



Broadcasting Decision CRTC 2016-110

PDF version

Reference: 2016-22

Ottawa, 23 March 2016

Shaw Communications Inc., on behalf of Shaw Media Inc. and its licensed subsidiaries Across Canada

Application 2016-0055-2, received on 15 January 2016

Various television services and stations – Corporate reorganization (transfer of shares)

*The Commission **approves** an application by Shaw Communications Inc. (Shaw Communications), on behalf of Shaw Media Inc. and its licensed subsidiaries (Shaw Media), for authority to effect a multi-step corporate reorganization by transferring all of Shaw Communications' shares in Shaw Media to Corus Entertainment Inc. or one of its subsidiaries (Corus).*

Consistent with the Commission's long-standing policy on tangible benefits and given that there is no change to the effective control of the licensees or the undertakings, this transaction does not require the payment of tangible benefits. Since the creation of Corus in 1999, the Commission has considered Shaw Communications and Corus to be effectively controlled by the same person, namely Mr. JR Shaw. The proposed reorganization does not change who will effectively control these companies and their services. From a regulatory perspective, the Commission has consistently considered Shaw Communications and Corus to be a single voice under the Commission's Diversity of Voices Policy and nothing changes in this regard under the proposed reorganization.

This corporate reorganization will contribute to a sustainable, healthy and competitive Canadian broadcasting system, consistent with the public interest and the objectives of the Broadcasting Act. In particular, approval of the application will contribute to the creation of a strong, well-financed and content-focused company equipped with increased scale and a strong mix of complementary media properties and brands that are well positioned to succeed in the highly competitive domestic and international broadcasting environments. Given that this is a corporate reorganization, the transaction will be seamless for Canadian television viewers.

Application

1. Shaw Communications Inc. (Shaw Communications), on behalf of Shaw Media Inc. and its licensed subsidiaries (Shaw Media), filed an application for authority to effect a multi-step corporate reorganization by transferring all of Shaw Communications' shares in Shaw Media to Corus Entertainment Inc. or one of its subsidiaries (Corus).

2. Corus is a publicly traded company that is effectively controlled by Mr. JR Shaw pursuant to the Shaw Family Living Trust agreement. Shaw Media is a wholly owned subsidiary of Shaw Communications, also a publicly traded company effectively controlled by Mr. JR Shaw pursuant to the Shaw Family Living Trust agreement. Both Shaw Media and Corus are controlled by Mr. JR Shaw but are operated by separate management teams and overseen by separate boards of directors. Prior to 2001, the Commission's policy had been to restrict cable distributors from holding or increasing their ownership interests in discretionary services. The Corus-Shaw Communications structural separation was carried out to address that policy concern. In Public Notice 2001-66-1, the Commission amended its policy and permitted cable distributors and their related entities to purchase interests, including controlling interests, in Canadian discretionary services. In Broadcasting Decision 2010-782, the Commission approved an application by Shaw Communications for authority to change the effective control of Canwest Global's licensed broadcasting subsidiaries, which included both conventional television stations and discretionary services.
3. Pursuant to the share purchase agreement, Corus would purchase the shares of Shaw Media for \$2.65 billion. In accordance with Broadcasting Regulatory Policy 2014-459 (the Tangible Benefits Policy), the applicant did not propose to pay any tangible benefits.
4. The corporate reorganization would be completed through one of the three series of transactions proposed below.

Option 1

Shaw Communications would sell the common shares of Shaw Media to Corus in consideration for cash and newly issued Class B non-voting shares by Corus.

Option 2

Through various transfers, one wholly owned subsidiary of Corus (Holdco1) would acquire the common shares of Shaw Media in consideration for non-voting preferred shares of Holdco1. Holdco1 would then convert its shares of Shaw Media into non-voting preferred shares and Corus would subscribe to the voting shares of Shaw Media.

Option 3

Through various transfers, one wholly owned subsidiary of Shaw Communications (Holdco2) would acquire the common shares of Shaw Media. Holdco2 would then transfer its shares to 1507441 Alberta Inc. (Holdco3), another wholly owned subsidiary of Shaw Communications. Finally, Corus would acquire the shares of Holdco3.

5. None of the proposed options would result in a change of the effective control of the undertakings, as effective control would continue to be exercised by Mr. JR Shaw throughout each step and subsequent to the closing of the transaction.

6. The proposed transaction involves the transfer of 22 discretionary television services and 12 conventional television stations.

Interventions and applicant's reply

7. The Commission received interventions in support of and in opposition to the application as well as comments. Most of the interventions were submitted by independent producers, firms representing independent producers and other members of the creative community, as well as citizen and consumer advocacy groups and individual Canadians. Of the 40 interventions received, eight were in opposition to the application. The applicant replied to the interventions. The public record for this application can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.

