need to impose tangible benefits.

17. Subsequently, in a letter dated 19 May 2010, Shaw restated its position that it was not requesting an exception to the application of the tangible benefits policy, but rather a flexible and reasonable application of the policy to this transaction.
18. Shaw further stated in a letter dated 28 May 2010 that the calculation of the tangible benefits should be based solely on the acquisition of the Canwest Global interests under the CCAA Proceedings and should not be applied to the acquisition of Goldman Sachs entities' interest in the CWI entities as this acquisition did not result in a change in effective control.
19. In Broadcasting Notice of Consultation 2010-498, the Commission stated that it may wish to discuss the value of the transaction applied to the assets and the allocation among the broadcasting undertakings.
20. The issue of corporations carrying out acquisitions through multiple steps (multi-step transactions), to effect changes in ownership and thereby avoid paying tangible benefits until the purchase of a percentage that would provide the corporation with effective control, was discussed by the Commission in Broadcasting Decision 2006-309. In that decision, the Commission acknowledged the concerns expressed by parties relating to multi-step transactions and reserved the right, in the case of such transactions, to review not just the final step, but the entire sequence of events, including all previous steps, in order to determine the appropriateness of any proposed benefits package.
21. This issue was also raised by many interveners in the context of the current proceeding, and an in-depth analysis was conducted by the Commission.
22. In its analysis, the Commission considered the extent of the connections between the transactions as a key to determining whether or not it was faced with a multi-step transaction. It considered, among other things, the lapse of time between the transactions, the parties involved, the purpose and objects of the transactions, and the degree of control of the acquiring company over the outcome of the transactions. The Commission also considered evidence on the record of the proceeding and information drawn from various public sources including representations made to the Courts, news releases, and meetings with shareholders.
23. Based on all of this information, the Commission determined that this acquisition was a multi-step transaction and that the calculation of benefits should be based not only on the Canwest Global interests under the CCAA but also the interests acquired in CWI from Goldman Sachs entities. During the public process, the Commission distributed a document entitled "Document for discussion on the value of the transaction" (evidence on the value of the transaction), which proposed how to address the value of the transaction and presented options in applying flexibility to the tangible benefits policy for the assets that were under the CCAA Proceedings.

Value of the transaction

24. Because the Commission does not solicit competing applications for authority to transfer the ownership or control of radio, television and other programming undertakings, the onus is on the applicants to demonstrate that the proposed value of the transactions is acceptable and reasonable.
25. Shaw ascribed a value of \$506 million to the transaction. This value represents what it identified as the payments relating to the agreement with Canwest Global, and includes the payments to bondholders and unsecured creditors in Canwest Television Limited Partnership. However, at the public hearing, the Commission provided Shaw with a document setting out the Commission's view of the value of the transaction. After reviewing the document, Shaw agreed to the value as proposed by the Commission.
26. The value set out in the document takes into consideration various payments involved in the transaction as well as the adjustments generally made by the Commission to any value of a transaction for the purpose of calculating the tangible benefits package. The value of the transaction includes payments to Goldman Sachs entities, payments to bondholders and other unsecured creditors, payments to Canwest Global shareholders, and adjustments for assumed net debt and leases, as shown in the following table:

Value of the transaction (\$millions)	
Purchase price	
Payments to Goldman Sachs	709
Payments to bondholders	442
Payments to other unsecured creditors	38
Payments to Canwest Global shareholders	12
Subtotal	1,201
Add to purchase price	
Assumed net debt	815
Assumed leases	31
Subtotal	846
Total	2,047

27. As a result, the value of the transaction as determined by the Commission is \$2.047 billion.

Proposed tangible benefits package

28. In Broadcasting Notice of Consultation 2010-498, the Commission further stated that it may also wish to discuss the proposed benefits package in terms of incrementality, acceptability, and proposals in respect of any benefits that may be found to be unacceptable to the Commission.

