



## Broadcasting Decision CRTC 2009-751

Route reference: 2009-461

Additional references: 2009-461-1, 2009-461-2, 2009-461-3 and 2009-461-4

Ottawa, 3 December 2009

**4510810 Canada Inc.**  
Across Canada

*Application 2009-0708-2, received 1 May 2009  
Public Hearing in the National Capital Region  
29 October 2009*

### **HARDtv – Acquisition of assets**

*The Commission **approves** an application by 4510810 Canada Inc. for authority to acquire from 6166954 Canada Inc. the assets of the national, English-language Category 2 specialty programming undertaking known as HARDtv and for a new broadcasting licence to continue operation of the undertaking under the same terms and conditions as those in effect under the current licence.*

### **Introduction**

1. The Commission received an application by 4510810 Canada Inc. (4510810 Canada) for authority to acquire from 6166954 Canada Inc. (6166954 Canada) the assets of the national, English-language Category 2 specialty programming undertaking known as HARDtv and for a new broadcasting licence to operate the undertaking under the same terms and conditions as those in effect under the current licence. The Commission did not receive any interventions with respect to this application.
2. 6166954 Canada, the current licensee of HARDtv, is also the licensee of OUTtv, a national, English-language Category 1 specialty programming undertaking. The shareholders of 6166954 Canada are 6559603 Canada Inc. (6559603 Canada), a corporation jointly owned and controlled by Joy MacPhail and James Shavick (55% of the voting interest), Pink Triangle Press (Pink Triangle) (24.94% of the voting interest), Peace Point Entertainment Group Inc. (Peace Point) (15% of the voting interest) and Re: Source Media Inc. (4.16% of the voting interest).
3. 4510810 Canada is a corporation controlled by Pink Triangle, which holds 55% of the voting interest. The other shareholder is Peace Point with the remaining 45% voting interest. Pink Triangle is a not-for-profit organization controlled by its board of directors and Peace Point is a corporation controlled by Leslie A. Tomlin.

## **Commission's analysis and determinations**

4. After examining the application in light of applicable regulations and policies, the Commission considers that the issues to be addressed in its determinations are the following:
  - the sale of HARDtv within the first licence term;
  - the assessment of the value of the transaction;
  - the assessment of the proposed tangible benefits; and
  - the unfulfilled tangible benefits.

### **Sale of HARDtv within the first licence term**

5. In March 2005, the Commission issued Broadcasting Decision 2005-89 approving an application by 6166954 Canada, a corporation then controlled by William R. Craig, for a broadcasting licence to operate HARDtv. On 10 October 2007 (Broadcasting Public Notice 2007-135), the Commission also approved the transfer of ownership and effective control of 6166954 Canada from William R. Craig to 6559603 Canada. Consequently, approval of the proposed transaction will result in a second change of ownership and control within HARDtv's first licence term.
6. The Commission is generally concerned when broadcasting undertakings are put up for sale within their first licence term or shortly following a previous sale. The general principles and criteria applied by the Commission in assessing these transactions are outlined in Broadcasting Public Notice 2008-4. As indicated in that notice, the Commission is concerned with the following two areas:
  - the integrity of the licensing process; and
  - the potential gain to the vendor.

### **Integrity of the licensing process**

7. In its application, 6166954 Canada indicated that it and its majority shareholder had devoted their resources to the rehabilitation and operation of OUTtv, a programming service with a broader audience base than HARDtv. The applicant further stated that OUTtv would continue to face significant challenges before achieving financial stability and that continued financing of HARDtv was no longer a viable option for 6166954 Canada's majority shareholder.
8. In support of this transaction, the applicant stated that there were few major media outlets serving Canada's gay and lesbian television community and that the sale of HARDtv's assets was the best way to ensure the survival of both programming services. The applicant added that 4510810 Canada's shareholders, which have a voting interest in the ownership of 6166954 Canada, are willing to make additional investments in order to stabilize the service.

9. In light of the above, the Commission is satisfied that the proposed transaction will not compromise the integrity of the licensing process.