Regulatory framework

8. Pursuant to section 5(1) of the *Broadcasting Act* (the Act), the Commission regulates and supervises all aspects of the Canadian broadcasting system with a view to implementing the numerous objectives of the Canadian broadcasting policy set out in section 3(1) of the Act. The review of ownership transactions is an essential element of the Commission's regulatory and supervisory mandate under the Act.
9. For this purpose, section 14(4) of the *Television Broadcasting Regulations, 1987* and section 10(4) of the *Specialty Services Regulations, 1990* (collectively, the Regulations) both require a licensee to obtain the Commission's prior approval in respect to any act, agreement or transaction that directly or indirectly would result in, among other things:
 - 14(4)(a) a change by whatever means of the effective control of its undertaking;
 - (b) a person alone
 - (i) who controls less than 30 per cent of the voting interests of the licensee, having control of 30 per cent or more of those interests,
 - (ii) who controls less than 30 per cent of the voting interests of a person who has, directly or indirectly, effective control of the licensee, having control of 30 per cent or more of those interests...
10. The Commission also takes into account its regulatory policies and information bulletins when exercising its discretionary authority to approve a proposed ownership transaction.
11. In rendering a decision, the Commission must be persuaded that, on balance, the proposed transaction benefits the Canadian broadcasting system and is in the public interest.

Commission's analysis and decisions

12. After examining the public record for this application in light of applicable regulations and policies, the Commission considers that the issues it must address are the following:

- Does the proposed transaction result in a change in effective control?
- Does the proposed transaction trigger the payment of tangible benefits?
- Is the proposed transaction in the public interest?

Change in effective control

13. When assessing an ownership transaction, the Commission must first determine whether the transaction involves a change in effective control of a broadcasting undertaking. A change in effective control generally triggers a review to determine eligibility to hold a licence, ineligibility of non-Canadians and whether tangible benefits should be imposed.

14. Section 3(1)(a) of the Act states that the Canadian broadcasting system shall be effectively owned and controlled by Canadians. The Regulations state that effective control of a licensee or its undertaking includes situations in which:

- (a) a person controls, directly or indirectly, other than by way of security only, a majority of the voting interests of the licensee;
- (b) a person has the ability to cause the licensee or its board of directors to undertake a course of action; or
- (c) the Commission, following a public hearing of an application for a licence, or in respect of an existing licence, determines that a person has such effective control and sets out that determination in a decision or public notice.

15. Some interveners raised questions as to whether the structural separation (separate directorships, board composition, accounting, etc.) that exists between the licensed subsidiaries of Shaw Communications and Corus is such that they should be considered as two separate entities for the purpose of determining effective control.

16. In its review of an application, the Commission considers any and all corporate governance arrangements that may have a substantial impact on major decisions by the licensee, including but not limited to those related to day-to-day operations. The management structure of a licensee and the related impact on programming and operational decisions can be considerations when assessing effective control.

17. To assess and determine the effective control of Shaw Media and Corus, the Commission examined the principal corporate structure documents of both companies and is satisfied that:

- Mr. JR Shaw indirectly controls the majority of the voting interests of the licensees; and
 - Mr. JR Shaw has the ability to cause the licensee or its board of directors to undertake a course of action as all major decisions related to both entities are dictated by provisions of the Shaw Family Living Trust. This trust is directly owned by a corporation solely owned and controlled by Mr. JR Shaw.
18. Further, the structural separation between Shaw Communications and Corus has existed since 1999 when Corus was spun off from Shaw in response to the Commission's requirement for structural separation between the distribution and the programming functions of vertically integrated entities. However, this did not result in a change in the effective control of Shaw Communications and Corus, which continued to be exercised by Mr. JR Shaw. The Commission has since consistently recognized this common control in its policies and regulations related to transfers of ownership, diversity of ownership and ownership concentration.
19. As such, the Commission considers that both entities are controlled by Mr. JR Shaw and that the proposed transaction does not constitute a change in effective control of Shaw Media, which has and will continue to be exercised by Mr. JR Shaw.

Application of the Tangible Benefits Policy

20. In the absence of a competitive licensing process for transfers of ownership or control of radio or television services, the purchaser is required to make significant and unequivocal financial contributions to the broadcasting system as a whole and to the communities served by the services in question. These contributions, known as tangible benefits, are defined as direct financial contributions that are made to Canadian content development and represent 10% of the value of a transaction for television services.
21. With respect to the proposed transaction, some interveners were of the view that the Commission should require the payment of tangible benefits. The Writers Guild of Canada (Writers Guild) submitted that the Commission should consider applying the Tangible Benefits Policy to this transaction, given the unprecedented nature and size of the transaction, and that, in their view, it involves a change in control at the programming and operational level. The Canadian Media Producers Association (CMPA) argued that the Commission should take into consideration the practical impact of further consolidation on the broadcasting system and not solely base its determination on considerations regarding effective control.
22. Under the Commission's Tangible Benefits Policy, were tangible benefits payable, the vast majority of the benefits would be directed to the independent production sector as well as the actors, writers and other creators who work on their productions.