29. As set out in Public Notice 1999-97, the Commission generally expects applicants to make clear and unequivocal commitments to provide tangible benefits representing 10% of the value of a transaction, as accepted by the Commission. Such benefits should be directed to the communities served and to the broadcasting system as a whole. Further, in order to be accepted as a benefit, the proposed expenditure must be incremental to expenditures that would generally be considered ongoing normal responsibilities of the existing licensee.
30. The Commission, in applying its benefits test, has been consistent and rigorous in requiring that (1) expenditures proposed as tangible benefits be truly incremental; (2) such expenditures be directed to projects and initiatives that would not be undertaken or realized in the absence of the transaction; and (3), as generally required, applicants demonstrate that expenditures proposed as tangible benefits flow predominantly to third parties, such as independent producers.
31. The Commission has examined the particular circumstances of the proposed transactions and finds that the circumstances that have generally justified an exception to the policy in past decisions, such as the nominal or negative value of the transaction and the precarious financial situation of the broadcasting undertakings, are not applicable in this instance.
32. However, the Commission acknowledges the resulting uncertainties caused by operating under CCAA protection and the difficulty in maintaining operational performance for those assets. It also acknowledges the difficulty in maintaining employees' morale, generated by the potential loss of key personnel.
33. The Commission is therefore of the view that flexibility should be applied in this particular situation.
34. Consequently, the Commission has calculated the amount of the tangible benefits package using two calculations. The first relates to the payments to the bondholders, to other unsecured creditors and to Canwest Global shareholders, represents 5% of the value of the assets under CCAA protection, and equals \$24.6 million. The second relates to the amounts paid for the remaining elements of the transaction, represents 10% of the value of those assets, and equals \$155.5 million.
35. Accordingly, the Commission determines that the total value of the tangible benefits package is \$180.1 million. The Commission accepts Shaw's proposed tangible benefits package as presented below:
- Conversion of all 67 analog transmitters outside mandatory markets to digital
Amount allocated: \$23 million
 - Progress reports are to be submitted to the Commission on 30 September 2012, 30 September 2014, and 30 September 2016.
 - Provision of satellite-delivered local broadcasting services to former over-the-air (OTA) households in markets where local broadcasters have not

converted to digital transmission (the “local television satellite solution”)
Amount allocated: \$15 million

- This includes the provision of satellite receivers and antennas, including installation, and free programming to qualifying households so that they can receive local and regional OTA signals on the Shaw direct-to-home (DTH) service.
 - If the “local television satellite solution” experiences a surplus, such a surplus will be reallocated to the “Development, creation and promotion of incremental, independently-produced programming of national interest” initiative, set out below.
- Production and exhibition of new morning newscasts in Regina, Saskatoon, Winnipeg, Toronto, Montréal and Halifax
Amount allocated: \$45 million
 - Development, creation and promotion of incremental, independently-produced programming of national interest
Amount allocated: \$79.1 million
 - This includes support for 8-point to 10-point drama for OTA network and specialty services.
 - No more than 50% of the monies would be allocated to 8-point drama.
 - This includes a \$3 million allocation to media accessibility, including video description of all national-interest programming funded under the benefits initiatives.
 - If the “media accessibility” element experiences a surplus, such a surplus will be reallocated to the incremental video description of other programs of national interest.
 - Creation of new media content to complement and reinforce other benefits initiatives in connection with programming of national interest and news
Amount allocated: \$18 million

36. Shaw confirmed that the tangible benefits would be expended over a seven-year period, and provided a payment schedule as part of its final comments; this payment schedule is set out in the appendix to this decision. Furthermore, Shaw confirmed that no administrative fees would be charged against the benefits.

37. In regard to incrementality, Shaw agreed that for the first year of the initiative relating to “Development, creation and promotion of incremental, independently-produced programming of national interest,” programming resulting from this initiative would be subject to the standard dual baseline for such initiatives. Specifically, any hours of programming claimed against this initiative must be in addition to the eight hours of

priority programming required by condition of licence; further, and any expenditures claimed against this initiative must be in addition to what has been typically spent on priority programming, which is determined by taking an average of the past three years of expenditures on priority programming. As noted in Broadcasting Regulatory Policy 2010-167, it is the Commission's preliminary view, subject to further discussion at the time of licence renewals, that from 1 September 2011 onwards, a new approach will be adopted for establishing incrementality, specifically, that the spending requirements for programs of national interest will be considered reasonable thresholds on which to base the incrementality of tangible benefits. Accordingly, the Commission will discuss at the licence renewal public hearing for private English-language ownership groups, to be held during the Spring of 2011, the appropriateness of using such a baseline, and the resulting decision will be used to inform how incrementality will be measured in year two and beyond of the tangible benefits.

