



Broadcasting Decision CRTC 2024-105

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Ottawa, 14 May 2024

First Peoples Radio Inc.
Ottawa and Toronto, Ontario

Public record: 2023-0451-7

Stingray Group Inc.’s payment of tangible benefits allocated in accordance with Broadcasting Decision 2018-404

Summary

The Commission has received an application from First Peoples Radio Inc. (FPR) requesting that funding being paid by Stingray Group Inc. (Stingray) be redirected to support the operations of FPR.

The Commission recognizes the importance of Indigenous broadcasters to the broadcasting system, and the financial difficulties that many of them face in getting sustainable sources of funding. It is the Commission’s intention that some of these challenges be addressed through other proceedings such as the proceeding on initial base contributions to support Canadian and Indigenous content, for which a decision will be published shortly, and on the ongoing work to co-develop the Indigenous Broadcasting Policy.

FPR operates two English- and Indigenous-language Indigenous radio stations (CFPO-FM Ottawa and CFPT-FM Toronto, Ontario), which are in financial distress. To remain open, FPR has asked that the Commission require Stingray to redirect \$2 million of what are known as tangible benefits payments to FPR. Effectively, this would mean that Stingray would be supporting the operations of FPR.

Tangible benefits payments come out of ownership transactions where there is a change in the ownership or control of a company. The Commission often requires the purchaser to pay “tangible benefits” to qualifying organizations and funds. These benefits are meant to benefit the broadcasting system as a whole, not to offset operational losses by specific individual broadcasters.

In Broadcasting Decision 2018-404, the Commission approved Stingray’s acquisition of a number of stations and Stingray’s proposed tangible benefits package, including the specific recipients, and when the money must be paid out.

FPR is requesting that the Commission reopen and change its decision in Broadcasting Decision 2018-404, and effectively redirect funds from the organizations specified in that decision to FPR’s operations.

The Commission recognizes the importance of FPR's radio stations. However, the Commission does not have the authority to reopen its past decisions under the *Broadcasting Act*. Further, the Commission is of the view that it would be inappropriate to redirect funds that have already been directed to other organizations. Recipients of tangible benefits approved by the Commission can rely on the Commission's decisions and the payments that result from them. Changing funding decisions after the fact to support individual broadcasters would introduce uncertainty into the broadcasting system.

Accordingly, the Commission denies FPR's application to redirect part of the tangible benefits package already approved by the Commission in Broadcasting Decision 2018-404 to support the operations of CFPO-FM and CFPT-FM.

Introduction

1. This decision raises issues related to the Commission's support of Indigenous broadcasters and the application of the Tangible Benefits Policy, set out in Broadcasting Regulatory Policies 2014-459 and 2022-332. Background information on these issues is set out below.
2. The policy objectives in subsection 3(1) of the *Broadcasting Act* provide that the broadcasting system in Canada should reflect the special place of Indigenous peoples and languages in Canadian society. Among other things, they also indicate that the broadcasting system should serve the needs and interests of Indigenous peoples and should provide opportunities for Indigenous-led production of programming, including in Indigenous languages.
3. The regulatory policy in section 5 of the *Broadcasting Act* also specifies that the system should be regulated and supervised in a manner that takes into account the characteristics of Indigenous-language programming and the conditions under which broadcasting undertakings that provide Indigenous-language programming operate. In addition, section 5 of the *Broadcasting Act* is clear that the system should be supervised so that it facilitates the creation of programming in Indigenous languages.
4. The Commission has taken strides to support Indigenous voices in the broadcasting system. As an example, the Commission licensed radio stations focused on Indigenous programming, including two stations operated by First Peoples Radio Inc. (FPR), in Broadcasting Decision 2017-198. This followed a call for applications for radio stations to serve urban Indigenous communities in Vancouver, British Columbia; Edmonton and Calgary, Alberta; Ottawa and Toronto, Ontario.
5. In addition, the Commission initiated Phase 2 of the co-development of an Indigenous Broadcasting Policy with the publication of Broadcasting Notice of Consultation 2024-67. In Broadcasting Notice of Consultation 2023-138, the Commission is also looking at how to support Indigenous broadcasters as part of the modernization of the framework for contributions to support Canadian and Indigenous content.
6. The review of ownership transactions is an essential element of the Commission's regulatory and supervisory mandate under the *Broadcasting Act*. Licensees cannot

transfer the ownership and control of a licence to another operator without the Commission's approval. When seeking the Commission's approval, the applicant must show that the application is the best possible proposal in the circumstances and that its approval is in the public interest.