23. In Broadcasting Decision 2013-738, the Commission approved the transfer of Historia and Séries+ from Shaw Media to Corus and recognized the common effective control of Shaw Media and Corus when it determined that tangible benefits would not be required. Specifically, the Commission stated:

... Corus and Shaw are both ultimately controlled by JR Shaw. Thus, the Commission considers that there is no change in ultimate control in the case of the acquisition of Shaw's interest (50%). However, the acquisition of Bell Media's interest (50%) is subject to the tangible benefits policy.

24. Furthermore, when the Commission reviewed the Tangible Benefits Policy in 2014, some parties suggested that tangible benefits should be required for all ownership transactions, including those where there was no change in effective control. In the policy, the Commission maintained the approach whereby tangible benefits would generally be required for transactions involving a change in effective control and would not be required for those ownership transactions that did not involve a change in effective control.

25. Consistent with the Tangible Benefits Policy, given that the proposed transaction will not change the effective control of the licensees or the undertakings, the Commission is not imposing tangible benefits. Moreover, the Commission sees no reason to make an exception to the Tangible Benefits Policy in this instance.

Public interest

26. Since the Commission does not solicit competing applications for changes to the ownership or effective control of broadcasting undertakings, the burden is on the applicant to show that approval of the application is in the public interest, consistent with the overall objectives of the Act.

27. To determine whether a proposed transaction is in the public interest, the Commission takes into account a wide set of factors set out in the Act, including the nature of programming and service to the communities involved, as well as regional, social, cultural, economic and financial considerations. The Commission must be persuaded that the proposed transaction benefits Canadians and the broadcasting system.

28. In Broadcasting Regulatory Policy 2015-86, the Commission stated that a successful framework for Canadian programming must seek to achieve the following outcomes:

- Canadians have access to and are watching compelling Canadian programming that reflects a diversity of viewpoints on a variety of platforms;
- broadcasters are motivated to invest in compelling content made by and for Canadians, generating revenues that are, in turn, reinvested in the creation of content; and
- broadcasters are better able to respond to consumers and adopt creative programming strategies.

29. In that policy, the Commission also stated that domestic demand is no longer sufficient for the production industry to continue to thrive when it is faced with content offerings from around the world. As such, a key driver of success will be the ability to offer compelling programming that caters to world audiences as well.
30. In its assessment of whether the transaction is in the public interest, the Commission considered the applicant's statement that scale is important to be able to compete in a competitive global broadcasting environment, as well as the issue of ownership consolidation and diversity of voices raised by some interveners.
31. Shaw Communications indicated that a lack of scale has resulted in Shaw Media and Corus losing out important advertising opportunities to larger competitors and being outbid for rights to high-quality content by domestic and international licensed and unlicensed competitors. This has led to, among other things, Corus's decision to exit the regional pay television business.
32. According to Shaw Communications, the proposed transaction is consistent with Broadcasting Regulatory Policy 2015-86 and will contribute to achieving the objectives of the Act through the creation of a strong, well-financed and content-focused company equipped with increased scale and a strong mix of complementary media properties and brands that are well positioned to succeed in the highly competitive domestic and international broadcasting environments. It will also protect local television and radio from advertiser erosion and provide financial strength to commission new Canadian programming from independent producers.
33. Several interveners from the independent production community expressed support for the enhanced scale to be achieved with the transaction. Entertainment One stated that this transaction "will bring meaningful opportunities and sustained investment to Canadian talent, independent producers and distributors to continue to deliver original programming for audiences both at home and around the world." Others, such as 9 Story Media Group and Productions Pixcom Inc. were in support of the transaction in light of their existing positive relationship with Corus.
34. In its opposing intervention, the CMPA acknowledged the benefits of the transaction for Corus, stating that "the transaction will make Corus an even stronger and more successful broadcaster" and that "strong broadcasters are essential to both a healthy and sustainable independent production sector and to a Canadian broadcasting system that best serves Canadian audiences."
35. Some interveners from the creative industry expressed concerns that Corus will use its increased size and strength to impose unreasonable licensing terms on independent producers. In this respect, the CMPA suggested that if the Commission were to approve the application, it should impose a condition of licence requiring that Corus negotiate agreed-upon competitive safeguards with the CMPA.