38. Similarly, in regard to the initiative relating to the "Production and exhibition of new morning newscasts in Regina, Saskatoon, Winnipeg, Toronto, Montréal and Halifax," Shaw stated that all programming hours and expenditures claimed against this initiative would be in addition to the hours of local programming required by condition of licence and to the typical expenditures on local programming, including the Local Programming Improvement Fund allocations, where received.
39. The Commission requires Shaw to adhere to the payment schedule set out in the appendix to this decision and to submit annual reports to the Commission by 30 November of each year, detailing its progress in fulfilling its tangible benefits.
40. Intervenors raised certain issues relating to the proposed tangible benefits; these issues as well as the Commission's determinations for each are set out below.

Conversion of analog transmitters outside mandatory markets

41. The Commission requires Shaw to complete the transition to digital broadcasting outside mandatory markets within five years.
42. The Canadian Association of Community Television Users and Stations, the Canadian Media Guild (CMG), TELUS Communications Company (TELUS) and Save Our CBC Kamloops highlighted the potential for multiplexing to extend the public benefit of Shaw's proposal to construct digital transmitters outside mandatory markets.
43. The Commission is persuaded of the benefits of multiplexing with respect to the promotion of media diversity and access, and its potential to offset some of the negative impact resulting from media consolidation. The Commission notes Shaw's willingness to consider multiplexing in the context of the transition of its transmitters outside mandatory markets. The Commission further expects Shaw to make its transmission facilities available to other broadcasters on a non-discriminatory and cost-recovery basis, as an extension of this initiative.

Proportion of tangible benefits allocated to programming initiatives

44. The creative sector argued that the proportion of the tangible benefits allocated to programming initiatives is not consistent with the Commission's standard approach to tangible benefits and with other tangible benefit packages approved by the Commission in the past.
45. However, although it considers proposed tangible benefits on a case-by-case basis, in this case, the Commission notes that the proportion of the tangible benefits allocated to programming-related initiatives is consistent with the Commission's standard approach and precedents, and reflects the evolving multiplatform environment in which broadcasters operate.

New morning newscasts

46. The Communications, Energy and Paperworkers Union of Canada (CEP), as well as certain members of the creative sector, were supportive of Shaw's proposal to reinstitute morning news programming in a number of markets where Canwest Global had discontinued this type of programming. The CEP noted Shaw's commitment that this initiative would result in a minimum of an additional two hours of new programming each weekday (for a minimum of an additional 10 hours per week) in each market (i.e., Toronto, Winnipeg, Regina, Saskatoon, Montréal and Halifax) and that approximately an additional 110 people would be hired as a result.
47. The Commission notes that Shaw confirmed that all of the additional hours would be original local programming that is unique to each market, and that national news inserts would represent a small part of this programming.
48. The Commission also notes Shaw's intention and affirmation that it will be able to maintain the morning newscasts in the identified markets (i.e., Toronto, Winnipeg, Regina, Saskatoon, Montréal and Halifax) once the tangible benefits have ended.
49. The Commission requires Shaw to meet its commitment to air, at minimum, an additional 10 hours per week of original local programming unique to the market, in each market.

New media support

50. There was support within the creative sector for the new media initiative, as it was recognized that this initiative is a reflection of the evolving broadcasting environment, but the argument was made that some of the activities proposed by Shaw are now considered the "cost of doing business" and should not be accepted as qualifying under the tangible benefits policy. Specifically, the creative sector took issue with activities that it characterized as promotional and advertising in nature, such as "brochure" websites.

