Broadcasting Decision CRTC 2004-284

Ottawa, 21 July 2004

Persona Communications Inc.
Across Canada

Application 2004-0166-2
Broadcasting Public Notice CRTC 2004-25
16 April 2004

Change in effective control

The Commission ***approves*** *the transfer of all of Persona Communications Inc.'s shares to Canadian Cable Acquisition Company Inc. (CCAC), subject to a* ***condition precedent*** *stipulating that this approval will only be effective provided the applicant submits, within 60 days of the date of this decision, a duly executed shareholders agreement for CCAC, which is acceptable to the Commission and which incorporates the modifications specified in this decision.*

The application

1. The Commission received an application by Persona Communications Inc. (Persona), formerly known as Regional Cablesystems Inc., for authority to effect a change in its effective control through the transfer of all of its shares to Canadian Cable Acquisition Company Inc. (CCAC).

The parties

2. Persona is the licensee of a number of cable broadcasting distribution undertakings (BDUs) serving various communities across Canada. It also provides telecommunications services to residential and commercial customers in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Newfoundland and Labrador. Persona is a wholly-owned subsidiary of Persona Inc., a corporation that is effectively controlled by its board of directors whose members are all Canadians.

3. Persona Inc. is owned by five groups of shareholders. Three of the shareholder groups are Canadian (79.56 per cent) and two are non-Canadian (20.44 per cent).

4. The purchaser, CCAC, is a wholly-owned subsidiary of Acquisition Holdco. Canco, which is equally owned by CIBC Wood Gundy Capital (SFC No. 2) Inc. (CIBC) and TD Capital Canadian Private Equity Partners Ltd. (TD), holds 67 per cent of the voting shares of Acquisition Holdco. The remaining 33 per cent of the voting shares of Acquisition Holdco would be held by HMTF General Partnership, a partnership that is made up of various non-Canadian family trusts and funds (the investors). These investors are the shareholders of Hicks, Muse, Tate & Furst Incorporated (HMTF), a non-Canadian owned and controlled private investment firm.

The proposed transaction

5. Under the proposed transaction, CCAC would acquire all of the issued and outstanding shares of Persona, at a total value of $406 million. Simultaneously, CCAC would sell the shares of its affiliated corporation, Persona Communications (Barbados) Inc., adjusting the total value of the proposed transaction to $360 million. The purchase price would be satisfied by a combination of equity investment and debt in Acquisition Holdco.

6. To finance the acquisition, CIBC, TD and the investors (also referred to as HMTF) would collectively contribute $155 million in equity financing. CIBC would contribute $15 million (10 per cent) and indirectly hold 33.5 per cent of the voting shares of Acquisition Holdco, TD would contribute $40 million (25 per cent) and indirectly hold 33.5 per cent of the voting shares of Acquisition Holdco and HMTF would contribute $100 million (65 per cent) and hold 33 per cent of the voting shares of Acquisition Holdco. The remaining financing would be provided by TD Bank, which would make $270 million in credit available to Acquisition Holdco.

7. CCAC and Acquisition Holdco would each have a board of directors consisting of eleven members. Under the terms of the proposed shareholders agreement, HMTF would have the right to nominate five members (45 per cent) to each board, TD would have the right to nominate three members (27 per cent), and CIBC would have the right to nominate two members (18 per cent). The remaining member of each board would be the chief executive officer (CEO) of the respective company. Should a board of directors increase to twelve members, HMTF would be entitled to nominate the additional member, thereby increasing its representation to 50 per cent of the board. If, at any time, a situation should arise in which there would not be at least two directors on a company board that were nominated by TD and/or CIBC, the investors would elect two Canadian independent members. The board of directors would also be reduced to five members, consisting of the two Canadian independent members, two nominees of HMTF, and the CEO.

8. Under the terms of the proposed shareholders agreement, major decisions would require the approval of at least two-thirds of the board of directors of the respective company, or eight of the eleven members. The applicant indicated that major decisions would, among other things, include the approval of: any contract exceeding $5 million; any annual capital expenditure exceeding $24 million; the appointment, dismissal or changes in the remuneration of the CEO; and the disposition of business investments.

9. In addition to the requirement noted above for board approval of major decisions, the terms of the proposed shareholders agreement would provide HMTF with approval rights over the following actions:

- any amendment to any provision of the certificate or incorporation articles, by-laws or other constituting documents of Acquisition Holdco or any of its subsidiaries;

- any authorization, issuance or creation of debt or equity securities of Acquisition Holdco;

- any authorization, declaration or payment of any dividends or any other distribution with respect to the debt securities, the voting shares, or the non-voting shares;

- any liquidation, dissolution or winding up of Acquisition Holdco; any merger consolidation; amalgamation; recapitalization sale of all shares or similar transactions involving Acquisition Holdco or any of its subsidiaries; any sale of all or substantially all of the assets of Acquisition Holdco or any of its subsidiaries;

- the approval of CCAC's annual budget if the aggregate amount of such budget varies by more than 5 per cent of the approved budget of the immediately preceding fiscal year;

- any acquisition or divesture of, or investment in, any business; and

- any material change in the line or nature of the business of Acquisition Holdco or any of its subsidiaries.

10. HMTF submitted that the proposed approval rights are consistent with protective rights normally granted to minority shareholders in private equity financings.

Interventions

11. The Commission received 33 interventions in connection with this application: 29 in support, two in opposition and one that commented on the proposal.

12. In his opposing intervention, Mr. Jason Gow stated that he is a former manager and shareholder of Saugeen Telecable Limited (Saugeen), a company that was acquired by Persona in 2003.[1] Mr. Gow questioned the value of the proposed transaction in relation to Persona's acquisition of Saugeen and, in particular, the assigned value per subscriber. He also expressed concern that a non-Canadian entity would have significant influence over a Canadian licensee.