**Potential gain to the vendor**

10. The Commission determines the profit from the sale of a recently purchased undertaking by deducting the value of the previous transaction from the value of the current transaction. It is also Commission practice to consider the investment in fixed assets in determining the profit. Finally, the Commission takes into account cumulative losses in assessing the profit remaining to the vendor.
11. At the time of the 2007 transaction, the Commission had determined the value of the transaction for OUTtv and HARDtv to be \$125,000. On the basis that it is common valuation practice for undertakings operating at a loss to base their valuation on the level of revenues, the Commission has determined, using historical financial data up to August 2007, that \$12,500 of the total 2007 transaction value of \$125,000 would be a reasonable value for HARDtv.
12. The applicant indicated that there have been no investments in fixed assets relating to HARDtv since the 2007 transaction. Also, the accumulated deficit since that time amounts to \$138,641. Consequently, the transaction would result in a deficit, as follows:

Value of the transaction	\$ 70,000
Less: value of the previous transaction	\$ 12,500
Profit	<b>\$ 57,500</b>
Less: investments in fixed assets since the previous transaction	\$ 0
	<b>\$ 57,500</b>
Less: cumulative losses since the previous transaction	\$138,641
Deficit of value of the transaction after investments in fixed assets and value of previous transaction	<b>-\$ 81,141</b>

13. In light of the above and based on the financial evidence provided by the applicant, the Commission is satisfied that the applicant would not realize an unreasonable financial gain from the sale of HARDtv.

**Assessment of the value of the transaction**

14. Because the Commission does not solicit competing applications for authority to transfer the ownership of television programming undertakings, the onus is on the applicant to demonstrate that the proposed value of the transaction is acceptable and reasonable. In accordance with the terms of the Purchase and Sale Agreement, the applicant submitted that the value of this transaction was \$70,000, the price paid.

15. Since the applicant will not be assuming any liability or lease commitments and there are no other considerations related to this transaction, the Commission considers the price paid of \$70,000 to be an appropriate value of the transaction.

### **Assessment of the proposed tangible benefits**

16. As set out in Public Notice 1999-97, the Commission generally expects applicants to make clear and unequivocal commitments to provide tangible benefits representing 10% of the value of a transaction, as accepted by the Commission. Such benefits should be directed to the communities served and to the broadcasting system as a whole.
17. The applicant proposed a tangible benefits package representing 10% (\$7,000) of the value of the transaction (\$70,000). The benefits package will consist of two \$3,500 scholarships to be allocated to the Inside Out Toronto Lesbian and Gay Film and Video Festival by no later than the end of the current licence term. The scholarships will be directed to full-time students studying in the fields of film and/or video, with a particular focus on areas relating to the expression of sexuality for individuals that identify as lesbian, gay, bisexual, transsexual, transgendered or intersex, to their issues and to their lives. The Commission considers this benefits package acceptable and has set out a **condition of licence** to this effect in the appendix to this decision.

### **Unfulfilled tangible benefits**

18. The Commission notes that 6166954 Canada has yet to fulfill the tangible benefits package of \$150,000 relating to the 2007 transfer of effective control of HARDtv and OUTtv. The applicant stated that 6166954 Canada was in the process of establishing grants to fulfill these tangible benefits and that, notwithstanding the proposed transfer of assets and control of HARDtv, 6166954 Canada would remain responsible for the full amount. An affidavit to this effect has been filed with the Commission and compliance in this regard will be reviewed in the context of OUTtv's upcoming 2010 licence renewal.
19. In order to enhance the transparency relating to the tangible benefits associated with the current transaction as well as the outstanding benefits resulting from the 2007 transaction, the Commission directs 4510810 Canada and 6166954 Canada to clearly identify the annual expenditures associated with their respective tangible benefit obligations in their annual returns.

### **Conclusion**

20. In light of the above, the Commission **approves** the application by 4510810 Canada Inc. for authority to acquire from 6166954 Canada Inc. the assets of the national, English-language Category 2 specialty programming undertaking HARDtv and for a broadcasting licence to continue the operation of the undertaking.