51. In this regard, the Commission notes that it is also of the view that some of the activities put forward by Shaw would constitute the cost of doing business in a multiplatform environment.
52. Accordingly, the Commission will only accept as qualifying activities those new media initiatives that have an interactive element that engages the audience, and that are associated with a program of national interest or a news program. In addition, the new media component must further expand upon the story and narrative elements of the program with which it is associated. The Commission is of view that “billboard websites” and the use of social media would not qualify. Similarly, the streaming of a production on the Internet at the same time as the television broadcast (i.e., simultaneous streaming) will not be considered an eligible digital media component. The Commission expects these monies to be used for innovative projects such as story-driven video games, webisodes, mobisodes, and interactive web content.

Unfulfilled benefits

53. The Commission notes that Shaw proposed the fulfillment of the approximately \$95 million outstanding tangible benefits resulting from Broadcasting Decision 2007-429 as a benefit of this transaction.
54. However, the Commission clarifies that it is not considering this as a benefit resulting from this transaction. In Public Notice 1993-68, the Commission confirmed that it considers benefits commitments as part of the obligations of a licensee that should be implemented regardless of ownership changes. Further, commitments to carry out such unfulfilled benefits are not considered to be benefits on the part of the purchaser.
55. Accordingly, the Commission directs Shaw to pay and continue to report on all outstanding tangible benefits resulting from Broadcasting Decision 2007-429, in addition to fulfilling the proposed tangible benefits package described above.

Terms of trade

56. Several interveners, including the Canadian Media Production Association (CMPA), commented on the issue of terms of trade. The CMPA argued that an independent producer who attempts to negotiate with a vertically and horizontally integrated Shaw/Canwest Global would be at a significant disadvantage. Accordingly, the CMPA submitted that Shaw should be required, by condition of licence, to conclude a terms of trade agreement with the CMPA within sixty days of the Commission’s approval of the transaction.
57. The establishment of terms of trade agreements emerged as an issue in Broadcasting Public Notice 2007-53, with the Commission expressing the opinion that the development of terms of trade agreements between broadcasters and independent producers to provide stability and clarity would be in the broadcasting industry’s interest as a whole.

58. Within the context of several public proceedings, the Commission has communicated its expectation that, at the upcoming conventional television licence renewals, broadcasters will either have in place terms of trade agreements, or have demonstrated efforts to negotiate terms of trade agreements, with independent producers.
59. During this hearing, Shaw committed to negotiating, together with other broadcasters, terms of trade with independent producers in advance of the upcoming licence renewal hearings, but argued that any Shaw-specific requirement could result in potentially placing it at a competitive disadvantage. Shaw stated that its objective would be to put forward substantive proposals governing the terms of trade between broadcasters and independent producers by the start of the licence renewal hearings scheduled for April 2011.
60. The Commission is encouraged by Shaw's above-noted plans in regard to completing its terms of trade negotiations before the licence renewal hearing. In the event, however, that no agreement is reached prior to that hearing, the Commission will require Shaw to file its substantive proposals to the Commission as part of the record of the licence renewal hearing, and will then establish appropriate provisions for terms of trade as part of its determinations set out in its licensing decision.

"Local television satellite solution"

61. The Commission notes that there was a general consensus that the "local television satellite solution" initiative would benefit approximately 31,500 households that are outside the mandatory markets and that rely on OTA reception from transmitters operating on channels 52 to 69. Those households may lose OTA access to local and regional programming if broadcasters operating transmitters on channels 52 to 69 choose to cease operating OTA transmitters altogether based on the requirement to vacate these channels.
62. The Commission commends Shaw for this initiative as it will provide affected households with the necessary reception equipment, and associated installation, required to maintain free access to the programming of local and regional stations that were previously available over the air.
63. The Commission requires Shaw to direct the allocated \$15 million for this initiative towards providing a satellite receiver and dish, and associated installation, to households that had relied solely on OTA reception to access at least one local and/or regional television station that was operating on channels 52 to 69 outside mandatory markets, and that had ceased OTA transmission due to the transition. Further, once those households that are outside mandatory markets and that relied on OTA reception from transmitters operating on channels 52 to 69 have had an opportunity to avail themselves of such a program, the Commission expects Shaw to provide households, both inside and outside mandatory markets, that have lost access to at least one OTA signal with satellite reception equipment until the allocated funds have been exhausted.