36. The CMPA and the Writers Guild, among other interveners, contended that the transaction would result in changes to the operational decision-making that will effectively result in “one less door to knock on” for producers and one less team of programmers working to differentiate its programming choices to attract and benefit audiences.
37. In the Commission’s view, eliminating the structural separation between the licensed subsidiaries of Shaw Communications and Corus will help achieve scale and contribute to cohesive decision-making. Further, it will remove an impediment that has resulted in lost opportunities in the areas of revenue and content acquisition and hindered the ability of both companies to compete in a highly competitive global broadcasting environment. Shaw Media and Corus will be better positioned to take creative and financial risks alongside strong Canadian-based domestic and global players, including independent producers.
38. Notwithstanding the above, the structural separation that currently exists between Shaw Media and Corus may have provided independent producers with an opportunity to pitch ideas to both Corus and Shaw Media independently. Such a separation may have been to the benefit of certain independent producers who have developed and forged independent relationships with each entity. Its elimination may result in fewer avenues for some independent producers even though the structural separation of Corus from Shaw Communications in 1999 was not carried out to benefit or protect the interests of independent producers.¹
39. However, as stated by the Commission in Broadcasting Regulatory Policy 2015-86:
- The production industry must move towards building sustainable, better capitalized production companies capable of monetizing the exploitation of their content over a longer period, in partnership with broadcasting services that have incentives to invest in content promotion.... [A] robust Canadian production sector is necessary in order to exploit longer-term revenue opportunities of content... [T]his would entail partnerships between well-capitalized independent production companies and broadcasters that own equity in the content and intellectual property.
40. Regardless of how many “doors” exist, the Commission considers that well-capitalized independent producers who can distinguish themselves with compelling content proposals will position themselves for opportunities and achieve success. Furthermore, the applicant is not proposing to close any services and the services will continue to operate under the same terms and conditions of licence as those currently in effect.
41. The conditions of licence relating to Canadian programming expenditures and the percentage of expenditures to be allocated to programs of national interest and independent production companies remain the same. As such, the level of funds available to independent producers as a result of existing expenditure requirements remains unchanged and will be subject to review through an industry-wide lens in the upcoming group-based licence renewal proceeding.

¹ See paragraph 2.

42. Further, the Commission has long recognized the structural separation that exists between the licensed subsidiaries of Shaw Communications and Corus. It has nonetheless consistently treated these entities as being under the common effective control of Mr. JR Shaw when applying regulations, policies and safeguards in the area of concentration of ownership (such as the Diversity of Voices Policy [Broadcasting Public Notice 2008-4], the Vertical Integration Framework [Broadcasting Regulatory Policy 2011-601] and the Wholesale Code [Broadcasting Regulatory Policy 2015-438]).
43. As such, and given that there is no change in effective control, the current safeguards will continue to apply to a combined Shaw Media and Corus and both entities will be required to adhere to the policies in the same manner as other vertically integrated entities.
44. The Commission also considers that imposing additional safeguards on the Shaw Media and Corus licensed subsidiaries as a result of this transaction would raise fairness issues and be unduly burdensome. The addition of safeguards would be inconsistent with the Commission's stated objective in Broadcasting Regulatory Policy 2015-86 that a successful framework for Canadian television programming must seek to remove regulatory barriers to entry, to programming adaptation and to domestic competition and must ensure that programming diversity is governed by market forces, where possible.
45. In addition, the Diversity of Voices Policy applies solely where there has been a change of effective control. In the Diversity of Voices Policy, the Commission stated:
- The Commission, as a general rule, will 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. Specifically,
- 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 [over-the-air (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.
46. Given that the proposed transaction does not constitute a change in effective control, the transaction does not need to be reviewed against the Diversity of Voices Policy. Moreover, Corus and Shaw have consistently been treated by the Commission as a single voice for the purposes of the Diversity of Voices Policy. For example, in Broadcasting Decision 2010-782, the Commission considered Shaw Communications and Corus as representing a single voice when it approved the acquisition of Canwest Global's licensed broadcasting subsidiaries by Shaw Communications.

47. Similarly, in Broadcasting Decision 2013-738, the Commission stated that for the purpose of implementing the Vertical Integration Framework, Shaw and Corus are defined as a single vertically integrated entity.² Under the new distribution rules set out in the Let's Talk TV policies, Corus and Shaw Communications continue to be deemed a single entity.
48. Consequently, the total television audience share held by Mr. JR Shaw and the consolidation of the Canadian broadcasting system in general will remain unchanged as a result of this proposed transaction.
49. The Canadian broadcasting industry is small: all players are interdependent and the financial health of one has a direct impact on the other. Independent producers need successful broadcasters just as broadcasters need successful independent producers. This transaction contributes to a sustainable, healthy and competitive Canadian broadcasting system which can only benefit independent producers.
50. Consequently, the Commission finds that the proposed transaction is consistent with the policy objectives set out in Broadcasting Regulatory Policy 2015-86 and other relevant policies and, thus, with the achievement of the objectives of the Act. Although the Commission recognizes that the proposed reorganization could have a negative impact on some parties, the impact is not undue and is outweighed by the overall benefits of the transaction in contributing to a sustainable, healthy and competitive Canadian broadcasting system. As such, the Commission considers that, on balance, the transaction is in the public interest.
51. In Broadcasting Notice of Consultation 2016-44, the Commission called for the submission of licence renewal applications for television licences owned by large ownership groups. As part of the licence renewal proceeding, the Commission will hold an appearing public hearing in which it intends to evaluate the overall group-based approach to licensing, including Canadian programming and programs of national interest expenditure requirements, with a view to implement some of the policy determinations set out in Broadcasting Regulatory Policy 2015-86. Some of the concerns raised by interveners can be addressed as part of that broader review.

