



## Broadcasting Decision CRTC 2013-642

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Route reference: 2013-602

Ottawa, 29 November 2013

### **Rogers Communications Inc., on behalf of Mountain Cablevision Limited and Fido Solutions Inc., to be partners in a general partnership carrying on business as Rogers Communications Partnership**

Across Canada

*Application 2013-1479-9, received 5 November 2013*

*Public hearing in the National Capital Region*

*22 November 2013*

### **Terrestrial broadcasting distribution undertakings serving various locations in Ontario, New Brunswick, and Newfoundland and Labrador; national video-on-demand programming undertaking known as Rogers On Demand; and terrestrial and direct-to-home national pay-per-view services known as Rogers Sportsnet – Acquisition of assets (corporate reorganization)**

*The Commission **approves** the application by Rogers Communications Inc., on behalf of Mountain Cablevision Limited and Fido Solutions Inc., to be partners in a general partnership carrying on business as Rogers Communications Partnership, for authority to effect a corporate reorganization.*

#### **The application**

1. Rogers Communications Inc. (RCI) filed an application on behalf of Mountain Cablevision Limited (Mountain) and Fido Solutions Inc. (Fido), to be partners in a general partnership carrying on business as Rogers Communications Partnership (collectively, the applicants or the new Partnership), for authority to effect a corporate reorganization requiring the issuance of new broadcasting licences. The Commission did not receive any interventions in connection with this application.
2. RCI and Fido, partners in a general partnership carrying on business as Rogers Communications Partnership (RCP), are the current licensees of the terrestrial broadcasting distribution undertakings (BDUs) that are operated by RCP under regional licences and that serve various locations in Ontario, New Brunswick, and Newfoundland and Labrador. They are also the licensees of the national video-on-demand (VOD) programming undertaking known as Rogers On Demand and of the national terrestrial and direct-to-home (DTH) pay-per-view (PPV) services both known as Rogers Sportsnet.

3. The applicants also requested new broadcasting licences to continue the operation of the above-noted undertakings under the same terms and conditions as those in effect under the current licences. In regard to the BDUs, the licensees hold, for New Brunswick and Newfoundland and Labrador, separate regional broadcasting licences that regroup the larger and smaller BDUs. They requested a single regional broadcasting licence that would group together all of the BDUs in these provinces.
4. Mountain is wholly-owned by RCI.
5. Pursuant to the Partnership Units Transfer Agreement between RCI, Mountain and Fido, Mountain would acquire from RCI all of the partnership units it holds in RCP (assets). Following the proposed transaction, Mountain would become the general partner in RCP and together with Fido would become the licensees of the above-noted broadcasting undertakings.
6. The Commission notes that RCI filed the present application in order to satisfy the requirements of the *Direction to the CRTC (Ineligibility of Non-Canadians)* (the Direction), which is discussed in detail below.

### **Commission's analysis and decisions**

7. After examining the application in light of applicable regulations and policies, the Commission considers that the issue it must address is whether the applicants qualify as "Canadian" for the purposes of the Direction.
8. The Commission has the authority under the *Broadcasting Act* (the Act) to regulate the broadcasting system in Canada to achieve the policy objectives set out in subsection 3(1) of the Act. Subsection 3(1)(a) of the Act states that the Canadian broadcasting system shall be effectively owned and controlled by Canadians.
9. Pursuant to the Direction, issued by the Governor in Council under subsection 26(1) of the Act, no broadcasting licence may be issued, and no amendment or renewals thereof may be granted, to an applicant that is a "non-Canadian." A "non-Canadian" is a person or entity that is not a "Canadian." A "Canadian" includes a "qualified corporation."
10. The Direction defines a "qualified corporation" as follows:

"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.

11. RCI indicated that it will be appointing a new non-Canadian President and Chief Executive Officer (CEO) of the corporation, which would become effective following the Commission's approval of the current transaction. The Commission notes, however, that under the Direction, a corporation whose CEO is non-Canadian does not qualify as Canadian. As a consequence, the Commission is precluded from issuing, amending or renewing a licence to such a corporation.
12. The Commission, in applying the Direction, therefore examines whether a non-Canadian can exercise either *de jure* control (legal control) or *de facto* control (control in fact).

#### **Legal control**

13. Under the proposed transaction, each of Mountain and Fido would be wholly-owned and controlled by RCI. Accordingly, in order to be a "qualified corporation," each of them must satisfy the test set out in paragraphs (a) and (b) above, and RCI as a parent corporation must satisfy the test set out in paragraph (c) of the definition of "qualified corporation" found in the Direction.