64. Until the end of its next DTH licence term, Shaw is required to provide households that avail themselves of this initiative with access to local and regional programming, in accordance with the forthcoming general authorization for broadcasting distribution undertakings (BDUs) relating to the free local package.
65. If required and or requested by Shaw or others, the Commission is willing to consider putting into place regulatory measures to facilitate the implementation of this initiative and to ensure that those Canadian households affected are able to access this initiative in a timely manner. The Commission expects that this program be made available to affected households three months prior to the digital transition date of 31 August 2011, despite challenges that Shaw may face in limiting access to this program to these households.

Diversity of voices

66. In Broadcasting Public Notice 2008-4, the Commission redefined the objective relating to diversity of voices as follows:
- to provide access, within the Canadian broadcasting system, to a diversity of voices through broadcasting services from the public, private and community elements;
 - to ensure plurality of ownership within the private element of the Canadian broadcasting system;
 - to ensure that audiences have access to a diversity of programming – especially national, regional and local content;
 - to ensure that any further consolidation in the Canadian broadcasting system provides a net benefit to Canadian audiences and to the creation of Canadian programming; and
 - to restrict ownership only when it is necessary to achieve the above objectives and to do so in a manner that is simple, clear and effective.
67. In that proceeding, the Commission did an assessment of the current state of plurality of editorial voices and diversity of voices, and completed a study in 31 local markets in Canada. It found that in all but the smallest markets studied, the public, private and community elements are available, and that within the private element, there is a variety of ownership in the local media.
68. In the above-mentioned policy, the Commission stated that any tangible benefits that may arise from an increase in consolidation should include improvements to the quality of the programming offered, including news and information programming. In that respect, the Commission stated that any assessment of key quality indicators is best done at licence renewals, but also noted that Shaw's proposal towards the production of independent programming was unclear and needed to be clarified.

69. In regard to market dominance, the Commission stated that, as a general rule, it would not approve applications for a change in effective control that would result in the control, by one person, of a dominant position in the delivery of television services to Canadians that would impact on the diversity of programming available to television audiences. It accordingly introduced the following thresholds:

- as a general rule, the Commission will not approve transactions that would result in the control by one person of more than 45% of the total television audience share – including audiences to both discretionary and OTA services;
- the Commission will carefully examine transactions that would result in the control by one person of between 35% and 45% of the total television audience share – including audiences to both discretionary and OTA services; and
- barring other policy concerns, the Commission will process expeditiously transactions that would result in the control by one person of less than 35% of the total television audience share – including audiences to both discretionary and OTA services.

70. The Commission considered the concerns raised by the interveners relating to Shaw's market power and potential increase in audience shares arising from the combination of Corus (Shaw)/Canwest Global assets and finds that the post-merger combined audience shares from the 2008-2009 broadcast year is below the 35% threshold. Moreover, based on preliminary data for the 2009-2010 broadcast year, Corus (Shaw)/Canwest Global remains below the 35% threshold indicated in the policy. Consequently, the Commission is satisfied that this transaction will not have a negative impact on the diversity of programming available to television audiences.

Vertical integration

71. In a transaction in which one party purchases the assets of one of its product suppliers, the Commission may consider matters such as whether the transaction gives rise to concerns about gate-keeping, undue preference, or other anti-competitive practices potentially associated with vertical integration and with cross-ownership in general.

72. In this case, Canwest Global supplies Shaw with its conventional and specialty signals that Shaw distributes via its cable and satellite distribution facilities, as well as its programming for the video-on-demand (VOD) service that Shaw provides to its cable system subscribers. Canwest Global also makes available these same signals and services to competing BDUs. The *Broadcasting Distribution Regulations* (the Regulations) stipulate certain terms and conditions under which BDUs are required to provide Canwest Global and other broadcasters access to their distribution facilities. Various other regulations and Commission determinations, such as the *Pay Television Regulations, 1990*, the *Specialty Services Regulations, 1990*, and the regulatory framework for VOD services (see Broadcasting Regulatory Policy

2010-190) stipulate how possible issues, such as undue preference, would be dealt with in regard to pay and specialty and VOD services.

