

Oral Remarks By

**CANADIAN MEDIA PRODUCTION  
ASSOCIATION (CMPA)**



***Broadcasting Notice of Consultation CRTC 2010-498 –  
Application by Shaw Communications Inc. to acquire  
effective control of Canwest Global’s broadcasting  
assets***

**September 22, 2010**

*CHECK AGAINST DELIVERY*

## Seating Plan

<b>Commissioners</b>
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<b>Reynolds Mastin Counsel, CMPA</b>	<b>John Barrack Chief Operating Officer &amp; Chief Legal Officer, CMPA</b>	<b>Norm Bolen President &amp; CEO, CMPA</b>	<b>Mario Mota Vice- President, Broadcasting Policy &amp; Regulatory Affairs, CMPA</b>
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## **NORM BOLEN**

Good morning Mr. Chair, Vice-Chairs, Commissioners, and CRTC staff. My name is **Norm Bolen**, and I'm the President and CEO of the Canadian Media Production Association (CMPA). I'm pleased to have with me today the following CMPA staff:

- to my left, **John Barrack**, Chief Operating Officer and Chief Legal Officer;
- to John's left, **Reynolds Mastin**, Counsel;
- and to my right, **Mario Mota**, Vice-President, Broadcasting Policy & Regulatory Affairs.

There are two areas we want to address here today.

- The first is the need for safeguards to address market power; and
- The tangible benefits package.

Independent producers need, and want, a strong Canwest. But a strong Canwest can't be at any cost. And the cost could be too high under the current Shaw proposal.

Mr. Chair, we share your view on this transaction. It will reshape the Canadian broadcasting system.

Shaw will be the most vertically integrated media company in Canada. And it will have unprecedented market power. This is true by any measure – whether you look at it by number of broadcast licences, by revenue, or by audience share.

The CMPA is not against consolidation in the industry. But there's always a tipping point. And this transaction is it. Safeguards are urgently needed.

BCE's proposed acquisition of CTV's broadcasting assets makes the need for checks and balances all the more urgent now. BCE and Shaw and its affiliates will together control the majority of conventional television stations. They will also control 69% of all English-language analog specialty and pay services.

The CMPA recently brought together the leaders of all the major Canadian independent production companies. They all told us the same thing. They're worried about their very survival.

Independent producers have no leverage in their dealings with broadcasters. They're cornered on rights. They're losing their independence.

It is the independent producers create the ideas. They develop the projects. They pull together the financing. And they used to control the exploitation of rights. But large media companies, because of their market dominance, now effectively control the copyright.

This essentially means that, without safeguards, you are being asked to read out the word “independent” from the Act. Why is this a problem? Because section 3(i)(v) of the *Broadcasting Act* calls for a significant contribution from the independent production sector. The independence and viability of the production sector is lost without the ability to share in rights. From there, we lose diversity of voices and ideas. And then much of the rest of Section 3 of the Act is jeopardized.

The need for meaningful safeguards is critical in the face of growing market power.

### ***Safeguards***

Vertical integration increases the likelihood of preferential treatment. Shaw has argued that existing rules are sufficient to address preferential treatment and market power. In our view, they are not – particularly with regard to program buying and rights. We’re proposing simple safeguards as part of this transaction to fill in the gaps.

It's critical that Shaw/Canwest and Corus remain truly separate and fully competitive. We propose the following:

- 1) Prohibit any programming or licensing overlap between Shaw/Canwest's and Corus' services, by condition of licence. Without this safeguard, competition decreases. Diversity of voices is reduced. And producers are left with one less door to knock on.

But there's one exception to this safeguard: Corus' pay TV movie service Movie Central. This service has long been an important financing partner on big-budget productions.

- 2) Also by condition of licence, require Shaw/Canwest to operate separate programming departments from Corus. This means separate executives with decision-making power and separate legal and business affairs departments. Without these measures, you lose a distinct programming voice and perspective in the market.

In addition, we were happy to hear Shaw yesterday commit to not engage in content exclusivity on unregulated platforms. In our view, content exclusivity is not in the public interest because it limits Canadian consumers' access to content. For certainty, we would like to see Shaw's commitment enshrined as a condition of licence. John.

## **JOHN BARRACK**

### ***Terms of Trade***

One of the most important safeguards is Terms of Trade.

Mr. Chair, as you reminded all of us yesterday, three years ago Rogers committed to taking a leadership role in negotiating Terms of Trade. However, this file has moved at a snail's pace. In response to your direct questions, Shaw only wanted to commit to "continuing the discussion" and providing you with "updates" on Terms of Trade negotiations. Simply put, this is not leadership.