7. One way of making sure that the public interest is served is by proposing financial contributions that are consistent with the size and nature of the transaction. These contributions are known as "tangible benefits."
8. Tangible benefits payments help the Canadian creative sector and the public by supporting production funds and other initiatives that develop programming in line with the broadcasting policy and the public interest. These initiatives are known as "eligible initiatives."
9. The Tangible Benefits Policy sets out the details of what qualifies as an eligible initiative. While tangible benefits contributors can give a percentage of their payments to eligible initiatives, they cannot use them for operational expenses either for themselves or another broadcaster.
10. In general, the Commission requires tangible benefits payments to be made over seven years so that recipients receive consistent and predictable funding.

Background

11. In Broadcasting Decision 2018-404, the Commission approved an application by Newfoundland Capital Corporation Limited, on behalf of Newcap Inc., and its licensed broadcasting subsidiaries, for permission to change the ownership and effective control of certain radio and television broadcasting undertakings so that effective control of the undertakings would be exercised by Stingray Group Inc. (Stingray). In that decision, the Commission also approved a tangible benefits package of almost \$31 million in line with the Tangible Benefits Policy.
12. The tangible benefits package approved in Broadcasting Decision 2018-404 was worth 6% of the total value of the transaction, and was to be distributed as follows:
 - 3% (\$15,052,014) to the Radio Starmaker Fund or Fonds RadioStar;
 - 1.5% (\$7,526,007) to FACTOR or Musicaction;
 - 1% (\$5,017,338) to any eligible Canadian content development initiative; and
 - 0.5% (\$2,508,669) to the Community Radio Fund of Canada.
13. Broadcasting Decision 2018-404 has not been the subject of an appeal or a judicial review. Stingray has been making its tangible benefits payments as directed by the Commission.

14. FPR was not involved, either as a party or as an intervener, in the proceeding leading to Broadcasting Decision 2018-404.

Application

15. FPR filed an application to redirect a portion of the tangible benefits package approved by the Commission in Broadcasting Decision 2018-404 to itself to support the operations of its two English- and Indigenous-language Indigenous¹ radio stations CFPO-FM Ottawa and CFPT-FM Toronto, Ontario (known collectively as ELMNT-FM).
16. Specifically, FPR requested to redirect \$2 million of the non-discretionary tangible benefits package to be distributed to Radio Starmaker Fund, Fonds RadioStar and FACTOR to support the operations of its ELMNT-FM stations. FPR argued that without this support, it will be forced to shut down both radio stations.
17. FPR noted that, before filing its application, it asked the recipients of Stingray's tangible benefits payments, with Stingray's support, if they would transfer the funds to FPR. FPR was not successful in getting the funds transferred. It also noted that Stingray advised it that transferring tangible benefits payments is a matter of policy for the Commission.

Interventions and reply

18. The Commission received 69 interventions in support and three interventions in opposition of this application. It also received one comment from the National Campus and Community Radio Association (NCRA).
19. The NCRA did not take a position on the application. However, it encouraged the Commission to make sure that Indigenous radio broadcasters have access to predictable, sufficient, and timely funding.
20. Stingray did not submit an intervention in this proceeding.

Interventions in support

21. Indigenous production organizations, communication agencies, law firms, and listeners filed interventions in support.
22. Many interveners noted that the ELMNT-FM stations are the only radio stations playing Indigenous artists not heard on any other radio stations. These interveners also noted that the stations organize local events that contribute to Indigenous populations, assist in reconciliation efforts, and give non-Indigenous listeners an opportunity to experience Indigenous languages and perspectives.