Interventions

73. Several interveners proposed safeguards that should be put into place to dissuade abuses of market power, and certain interveners raised an issue that should be addressed, in the event the Commission were to approve the purchase by Shaw of Canwest Global.
74. The Alliance of Canadian Cinema, Television and Radio Artists, the American Federation of Musicians, the Association of Canadian Advertisers and the CMG proposed structural separation of the different programming entities under Shaw control to ensure diversity of voices and to protect the revenue stream that goes to the production of Canadian programming. TELUS also proposed the structural separation of Shaw and Canwest Global in order to protect confidential and competitively sensitive information provided by competing BDUs to Canwest Global as part of negotiations for the distribution of their programming services.
75. TELUS further submitted that the Commission should clarify what constitutes undue preference, particularly in regard to exclusive access to broadcast content, refusal to sell advertising on key prime time shows, and discriminatory content or pricing arrangements. TELUS argued that a reverse onus with respect to undue preference complaints must be established by condition of licence for Shaw and Canwest Global, noting that both the integrated carrier and the programming service control all of the necessary information to prove or disprove any allegation of undue preference. Pelmorex Communications Inc. submitted that, in the event of a dispute with Shaw, the situation that triggered the dispute should be reversed until the dispute is resolved.
76. Several interveners including Channel Zero Inc., High Fidelity HDTV Inc. and the Independent Broadcasters Group expressed their concern regarding how Shaw was going to meet the existing requirement of section 18(14) of the Regulations¹ now that it is distributing eight new related Category 2 services, formerly unrelated Canwest Global services.
77. In addressing interveners' concerns, Shaw submitted that the current regulatory frameworks set out clear guidelines and safeguards to ensure the ongoing success of the Canadian broadcasting system. Shaw noted several instances in the past where the Commission has approved the integration of programming and distribution businesses without imposing on the controlling party any of the specific limitations being proposed in this proceeding. Shaw is of the view that if the Commission considers it necessary to expand upon existing safeguards, this would require a general policy

¹ Section 18(14) of the Regulations currently requires a 5:1 ratio of non-related to related Category 2 services. Pursuant to Broadcasting Regulatory Policy 2008-100, effective 1 September 2011, the requirement will be reduced to a 3:1 ratio of non-related to related Category 2 services.

change, not a case-by-case approach. In the absence of such an approach, Shaw considered that the imposition of safeguards specific to it would be discriminatory, that competitive equity and procedural fairness would be undermined, and that regulatory uncertainty would chill investment going forward.

78. Shaw agreed to submit to the Commission, on a confidential basis, existing affiliation agreements between Canwest Global and Shaw that were negotiated on an arm's length basis. The Commission requires Shaw to submit these agreements by no later than 30 days from the date of the present decision.
79. Shaw indicated during the hearing that, with the acquisition of the Canwest Global Category 2 services, it would no longer be in compliance with section 18(14) of the Regulations. It further indicated that it would not be able to come into compliance with the provision to distribute five unrelated Category 2 services for each related Category 2 service for either its cable or DTH systems. For its terrestrial BDUs, Shaw committed to being able to comply with a three to one unrelated to related ratio within six months and, until it reached this objective, to not add any new related Category 2 services to its systems. For its DTH BDU, Shaw submitted that it would not be able to come into compliance with even a three to one ratio before its new satellite was operational, sometime in late 2012.