Conclusion

52. In light of all of the above, the Commission **approves** the application by Shaw Communications Inc., on behalf of Shaw Media Inc. and its licensed subsidiaries, for authority to effect a multi-step corporate reorganization by transferring all of Shaw Communications Inc.'s shares in Shaw Media Inc. to Corus Entertainment Inc. or one of its subsidiaries.
53. Following completion of the transaction, the services will continue to operate under the same terms and conditions as those in effect under the current licences.

² See note in section 4.2 h) Ownership Groups, *Communications Monitoring Report 2015*.

54. Shaw Communications is required to inform the Commission once each step of the transaction has been completed.
55. The Commission also **directs** the applicant to file executed copies of all corporate documents (including but not limited to partnership agreements, partnership registrations, certificate and articles of incorporation, bylaws, certificate and articles of dissolution, and certificate and articles of amalgamation) **by 22 April 2016**.

Determining the need for an oral public hearing

56. Some interveners requested that the Commission hold an oral public hearing for this application, citing the size of the transaction and its impact on the Canadian broadcasting system. They suggested that it would be in the public interest to provide parties with an opportunity to discuss their concerns further within the context of an appearing public hearing.
57. As set out in Broadcasting Information Bulletin 2008-8-2, applications for changes in effective control or certain transfers of shares of broadcasting undertakings (share transfer applications) may be processed in one of three ways:
- administratively (a non-public review of routine transactions);
 - by way of a notice of consultation (with a request for written interventions); or
 - by way of a notice of consultation (notice of hearing) where parties appear before the Commission and make both written and oral submissions.
58. Share transfer applications may be reviewed administratively if the transaction involves an intra-corporate reorganization and there is no change in effective control.
59. Since 2007, the Commission has processed an average of 50 ownership transactions per year, many of which were processed administratively and involved corporate reorganizations of some of Canada's largest broadcasting licensees.
60. The Commission has issued a notice of consultation asking for written comments when:
- an application does not meet the criteria to be reviewed administratively; or
 - the transaction is of such importance that, in the Commission's opinion, it warrants a public process in the form of a notice of consultation.
61. If, in response to a notice of consultation, the Commission receives written interventions that raise substantive concerns that it considers warrant oral submissions and further discussion, it may then decide to hold an appearing public hearing.
62. The Commission may also proceed immediately to an appearing public hearing if the application involves a transaction the importance of which is such that, in the Commission's opinion, it warrants further discussion.

63. The decision of how best to assess the merits of a particular transaction falls clearly within the Commission's discretion and is based on balancing a number of factors, including the transparency of the process for all Canadians, the significance of the transaction to the broadcasting system, the benefits of receiving input from the public and the industry and obtaining an appropriate evidentiary record to make an informed decision.
64. The Commission reviews the vast majority of applications it receives through a written public process under its various statutory authorities. Because appearing public hearings are resource intensive, cause delay and thereby create unwarranted market and regulatory uncertainty, they are reserved for applications where the Commission judges that they are necessary to complete and test the evidentiary record to an extent that would not be possible by a written process alone.
65. In the present case, and consistent with Broadcasting Information Bulletin 2008-8-2, the Commission could have reviewed this transaction administratively. However, the Commission determined that it was in the public interest to issue a notice of consultation so as to provide all interested persons the opportunity to comment on the proposed transaction, given the financial significance of the transaction as well as the number of services affected.
66. The Commission has carefully considered the question of whether to hold an appearing public hearing for this transaction and has determined that:
- the transaction as proposed is straightforward, in the nature of an intra-corporate reorganization involving the transfer of broadcasting assets between two companies under common control by way of a share transfer;
 - interested persons have had the full opportunity to make comprehensive written submissions on the transaction;
 - it has all the information it requires to assess the issues raised by the transaction and by the parties; and
 - the application is consistent with current applicable policies and regulations.
67. Accordingly, holding an appearing public hearing is not in the public interest as it would delay the processing of the application and would provide little, if any, benefit to the Commission in its consideration of the application. Moreover, such an additional process would create unwarranted market and regulatory uncertainty concerning two publicly traded companies.

Employment equity

68. Because this licensee is subject to the *Employment Equity Act* and files reports concerning employment equity with the Department of Employment and Social Development, its employment equity practices are not examined by the Commission.

Secretary General

Related documents

- *Call for licence renewal applications*, Broadcasting Notice of Consultation CRTC 2016-44, 8 February 2016
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86, 12 March 2015
- *Simplified approach to tangible benefits and determining the value of the transaction*, Broadcasting Regulatory Policy CRTC 2014-459, 5 September 2014
- *Historia and Séries+ – Acquisition of assets and change in effective control*, Broadcasting Decision CRTC 2013-738, 20 December 2013
- *A guide to the CRTC application process for changes in effective control and certain transfers of shares of broadcasting undertakings as well as for the acquisition of assets of broadcasting undertakings – Change in the manner of issuing related information bulletins*, Broadcasting Information Bulletin CRTC 2008-8-2, 6 December 2013
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011
- *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2010-782, 22 October 2010
- *Diversity of voices – Regulatory policy*, Broadcasting Public Notice CRTC 2008-4, 15 January 2008
- *Ownership of analog discretionary services by cable undertakings – amendment to the Commission's policy*, Public Notice CRTC 2001-66-1, 24 August 2001