14. Based on the information filed with the application, the Commission considers that the CEOs of each of Fido and Mountain and not less than 80 per cent of their respective directors would be Canadian. Accordingly, the Commission is of the view that the requirements in paragraph (a) of the definition of “qualified corporation” have been met.
15. In addition, based on the information filed with the application, the Commission considers that Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise 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. Accordingly, the Commission is of the view that the requirements in paragraph (b) of the definition of “qualified corporation” have been met.
16. In regard to the tests applicable to a parent corporation in paragraph (c) of the definition of “qualified corporation,” the Commission considers that a) the requirement in subparagraph (i) is satisfied, and b) the requirement in subparagraph (ii) is satisfied because not less than 66 2/3 per cent of the voting shares and of the votes of RCI are beneficially owned and controlled by Canadians.
17. In light of the fact that the CEO of the parent corporation is non-Canadian, for the purposes of the Direction, the test set out in subparagraph (c)(iii) is engaged such that to meet the definition of a qualified corporation, it must be determined that the parent corporation or its directors do not exercise control or influence over the programming decisions of the subsidiary corporation.
18. In order to satisfy the test set out in subparagraph (c)(iii), the applicants have proposed to amend their respective by-laws to establish an Independent Programming Committee (IPC).
19. The proposed by-laws are structured such that the IPC would be provided with sole and exclusive responsibility and authority to make all programming decisions on behalf of the applicants, where programming decisions are understood to mean all decisions of any kind relating to or affecting television programming broadcasts, including decisions relating to programming content and funding. As to the structure of the IPC itself, not less than 80 per cent of the members would be Canadian within the meaning of the Direction, and directors, officers and employees of RCI would all be excluded from participation in the committee.
20. The Commission notes that in Decision 97-635, it concluded that programming decisions could relate to the selection of signals to be distributed or to the terms of their distribution. The Commission is of the view that the definition of “programming decision” contained in the proposed amended by-laws may not capture such matters. Therefore, the Commission considers that the proposed definition of “programming decision” will need to be amended to clearly capture decisions pertaining to the selection of signals to be distributed and to the terms associated with their distribution.
21. The Commission considers that amending Mountain’s and Fido’s respective by-laws in order to establish an IPC with the structure and mandate proposed by the applicants, subject to the modifications required to address the concern identified in

paragraph 20, ensures that RCI or its directors do not exercise control or influence over programming decisions of the proposed licensees.

22. In light of the above, the Commission **directs** Mountain and Fido to file, by no later than **30 December 2013**, executed copies of their respective shareholders' resolution in order to amend their by-laws for the establishment of an IPC, including the wording proposed in the application modified to the extent required to ensure that the definition of "programming decision" captures decisions pertaining to the selection of signals to be distributed and to the terms associated with their distribution.

#### **Control in fact**

23. As mandated by section 3 of the Direction, the Commission must satisfy itself that an applicant is not controlled in fact by a non-Canadian.
24. The Commission considers that the appropriate test for assessing control in fact was set out in Decision No. [297-A-1993](#) (the Canadian Airlines decision) of the National Transportation Agency (now known as the Canadian Transportation Agency) (CTA). In that decision, the CTA found that control in fact generally can be viewed as the ongoing power or ability, whether exercised or not, to determine the strategic decision-making activities of an enterprise. It can also be viewed as the ability to manage and run the day-to-day operations of an enterprise.
25. To that effect, the Commission notes that the boards of directors of Mountain and Fido are appointed by RCI's board of directors. The record indicates that RCI's board of directors is comprised of 17 members, 15 of which are Canadian for the purposes of the Direction. Also, the new non-Canadian CEO of RCI would not be eligible to be a director or officer of Mountain or Fido, or of a new management committee of the new Partnership that will perform functions similar to those performed by a board of directors. Additionally, the Commission notes that in no instance would the two non-Canadian directors on RCI's board of directors be able, on their own, to pass any resolution. Furthermore, the Commission notes that the trustees of the Rogers Control Trust, all of which are Canadian, own, directly or indirectly, 90.9 per cent of the voting shares in RCI. In light of the above, the Commission determines that the control in fact over the new Partnership would continue to reside with Canadians and that the non-Canadian CEO of RCI would not have the power or ability, whether exercised or not, to determine the strategic decision-making activities of the new Partnership, and would not have the necessary powers or ability to manage and run the day-to-day operations of the new Partnership.

#### **Other matters**

26. The Commission notes that in the application, RCI also undertook to amend the bylaws for all of its remaining subsidiaries holding broadcasting licences consistent with the terms set out in its application. The Commission accepts this undertaking and expects that RCI will file executed copies of the amended by-laws and related shareholders' resolutions with the Commission by no later than **30 December 2013**.

## Conclusion

27. In light of all the above, the Commission **approves** the application by Rogers Communications Inc., on behalf of Mountain Cablevision Limited and Fido Solutions Inc., to be partners in a general partnership carrying on business as Rogers Communications Partnership, for authority to effect a corporate reorganization.
28. Upon surrender of the current licences, the Commission will issue new broadcasting licences to Mountain Cablevision Limited and Fido Solutions Inc., to be partners in a general partnership carrying on business as Rogers Communications Partnership, to operate the broadcasting undertakings identified in paragraph 2 under the same terms and conditions as those in effect under the current licences. The Commission will issue a single regional broadcasting licence for the BDUs serving various locations in New Brunswick and Newfoundland and Labrador.
29. The Commission notes that the terrestrial and DTH PPV broadcasting licences will expire 31 August 2014, that the BDU licences will expire 31 August 2015,<sup>1</sup> and that the VOD licence will expire 31 August 2016.
30. The Commission advises the licensees that any non-compliance that may have occurred under RCI and Fido will be considered at the time of the next renewal of these licences.

Secretary General

### Related documents

- *Administrative renewals*, Broadcasting Decision CRTC 2013-633, 27 November 2013
- *Applications by Câble-Axion Québec inc. to carry on 7 new cable distribution undertakings – Approved; Applications by Câblodistribution de la Côte du Sud inc., Télécâble Ste-Marie inc. and Télécâble Régional inc. to extend the authorized service areas of 7 other cable distribution undertakings – Approved*, Decision CRTC 97-635, 14 November 1997

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<sup>1</sup> The original expiry date for the BDU broadcasting licences was 31 August 2014. They were administratively renewed until 31 August 2015 in Broadcasting Decision 2013-633.