Commission's analysis and determinations

80. The Commission notes that it has in the past approved several transactions allowing the merger of distribution and programming undertakings, including the acquisition of Citytv stations by Rogers Media Inc. and the acquisition of TVA by Quebecor Media Inc.² The Commission considers that the existing regulatory tools, particularly the undue preference provisions in the regulations, have been sufficient to deal with any anti-competitive issues and have ensured the continued success of the Canadian broadcasting system.
81. As noted above, the percentage of the broadcasting systems owned and operated by Shaw after the purchase of Canwest Global would be below the 35% threshold indicated in the diversity of voices policy. The Commission notes that no evidence was provided on the record to indicate that Shaw is in a more advantageous position with its acquisition of Canwest Global than other integrated companies. The Commission cannot conclude, therefore, that it is necessary to impose more stringent regulations on Shaw than on other integrated distribution and programming companies.
82. However, the Commission considers that in light of the concerns expressed by several interveners and the growing trend of industry consolidation, there is merit in initiating a policy hearing to consider whether additional regulatory tools and measures are necessary to more effectively deal with vertical integration issues and to better prevent possible resulting anti-competitive behaviour. As a result, in Broadcasting

² See Broadcasting Decision 2007-360 and Decision 2001-384, respectively.

Notice of Consultation 2010-783, also issued today, the Commission is seeking comments on whether additional regulatory safeguards and measures should be put in place to clarify for the industry what would constitute anti-competitive behaviour on the part of a vertically-integrated company.

83. In regard to the issue of compliance with section 18(14) of the Regulations, the Commission notes that, as a result of the purchase of the Canwest Global assets, the former Canwest Global Category 2 services that were unrelated to Shaw become related services. In order to remain in compliance, Shaw would have to add to each of its cable systems and to its satellite distribution system, at least five additional unrelated Category 2 services for each of the currently distributed Canwest Global Category 2 services. In Calgary, for example, the Commission notes that in order for Shaw to remain in compliance, without removing any of the currently distributed Canwest Global Category 2 services, it would have to add at least 40 additional unrelated Category 2 services.
84. In view of the large number of services that Shaw must add to its systems for it to remain compliant with section 18(14) of the Regulations, the Commission considers it reasonable that it be given some time to come into compliance. The Commission considers it important that to the extent possible, the transition of the Canwest Global properties to Shaw not be disruptive to consumer services. However, at the same time, the Commission considers that to protect the integrity of the broadcasting system, the regulations must be adhered to. The Commission is of the view that not allowing Shaw to distribute any new related Category 2 services on its cable and DTH systems until it comes into compliance with the Regulations on each respective platform strikes a reasonable balance. Shaw would not have to delete any currently distributed Category 2 services while being limited in what it adds until such time that it comes into full compliance for both its cable and DTH systems.
85. The Commission therefore accepts Shaw's proposal not to add any new related Category 2 services until it comes into compliance with the Regulations. In addition, the Commission expects that Shaw be in compliance with the Regulations for its cable systems by no later than 1 September 2011, and for its satellite distribution system by no later than 31 December 2012.

Programming exclusivity

86. The proposed transaction raised issues relating to vertical integration, and Shaw undertook, at the request of the Commission, to express in writing its commitment regarding programming exclusivity. During the public hearing, Shaw stated the following:

Given that exclusivity is not part of our business plan, we have no intention of denying programming to our competitors.

87. In addition, Shaw committed to the principle of programming non-exclusivity and, accordingly, to making available to its competitors in the Canadian broadcasting system, on negotiated commercial terms, mobile and broadband rights to television

programming from Shaw's OTA and specialty services. Moreover, Shaw stated that its competitors should also make the same commitment.

88. Shaw argued, however, that this commitment should not be captured as a condition of licence given that, outside of the fact that its competitors would not be subject to the condition, the issue of exclusive rights is not limited to vertically-integrated undertakings, and given that the Commission's undue preference mechanisms are sufficient to address this issue.
89. The Commission expects Shaw to fulfill its commitment to the principle of programming non-exclusivity by making available to its competitors, on commercial terms, mobile and broadband rights to television programming from its OTA and specialty services.
90. As announced in Broadcasting Notice of Consultation 2010-783, the Commission has launched a process that will explore the possibility of applying similar requirements to all parties.

Conclusion

91. In light of all of the above, the Commission **approves** the application by Shaw Communications Inc., on behalf of Canwest Global Communications Corp., for authority to change the effective control of Canwest Global's licensed broadcasting subsidiaries to Shaw, which will henceforth be exercised by Shaw. This change will be effected through a wholly-owned subsidiary of Shaw known as 7316712 Canada Inc.