* *This decision is to be appended to each licence.*

Commissioner Raj Shoan's dissent on a procedural matter

Upon approval of this transaction, amongst developed countries, Canada will have one of the most consolidated media industries in the world.³ This may or may not be an appropriate direction for the country given its large geography, relatively small population base and our proximity to the powerhouse production and media entities of our neighbour to the south. Regardless, I offer no opinion on the merits of the Shaw-Corus application and have abstained from voting upon it. In my view, in the absence of a fulsome public hearing to assess a transaction of this size, the Commission cannot possibly have sufficient information and understanding of the potential market impacts to approve the application as filed.

Specifically, following today's decision, Corus Entertainment Inc. (Corus), Bell Media Inc. (Bell) and Rogers Media Inc. (Rogers) will control over 80% of the television viewing audience in Canada's English-language television market. Corus alone will control more than a third of such viewing and Corus and Bell combined will control over 70% of television viewing in Canada's English-language television market. Lastly, through this transaction, Corus will become the dominant player in the acquisition and production of programming in the genres of children's programming, lifestyle programming and programming directed to women in Canada's English-language television market. In my view, on the basis of the potential policy concerns related to this level of market dominance and industry consolidation, a public hearing was warranted.

Some interveners raised the following policy concerns that should have been examined in greater detail at a public hearing:

- market dominance and how such dominance could impact intellectual property rights and associated revenues insofar as their preservation tangibly affects the "independence" of the Canadian independent production sector;
- Corus's stranglehold over the acquisition and production of programming in the genres of children's programming, lifestyle programming and programming directed to women; and
- whether the operational efficiencies that Corus intends to seek over the next few years will impact the operations, news or otherwise, of the over-the-air television stations acquired from Shaw.

Applicable Law and Policy

The *Broadcasting Act* contains a number of policy objectives that can apply in the context of this process, including the following:

3 (1) It is hereby declared as the broadcasting policy for Canada that

- (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

³ While effective control will remain with JR Shaw, two structurally separate companies with separate boards of directors and programming teams will be reduced to one. Intervenors referred to this change as "one less door to knock on." It is in this sense that I refer to consolidation.

- (i) the programming provided by the Canadian broadcasting system should
 - (ii) be drawn from local, regional, national and international sources,
 - (v) include a significant contribution from the Canadian independent production sector;
- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
 - (i) contribute significantly to the creation and presentation of Canadian programming

In addition, in *Diversity of Voices – Regulatory policy, Broadcasting Public Notice CRTC 2008-4*, 15 January 2008 (the Diversity of Voices policy), the Commission stated at paragraph 37 with respect to market dominance that, “while this concern is largely an economic issue relating to questions of competition, issues of dominance also have social and cultural dimensions. The gate keeping powers that can result from market dominance may affect the diversity of programming within the Canadian broadcasting system. What is carried, what is commissioned, what is broadcast – these are all issues that intersect with the question of market dominance.”

At paragraph 87 of the Diversity of Voices policy, the Commission concluded that, **barring other policy concerns**, it would 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 over-the-air services (emphasis mine). As noted by Corus, this transaction will result in control by JR Shaw of 34.5% of total television audience share.

Analysis

Before delving into the policy issues raised by interveners, it is important, in my view, to acknowledge the range of interventions received from the independent production sector in this process. Interventions were received from:

- The Canadian Media Producers Association (CMPA), which represents more than 350 companies engaged in the development, production and distribution of English-language television programs, feature films and digital media;⁴
- The Alberta Media Production Industries Association, which has 185 member-companies, representing more than 2,000 industry professionals;⁵
- FilmOntario, an industry-funded, non-partisan screen-based (film/interactive/television) consortium 30,000 strong, of companies, producers, unions, guilds, financial services and organizations within Ontario;⁶

⁴ <http://www.cmpa.ca/about-cmpa/overview>

⁵ <http://ampia.org/about-ampia/about-ampia/>

- Manitoba Film and Music, which supports industry organizations in order to develop the business skills and talents of developing and established filmmakers and music recording professionals;⁷
- On Screen Manitoba, a non-profit professional association that includes both individuals (producers, writers, directors and other industry professionals) and organizations (production companies, labour groups, distributors, broadcasters, service suppliers, training bodies and exhibitors) representing some 1,500 media production industry professionals;⁸
- The Newfoundland and Labrador Film Development Corporation, which has been mandated to promote the development of the indigenous film and video industry in Newfoundland and Labrador, as well as to promote Newfoundland and Labrador in national and international film and video markets as a location for film, television, and commercial productions;⁹
- The Saskatchewan Media Production Industry Association,¹⁰ a provincial, member-based non-profit organization that acts as an advocate for all personnel related to the making and exhibiting of media productions and helps to create an environment that provides opportunities for the production, promotion and appreciation of media production in Saskatchewan;¹¹ and
- The Nunavut Film Development Corporation (in partnership with the TV Nunavut Educational Broadcast Society), the film commission and funding agent for the territory of Nunavut, which is responsible for fostering and promoting the development and growth of the film, television and digital media industry in Nunavut.¹²

I was impressed that this abbreviated process attracted such a wide range of national, provincial and territorial interventions from this sector. Virtually all of these interveners were united in their call for a public hearing.