21. Upon surrender of the current licence issued to 6166954 Canada Inc., the Commission will issue a new licence to 4510810 Canada Inc. The licence will expire 31 August 2011, the expiry date of the current licence, and will be subject to the **conditions** set out in the appendix to this decision.

### **Other matters**

22. In Broadcasting and Telecom Regulatory Policy 2009-430, the Commission stated its intention to impose on television broadcasters and broadcasting distribution undertakings, at the time of their licence renewals, conditions of licence relating to accessibility provisions. Accordingly, the Commission will consider imposing such conditions of licence on HARDtv at the time of the licence renewal for this service. In the meantime, the Commission expects HARDtv to adhere, as soon as possible, to the applicable accessibility requirements specified in Broadcasting and Telecom Regulatory Policy 2009-430.

Secretary General

### **Related documents**

- *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy CRTC 2009-430, 21 July 2009
- *Diversity of voices – Regulatory policy*, Broadcasting Public Notice CRTC 2008-4, 15 January 2008
- *Applications processed pursuant to the streamlined procedure*, Broadcasting Public Notice CRTC 2007-135, 4 December 2007
- *617 – Category 2 specialty service*, Broadcasting Decision CRTC 2005-89, 4 March 2005
- *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000
- *Building on success – A policy framework for Canadian television*, Public Notice CRTC 1999-97, 11 June 1999

*This decision is to be appended to the licence. It is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>.*

## Appendix to Broadcasting Decision CRTC 2009-751

### Conditions of licence and expectation

1. The licence will be subject to the conditions set out in *Introductory statement – Licensing of new digital pay and specialty services – Corrected Appendix 2*, Public Notice CRTC 2000-171-1, 6 March 2001.
2. The licensee shall provide a national, English-language Category 2 specialty programming undertaking devoted to gay and lesbian adult entertainment programming, including adult entertainment films, talk shows, phone-in shows and other programming on the theme of sexuality ranging from entertainment material to educational and analytical material on sexuality and health.
3. The programming must be drawn exclusively from the following categories, as set out in item 6 of Schedule I to the *Specialty Services Regulations, 1990*, as amended from time to time:
  - 1 News
  - 2 (a) Analysis and interpretation  
(b) Long-form documentary
  - 3 Reporting and actualities
  - 5 (b) Informal education/Recreation and leisure
  - 7 (a) Ongoing dramatic series  
(b) Ongoing comedy series (sitcoms)  
(c) Specials, mini-series or made-for-TV feature films  
(d) Theatrical feature films aired on TV  
(e) Animated television programs and films  
(g) Other drama
  - 9 Variety
  - 11 General entertainment and human interest
  - 12 Interstitials
  - 13 Public service announcements
  - 14 Infomercials, promotional and corporate videos
4. In order to ensure that the licensee complies at all times with 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 licensee shall file, for the Commission's prior review, a copy of any programming supply agreement and/or licence trademark agreement it intends to enter into with a non-Canadian party.

5. The licensee shall adhere to section D.3 of the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, Broadcasting Public Notice CRTC 2003-10, 6 March 2003.
6. The licensee shall expend \$7,000 in the form of two \$3,500 scholarships to be allocated to the Inside Out Toronto Lesbian and Gay Film and Video Festival by no later than the end of the licence term. The scholarships shall be directed to full-time students studying in the fields of film and/or video, with a particular focus on areas relating to the expression of sexuality for individuals that identify as lesbian, gay, bisexual, transsexual, transgendered or intersex, to their issues and to their lives.
7. The licensee shall adhere to its internal policy for adult programming as filed with the Commission.

For the purposes of the conditions of this licence, including condition of licence 1, *broadcast day* refers to the 24-hour period beginning each day at 6 a.m.

### **Expectation**

The Commission expects HARDtv to adhere, as soon as possible, to the applicable accessibility requirements specified in *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy CRTC 2009-430, 21 July 2009.