Secretary General

Related documents

- *Review of the regulatory framework relating to vertical integration*, Broadcasting Notice of Consultation CRTC 2010-783, 22 October 2010
- *Various television and specialty programming undertakings – Acquisition of assets (corporate reorganization)*, Broadcasting Decision CRTC 2010-781, 22 October 2010
- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2010-498, 22 July 2010
- *Regulatory framework for video-on-demand undertakings*, Broadcasting Regulatory Policy CRTC 2010-190, 29 March 2010
- *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Diversity of voices* – Regulatory policy, Broadcasting Public Notice CRTC 2008-4, 15 January 2008
- *Transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to CanWest MediaWorks Inc.*, Broadcasting Decision CRTC 2007-429, 20 December 2007
- *Transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media Inc.*, Broadcasting Decision CRTC 2007-360, 28 September 2007
- *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, 17 May 2007
- *Change in effective control*, Broadcasting Decision CRTC 2006-309, 21 July 2006
- *Transfer of effective control of TVA to Quebecor Média inc.*, Decision CRTC 2001-384, 5 July 2001
- *Building on success – A policy framework for Canadian television*, Public Notice 1999-97, 11 June 1999
- *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1993-68, 26 May 1993
- *Elements assessed by the Commission in considering applications for the transfer of ownership or control of broadcasting undertakings*, Public Notice CRTC 1989-109, 28 September 1989

Appendix to Broadcasting Decision CRTC 2010-782

Benefits payment schedule proposed by Shaw Communications Inc. in regard to its acquisition of the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries (\$ million)

Broadcast year	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	Total (seven broadcast years)
ON-SCREEN AND/OR PROGRAMMING-RELATED BENEFITS								
<i>Incremental programs of national interest (PNIs)</i>								
Pilot projects for scripted drama and other PNIs	1.50	2.00	2.00	2.00	2.00	2.00	-	11.50
Production of scripted drama and other PNIs	-	4.20	4.40	7.00	15.00	15.00	15.00	60.60
Third-party promotion of new PNIs	-	-	0.50	0.50	1.00	1.00	1.00	4.00
Descriptive video of new PNIs and other programming	-	0.50	0.50	0.50	0.50	0.50	0.50	3.00
Total	1.50	6.70	7.40	10.00	18.50	18.50	16.50	79.10
<i>Morning news in specific markets</i>								
Halifax	0.20	0.90	0.80	0.80	0.80	0.80	0.80	5.10
Montréal	-	0.25	0.95	0.95	0.95	0.95	0.95	5.00
Toronto	2.50	3.00	3.00	3.00	3.00	3.00	3.00	20.50
Winnipeg	-	0.75	0.85	0.85	0.85	0.85	0.85	5.00
Regina	0.40	0.80	0.70	0.70	0.70	0.70	0.70	4.70
Saskatoon	0.40	0.80	0.70	0.70	0.70	0.70	0.70	4.70
Total	3.50	6.50	7.00	7.00	7.00	7.00	7.00	45.00
<i>New media initiatives attached to programming benefits (as outlined above)</i>								
Total	0.80	1.20	3.20	3.20	3.20	3.20	3.20	18.00
TOTAL (ON-SCREEN AND/OR PROGRAMMING-RELATED BENEFITS)								
	5.80	14.40	17.60	20.20	28.70	28.70	26.70	142.10
NON-PROGRAMMING RELATED BENEFITS								
Equipment fund for households no longer receiving over-the-air broadcast signals	-	2.00	3.25	3.25	3.25	3.25	-	15.00
Digital television transition (i.e., transmitters outside mandatory markets)	-	4.60	4.60	4.60	4.60	4.60	-	23.00
TOTAL (NON-PROGRAMMING RELATED BENEFITS)								
	-	6.60	7.85	7.85	7.85	7.85	-	38.00
TOTAL (ON-SCREEN AND/OR PROGRAMMING- AND NON-PROGRAMMING RELATED BENEFITS)								
	5.80	21.00	25.45	28.05	36.55	36.55	26.70	180.10