These interventions were in addition to the thoughtful submissions of various unions and trade organizations as well as policy groups and organizations representing niche programming.

Although the totality of these submissions was not sufficient to convince my colleagues that a public hearing was warranted, they were demonstrative of a highly engaged sector of the broadcasting industry and I thank them for their efforts and informative interventions.

⁶ <http://www.filmontario.ca/>

⁷ mbfilmmusic.ca

⁸ <http://onscreenmanitoba.com/osm-what-we-do/about-on-screen-manitoba/>

⁹ <http://www.nlfdc.ca/default.aspx>

¹⁰ The intervention refers to this association as the “Saskatchewan Motion Picture Industry Association.”

¹¹ <http://www.smpia.sk.ca/about-us.htm>

¹² <http://www.nunavutfilm.ca/about>

Market Dominance and Intellectual Property

The potential market dominance to be exercised by Corus with respect to global intellectual property rights following approval of the transaction was a major recurring theme throughout the interventions. Several producers or law firms representing producers noted the dynamic, stating that they increasingly found themselves “on the front lines of an uphill battle to protect and preserve independent producers’ rights to their intellectual property and the revenues associated with those rights.”

The Documentary Organization of Canada (DOC) noted the following: “Producers, like Broadcasters and their shareholders, are in business. This requires that they must retain copyright ownership in their own programming and they must have the ability to sell their product to the marketplace both at home and abroad. Retaining these rights is a minimum for sustainability of these small businesses.”¹³

Rights protection was not an issue limited to small business, however. Entertainment One, one of the country’s largest producers, shared the same concern. While Entertainment One was supportive of the transaction, its support was contingent upon “the assumption that Canadian creators and independent producers, as well as independent studios and distributors, will continue to have meaningful control, ownership and participation in the content that is commissioned by [Corus-Shaw].”¹⁴

The fear was that, if the merged Corus-Shaw used its size and strength to impose unreasonable and inequitable program licensing terms on independent producers, then Corus’s post-transaction strategy for success would come at the expense of the independent production sector and its ability to make a significant contribution to the Canadian broadcasting system.¹⁵

The CMPA expressed the view that “it is incumbent on the Commission to fully address the very real concerns this transaction raises related to program diversity, competition, ownership concentration and the undue exercise of market power.”¹⁶

The underlying concern of these arguments, from my reading of the interventions, was the continuing independence of the Canadian production sector. The CMPA submitted that, if Corus had free reign to implement its “own and control” strategy, it would increasingly convert truly independently-produced programs into “Corus service work,” making those programs “independently-produced” in name only. In the view of the CMPA, this would “defeat the Commission’s purpose in requiring broadcasters to commission from independent producers in the first place.”¹⁷

Other interveners echoed these concerns. DOC argued that approval would leave its producers “vulnerable to the likelihood, if not certitude, that this consolidation translates into a situation where the broadcaster will demand everything – all rights, all ownership, all distribution. In

¹³ Paragraph 7, DOC Intervention

¹⁴ Paragraph 5, Entertainment One Intervention

¹⁵ Paragraph E1, CMPA Intervention

¹⁶ Paragraph E17, CMPA Intervention

¹⁷ Paragraph E24, CMPA Intervention

short, independent producers will become producers for hire or producers of convenience.”¹⁸ DOC later squarely identified the policy issue to be discussed by a potential public hearing: “we need to protect our Producers from this kind of practise as it undermines their ability to maintain their businesses.”¹⁹

The Public Interest Advocacy Centre (PIAC) suggested that the transaction would also reduce the diversity of programming in the Canadian broadcasting system, as fewer separately-managed and operating companies would be the programming “gatekeepers” within the private broadcasting industry.²⁰ This dynamic was also alluded to by other interveners as the potential result of “one less door to knock on” for producers when seeking to have their work commissioned by the now increasingly consolidated broadcasting industry. The Commission itself acknowledged this potential policy downside to consolidation in its Diversity of Voices policy.

Ian Cooper (of Cooper Media Law) concluded that, in effect, producers would be “treated as employees when they are lucky enough to have a show in production and independent business owners when they are not.” In Mr. Cooper’s view, such a model would be unsustainable for the vast majority of the (\$7 billion) independent production industry and would be accompanied by a decline in both the quality and quantity of television produced by Canadians for Canadian audiences.