One area where Shaw and the CMPA fully agree is on the need for the Commission to apply its Diversity of Voices policy. That policy states that when analyzing applications for changes in effective control, the Commission will give due consideration to the "existence of effective terms of trade agreements between licensees and independent producers."

No such agreement exists between Shaw/Canwest and the CMPA. Shaw did not even reference Terms of Trade in its application. Again, this is not the leadership we need from Shaw.

We're also concerned about Shaw affiliate Corus Entertainment's submission to the Government of Canada's national digital economy consultation. In that filing, Corus asked the Government to direct the Commission to:

- eliminate requirements for independent production; and
- to abandon Terms of Trade.

Mr. Chair, in the face of Corus' position, we appreciate the Commission's continued support for Terms of Trade. We've heard you that Terms of Trade are best addressed through the group licence renewal process. In order to ensure the best chances of success, it's essential that broadcasters be required to submit final Terms of Trade agreements as part of their licence renewal applications. And if no agreement is reached, then we would need to make submissions to you as to appropriate remedies to get a deal done.

We've developed a simplified proposal that aims to meaningfully address the concerns raised by the Commission and by the broadcasters around the negotiating table.

Let's be clear: we want a deal. But we need a willing dance partner.

Independent producers are fearful above all else that our window of opportunity may close for another five years. If this is allowed to happen, then a key element of the broadcasting system will simply cease to exist in any meaningful way.

We would also ask that the Commission provide an observer when negotiations resume. We are confident that simply having Commission staff in the room will discipline both parties and enable us to build momentum more quickly.

At the end of the day, BDUs, broadcasters, and producers are in the rights exploitation business. Broadcasters need access to rights to run successful businesses. So do independent producers. It's all about fair and equitable allocation of those rights. Terms of Trade can ensure that producers remain independent, while enabling broadcasters to maximize the multiplatform benefits of consolidation.  
Mario.

## **MARIO MOTA**

### ***Value of the Transaction and Tangible Benefits***

I will now speak about the value of the transaction and tangible benefits. The CMPA had prepared a detailed analysis of Shaw's reply to our Joint Report on the issue of the value of the transaction. However, we commend Shaw for conceding yesterday that the value is at least \$2 billion. Therefore, rather than discuss the issue further,

we'd be happy to file that additional analysis should it be useful to the Commission.

Turning to benefits, the core issue in this proceeding is the same as with any other transfer of ownership: Is this the best proposal for the system in the circumstances?

Shaw argues that because of intangible benefits, tangible benefits amounting to 10% of the value of the transaction should not apply in this case. We disagree.

The CMPA acknowledges that the Commission has the flexibility to apply its benefits policy in a discretionary manner. We just don't believe it should be applied in a manner that allows benefits to be avoided or discounted in this case.

Yesterday we heard the Commission say that it could require 10% in benefits be payable on the CWI value of the transaction, or \$155.5 million in total. You asked Shaw to provide a rationale for a discount on the remaining CTLP value of the transaction.

Let's look at the CTLP portion of the transaction. We submit that the CTLP assets are not failing undertakings. Therefore, no discount on benefits is warranted. There should be no exception to the normal application of the Commission's benefits policy.

- First, Shaw acknowledges that interest payments on Canwest's huge debt load, not its operating performance, forced Canwest into CCAA protection. 2010 is turning out to be a great year financially for Canwest, including the CTLP assets. The numbers speak for themselves.
- Second, let's remember that the CTLP entity includes a few profitable specialty services, such as TVtropolis.
- Third, there's no doubt a stronger Canwest will emerge from CCAA protection, including the CTLP assets. They will have a much cleaner balance sheet.

Regarding the Canwest-Alliance Atlantis benefits, an existing condition of licence requires the remaining funds to be spent, regardless of this transaction. This is not a new benefit. Any owner would have had to fulfill the remaining benefits under existing CRTC policy.

The proposed tangible benefits package also fails to live up to CRTC policy in three key areas:

- First, more money needs to go to on-screen initiatives – at least 85% of all benefits funds per Commission practice;
- Second, some of the proposed initiatives should not qualify; and
- Third, more funds need to flow to third parties, such as independent producers.

As a final point, should the CRTC require changes to the tangible benefits, in the interests of transparency and fairness we encourage the Commission to allow parties to file comments on Shaw's revised proposal. And given the importance of this proceeding, we're formally asking the Commission to allow all parties to file final written comments after the hearing. Norm.

## **NORM BOLEN**

Mr. Chair and members of the Commission, this transaction is a game changer. It's about market power. It's about leverage. And it's about rights. And, ultimately, it's about finding a balance. The challenge is to find the right balance to ensure that diversity thrives in the face of a transaction of this scale.

And that requires strong safeguards.

We'd be pleased to answer any questions you might have. Thank you.