13. Mr. Bernard Hickey also opposed the proposed transaction. In his intervention, however, Mr. Hickey did not comment on the merits of the application itself. Mr. Hickey's opposition was related to a legal and financial dispute that originated in 1982 between him and the principals of Persona.

14. The Canadian Film and Television Production Association (CFTPA) offered general comments on issues arising from the application with respect to the effective control of Persona.

15. The applicant did not respond to the interventions.

The Commission's analysis and determination

16. Based on its analysis of the record, the Commission is satisfied that the acquisition of Persona by CCAC would provide the licensee with the financial resources needed to strengthen and sustain its competitive position and enable it to provide better service to consumers. With regard to concerns expressed by Mr. Gow, the Commission finds that the proposed value of the transaction is reasonable. Furthermore, based on the evidence filed with the application, the Commission has no concerns with respect to the availability or the adequacy of the required financing. Accordingly, the Commission considers that approval of the proposed acquisition would be in the public interest. The Commission, however, is concerned by some of the proposed terms and conditions of the acquisition of Persona.

17. As part of its determination of whether a company is eligible to hold a broadcasting licence, the Commission applies the *Direction to the CRTC (Ineligibility of non-Canadians)* P.C. 1997-486, 8 April 1997, as amended by P.C. 1998-1268, 15 July 1998 (the Direction). The Commission notes that Persona's application satisfies the share ownership requirements set out in the Direction.

18. The Direction also provides that no broadcasting licence may be issued to an applicant that is effectively controlled by a non-Canadian, whether on the basis of personal, financial, contractual and business relations or any other considerations relevant to determining control.

[1] In *Acquisition of assets*, Broadcasting Decision CRTC 2003-536, 6 November 2003, the Commission approved an application by Persona Communications Inc. to acquire the assets of cable BDUs from Saugeen Telecable Limited and certain affiliated companies.

19. On this issue of effective control, the Commission shares the concerns raised by Mr. Gow regarding HMTF's potential influence over Persona and has noted the CFTPA's comments regarding who would hold the ultimate control of Persona if the proposed transaction were approved. Under the proposed shareholders agreement, HMTF, a non-Canadian shareholder, would contribute the most equity of all three investors, and would control five of the eleven seats of CCAC's board of directors and the board of its parent company. Given that major decisions would require the approval of at least two-thirds of the board of directors, no major decision could be approved without the consent of the HMTF-nominated board members, which would, in effect, allow a non-Canadian entity veto power over major decisions related to a Canadian licensee's operations, as noted in paragraph 8 above. The Commission considers that, in the event that the board of directors and HMTF's board representation were reduced to allow the appointment of two Canadian independent directors, HMTF would, in fact, be able to exercise an even greater level of influence over CCAC because HMTF would have the right to nominate two of the five members and the third member, the CEO, would be directly tied to HMTF because it would have veto power over his appointment, dismissal and level of remuneration. Furthermore, the proposed shareholders agreement does not provide a mechanism to deal with a situation where HMTF vetoes a major decision that the other directors want to approve.

20. The proposed shareholders agreement would also provide HMTF with the right of approval over important aspects of the licensee's operations, as noted in paragraph 9 above. While the Commission recognizes that a certain degree of protection is common in private equity financings for minority shareholders, the Commission finds that the right of prior approval of the operating budget, the sale of the company or its assets and the payment of dividends would give a HMTF significant influence over CCAC's business affairs.

21. In view of the foregoing, the Commission finds that under the proposed shareholders agreement, HMTF would be in a position to exercise effective control of CCAC, which would be acquiring a Canadian licensee. The Commission, therefore, determines that approval of the application under the terms and conditions set out in the proposed shareholders agreement, as filed, would be contrary to the Direction. In the circumstances, the Commission determines that approval of the proposed transaction would only be warranted if it was subject to conditions that would prevent HMTF from exercising effective control over the licensee. The Commission, therefore, **approves** the application by Persona Communications Inc. for authority to effect a change in its effective control through the transfer of all of its shares to Canadian Cable Acquisition Company Inc., subject to the **condition precedent** that the applicant submit, within 60 days of the date of this decision, a duly executed shareholders agreement for CCAC, which is acceptable to the Commission and which incorporates the modifications set out below.

22. The shareholders agreement must provide wording, acceptable to the Commission, indicating that the following elements no longer fall within the major decisions category, which would have provided HMTF with veto power, but rather be subject to CCAC's board of directors and require the affirmative vote of the simple majority of directors:

- CCAC's contracts that exceed $5 million;
- CCAC's annual capital expenditures that exceed $24 million;
- the appointment, dismissal or changes to the remuneration of CCAC's CEO; and
- the disposition of CCAC's business investments.

23. In addition, the shareholders agreement must provide that, in the event that the HMTF-nominated board members veto a major decision, a majority of the board of directors has the right to call another directors' meeting of the licensee at which the rejected major decision will be reconsidered and the approval of which will require only a majority of the board of directors.

24. Further, the shareholders agreement must ensure that the following elements no longer require HMTF's prior approval, but rather be subject to CCAC's board of directors and require the affirmative vote of the simple majority of directors:

- the disposition of CCAC's business investments;
- the sale of CCAC or any of its assets; and
- any authorization, declaration or payment of any of CCAC's dividends

25. Finally, the clause set out in the current proposed shareholders agreement that provides for a reduction in the size of the board of directors and gives HMTF additional control by granting it the right to nominate two of the five directors of a reduced board must be deleted from the shareholders agreement.

26. The Commission notes that an approval that is subject to a condition precedent is effective only if the terms of that condition are met.

27. The Commission further notes that the concerns raised in Mr. Hickey's intervention do not fall within the Commission's jurisdiction.

Secretary General