¹ In this decision, Type B Native radio stations, as defined in Public Notice 1990-89, are called "Indigenous radio stations."

23. Interveners also noted that the ELMNT-FM stations are not-for-profit stations and that they need to be supported by the government until they can be self-sufficient. In addition, interveners stated that the stations are a source of income for artists and producers, and create a space of support for Indigeneity.
24. The evidence provided by all supporting interveners indicates that the ELMNT-FM stations provided high-quality and valuable Indigenous-centred programming to the markets they serve.

Interventions in opposition

25. In its intervention, the Fondation Musicaction (Musicaction)² noted that broadcasters' tangible benefits given to both Musicaction and Fonds RadioStar need to be used to develop Canadian and Indigenous musical content. They are not meant to support broadcasters' operations.
26. Musicaction stated that Fonds RadioStar is only financed by tangible benefits. These amounts are expected and fixed when the Commission approves the transfer of ownership, in line with the Commission's Tangible Benefits Policy. It argued that the approval of FPR's application would redirect funds expected since 2018 and would have an unprecedented retroactive impact on Fonds RadioStar.
27. The Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) noted that tangible benefits packages are nearing their end. As such, the independent funds' days are numbered. According to the ADISQ, a drop in expected revenues would accelerate Fonds RadioStar's closure and disadvantage artists.
28. Evanov Communications (Evanov) stated that FPR is not the only broadcaster facing financial hardship. The entire radio broadcasting sector has been facing significant revenue and profitability challenges for years, even before the COVID-19 pandemic. It is of the view that the issue of supporting Indigenous artists and programming call for a broader discussion and the development of a long-term, sustainable, equitable framework that will help all Indigenous broadcasters.
29. Interveners stated that redistributing the funding could set a legal precedent that would be a departure from Commission past decisions and encourage other similar requests.

FPR's reply

30. In its reply, FPR stated that it searched for other means of financing before it submitted its application. The application is its last resort for keeping ELMNT-FM stations on air.

² Musicaction was one of the recipients of the tangible benefits package approved in Broadcasting Decision 2018-404.

31. It added that while the Commission is looking at funding mechanisms that will include online services' contributions to Canadian initiatives and Indigenous broadcasting, it is unable to survive this transition period.
32. FPR argued that Fonds RadioStar has an important reserve of net unrestricted assets. In its view, this reserve should support Fonds RadioStar's activities and operations for about four years.

Issues

33. After examining the public record for this application in light of applicable regulations and policies, the Commission considers that it must address the following issues:
 - whether the Commission has the authority to reopen a past decision and to redirect tangible benefits payments; and
 - whether to redirect tangible benefits payments to FPR.

Authority to reopen a past decision and to redirect tangible benefits

34. In Broadcasting Decision 2018-404, the Commission approved Stingray's tangible benefits package, including the recipients and when the money must be paid out. In addition to the approval of the tangible benefits package, the Commission directed Stingray to distribute the tangible benefits funds evenly over seven broadcast years.
35. Since the decision, Stingray has been paying tangible benefits as required.
36. As Musicaction noted in its intervention, the recipients of Stingray's tangible benefits payments expect and rely on the tangible benefits payments, as approved by the Commission. The Commission is of the view that redirecting tangible benefits payments that the Commission has already approved in Broadcasting Decision 2018-404 is equal to revisiting the decision.
37. As a matter of law, as per subsection 31(1) of the *Broadcasting Act*, all decisions made by the Commission under that Act are final and conclusive. Unlike under the *Telecommunications Act*, the Commission does not have the express authority to review and rescind or vary its decisions under the *Broadcasting Act*.³ This means that the Commission generally cannot reopen past broadcasting decisions. In addition, at common law, Commission broadcasting decisions cannot be changed under the doctrine of *functus officio*. This legal principle means that official legal decisions cannot be changed by the same decision maker that made them, except in very limited circumstances. These circumstances do not apply in this case.

³ See section 62 of the *Telecommunications Act*.