In my view, the potential impact of market dominance on the ability of independent producers to retain their copyright in a meaningful manner was forcefully stated by a broad cross-section of the interveners for this process and, as such, warranted further discussion at a public hearing. If this transaction revealed a growing trend to the detriment of Canadian independent producers, then, through a public hearing, the Commission could have set certain safeguards or protections in place, which may have formed the basis for an industry-wide solution to be discussed and potentially implemented at broadcaster licence renewal proceedings in 2017 and 2018. By declining to investigate this policy issue at this time by way of a public hearing, the Commission may be exacerbating a new and festering challenge to the Canadian independent production sector.

Market Dominance and Genres of Programming

With respect to the impact of the transaction on the creation of specific genres of programming, interveners argued that certain genre sectors would be disproportionately affected.

The CMPA argued that “[w]hile reduced competition among program buyers would impact negatively on all independent producers, producers of lifestyle and women’s programming would be most impacted as they would join producers of children’s programming in effectively being left with a handful of buyers for their shows.” Corus, argued the CMPA, would then be able to exploit its market dominance by dictating the terms of program deals to its commercial advantage and thereby centralizing production, rights and revenues at Corus Quay in Toronto.²¹

¹⁸ Paragraph 6, DOC Intervention

¹⁹ Paragraph 9, DOC Intervention

²⁰ Paragraph 23, PIAC Intervention

²¹ Paragraph E23, CMPA Intervention

The Youth Media Alliance echoed these concerns, noting that Corus's first quarter earnings confirmed its domination of English-language children's programming services. It suggested that, when combined with Shaw Media's assets, the merged entity would also control the top women's and lifestyle channel.

This issue raised by interveners – that one dominant broadcaster in primary control of the suite of programming services in one genre of programming could pick and choose which independence producers would receive licensing fees/production funding and, in so doing, re-shape the number of producers operating in that genre – is a nuanced one arising from the series of policy decisions made by the Commission in the context of its Let's Talk TV television framework review. This is likely a situation that could not have occurred prior to the elimination of the Commission's genre exclusivity policy.

In my view, given the novelty of this policy issue, the likelihood that it will be raised again in the future, and the impact of this specific type of market dominance on the future independence of the Canadian production sector in light of the policy objectives of the *Broadcasting Act*, further discussion was warranted at a public hearing setting.

Operational Efficiencies

Lastly, a detailed discussion of operational efficiencies was one that received scant attention in the interventions received and was, in my view, a glaring omission in the filed application. In *Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310, 27 June 2013, the Commission extracted a commitment from BCE to maintain the local programming levels for all of its conventional television stations as well as those acquired from Astral for a period of four years after the date of the transaction. This concession was sought due to recognition by the Commission of the challenged environment confronting the conventional television industry in Canada.

In this transaction, Corus is acquiring a national network of 15 conventional television stations – far exceeding the number acquired by BCE in its transaction with Astral. Furthermore, the operating environment for over-the-air television in Canada is far more challenged today than it was three years ago at the time of the Bell-Astral transaction. Nonetheless, Corus offered little in the way of tangible protections for the quality and quantity of programming on these services on a going forward basis.

In its intervention, the Forum for Research and Policy in Communications (FRPC) raised legitimate queries as to the potential sources of “operational efficiencies” that Corus would seek.²² It noted that Corus had already advised its shareholders that it must find “an estimated \$40 to \$50 million in annual cost synergies” within the next couple of years and that it expects to find these from “operational efficiencies, the consolidation of facilities and real estate, systems, programming expenditures and other savings.”

²² Paragraph 31, FRPC Intervention

In my view, the ongoing viability of the Global Television network in light of recent challenges to the over-the-air television industry should have been explored in greater detail by the Commission at a public hearing. In *Over-the-air transmission of television signals and local programming*, Broadcasting Regulatory Policy CRTC 2015-24, 29 January 2015, the Commission considered that over-the-air transmission of television signals continues to play an important role in the Canadian broadcasting system at this time, particularly with respect to local programming. A Corus commitment to maintain that local programming was an important policy issue warranting a public hearing.

Conclusion

As noted above, in the Diversity of Voices policy, the Commission concluded that, **barring other policy concerns**, it would 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 over-the-air services.

In my view, important policy concerns raised by interveners warranted a public hearing. Specifically, intervenor concerns relating to market dominance and operational efficiencies were sufficiently pressing to justify a public hearing in which to explore these issues in greater detail.

Consolidation often occurs in stable, mature industries – such as Canada’s communications sector – when entities seek greater “scale.” Such activity, however, should not come at the expense of public policy objectives or a vulnerable sector within the industry as a whole. With this transaction, three companies will control over 80% of the television viewing audience in Canada’s English-language television market. It is difficult to envision a market more consolidated than this one.

In my respectful view, given this degree of consolidation, the Commission should have thoroughly examined through a public hearing whether elements of market dominance could disadvantage, or potentially cripple, certain segments of the industry and inhibit meaningful competition in the Canadian broadcasting and production sectors. Such a review would have been entirely in keeping with and in service to the policy objectives of the *Broadcasting Act*.