38. As a result of the finality of Commission decisions, the tangible benefits framework profits from certainty. Recipients of payments are also able to rely on the Commission's decisions and the payments that result from them. The integrity of the Commission's supervisory role over the broadcasting system also depends on this certainty.
39. In light of the above, the Commission finds that Broadcasting Decision 2018-404 cannot be revisited.

Redirection of the tangible benefits payments required in Broadcasting Decision 2018-404 to FPR

40. Even if the Commission could revisit Broadcasting Decision 2018-404, the Commission is of the view that it would be inappropriate to redirect the funds to FPR.
41. Tangible benefits payments are not meant to ease financial pressure on broadcasters. While the Tangible Benefits Policy sets out that tangible benefits payors can give 1% of the value of a transaction to eligible initiatives, operational costs are not eligible, as per Broadcasting Regulatory Policy 2022-332. Such initiatives must be above and beyond regular programming costs.
42. In its application, FPR proposed to redirect funds for its operations and not an eligible initiative under the Tangible Benefits Policy. Using tangible benefits funds in this way would not be in line with the Tangible Benefits Policy framework.
43. FPR proposed to redirect 31% of Stingray's remaining tangible benefits contributions approved in Broadcasting Decision 2018-404. As per that decision, Stingray is required to pay these contributions to Radio Starmaker Fund, Fonds Radio Star and FACTOR. The 31% represents \$2 million due by 31 August 2024 for the 2023-2024 broadcast year, and by 31 August 2025 for the 2024-2025 broadcast year.
44. The Commission is of the view that approving this application would likely result in important changes to projects that have already been approved for funding by Radio Starmaker Fund, Fonds RadioStar, and FACTOR. The independent funds must make sure their beneficiaries have consistent funding. As such, hindering the predictability of the independent funds' source of funding would cause a negative impact.
45. In light of the above, the Commission considers that approving this application is not in line with the principles of the Tangible Benefits Policy. It would also have a negative impact on the stability and predictability of funding for independent funds and their recipients.

Conclusion

46. In light of all of the above, the Commission denies, by majority decision, FPR's application to redirect part of the tangible benefits package approved in Broadcasting Decision 2018-404 to support the operations of its two English- and

Indigenous-language Indigenous radio programming undertakings CFPO-FM Ottawa and CFPT-FM Toronto, Ontario.

47. The Commission recognizes that FPR is facing financial difficulties and that there is a need to address sustainability questions for Indigenous broadcasters. While this decision finds that the redistribution of tangible benefits was not an appropriate mechanism, the Commission notes the Indigenous communities' support of FPR's application and the importance of stations like ELMNT-FM to the broadcasting system. The Commission intends to address some financial challenges faced by Indigenous broadcasters through other proceedings, like the proceeding on initial base contributions to support Canadian and Indigenous content, initiated by Broadcasting Notice of Consultation 2023-138, and for which a decision will be published shortly. The Commission also intends to address these challenges through the ongoing co-development of the Indigenous Broadcasting Policy.

Secretary General

Related documents

- *Call for comments – Co-development of an Indigenous Broadcasting Policy*, Broadcasting Notice of Consultation CRTC 2024-67, 22 March 2024
- *Notice of hearing – The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous content*, Broadcasting Notice of Consultation CRTC 2023-138, 12 May 2023
- *Revised Commercial Radio Policy*, Broadcasting Regulatory Policy CRTC 2022-332, 7 December 2022
- *Various radio and television broadcasting undertakings – Change in ownership and effective control*, Broadcasting Decision CRTC 2018-404, 23 October 2018
- *Licensing of new radio stations to serve the urban Indigenous communities in Vancouver, Edmonton, Calgary, Ottawa and Toronto*, Broadcasting Decision CRTC 2017-198, 14 June 2017
- *Simplified approach to tangible benefits and determining the value of the transaction*, Broadcasting Regulatory Policy CRTC 2014-459, 5 September 2014
- *Native Broadcasting Policy*, Public Notice CRTC 1990-89, 20 September 1990