



September 30, 2010

Via CRTC comments/interventions form

Mr. Robert A. Morin
Secretary General
Canadian Radio–television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Notice of Consultation CRTC 2010–498, Item #2: Application by Shaw Communications Inc., on behalf of Canwest Global Communications Corp. and its operating subsidiaries/licensees, for authority to transfer effective control of Canwest Global’s broadcasting entities to Shaw, through a wholly owned subsidiary of Shaw known as 7316712 Canada Inc. (Application No. 2010–0550–5) – FINAL COMMENTS

1. The Canadian Media Production Association (the “CMPA” or the “Association”), formerly known as the Canadian Film and Television Production Association, welcomes the opportunity to provide these **final comments** regarding the above–referenced Notice of Consultation. The CMPA continues to offer **conditional support** of the transaction, provided that the issues and concerns that we expressed throughout this proceeding are meaningfully addressed.
2. The CMPA represents the interests of screen–based media companies engaged in the production and distribution of English–language television programs, feature films, and new media content in all regions of Canada. Our 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.
3. The CMPA’s concerns with respect to this transaction remain as follows: (a) the potential for anti–competitive behaviour arising from further broadcaster consolidation and the need to establish effective safeguards to prevent such behaviour; (b) arriving at the appropriate valuation of the transaction; (c) determining the appropriate quantum and allocation of tangible benefits funds.

The Need for Safeguards is Clear

4. In its Diversity of Voices regulatory policy released in January 2008, the Commission stated that increased consolidation in the television sector as a whole could “result in increased difficulties for independent producers in negotiating reasonable terms for their programming.”¹ The Commission added that while it recognizes that strong companies are necessary to ensure that the objectives of the *Broadcasting Act* are met, “it must balance this against the negative consequences for independent producers and the impact on diversity of programming that excessive market power could bring.”²
5. The Diversity of Voices policy states that, as a general rule, the CRTC 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 the diversity of programming available to television audiences. Of particular relevance to the Shaw–Canwest transaction, the Commission specifically noted that:
 - **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.** ³ [bold emphasis original; underline and italics our emphasis]
6. The Diversity of Voices policy also 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.”⁴
7. The CMPA submits that a number of parties in this proceeding, including the Association, have raised substantial “policy concerns” regarding the enormous market power that Shaw will yield following approval of the transaction. Many of our concerns arise from the nature of the potential relationship between a Shaw–owned Canwest and Shaw affiliate Corus Entertainment.

Programming Departments and Rights Acquisition Between Shaw/Canwest and Corus Must be Separate

8. Throughout this proceeding, Shaw has stated that while Shaw and Corus are “affiliates” under corporate law, Corus is an independently operated company, with distinct and independent boards of directors and management teams. Shaw has also consistently stated that it currently has no “plans” to combine the Shaw/Canwest and Corus assets into one company, although it has not ruled it out completely.

¹ *Broadcasting Public Notice CRTC 2008–4*, Regulatory policy – Diversity of voices, January 15, 2008, at paragraph 77.

² *Ibid.*, at paragraph 85.

³ *Broadcasting Public Notice CRTC 2008–4*, Regulatory policy – Diversity of voices, January 15, 2008, at paragraph 87.

⁴ *Broadcasting Public Notice CRTC 2008–4*, Regulatory policy – Diversity of voices, January 15, 2008, at paragraph 89.

9. In a *National Post* article published on September 28, 2010, however, Corus President and CEO John Cassaday noted that an “obvious option” for the Shaw family would be to consolidate the Shaw/Canwest and Corus assets at some point in the future. He also indicated that Corus is interested in buying programming services from Shaw/Canwest that Shaw may consider non-core assets.
10. The CMPA is concerned about the potential for any future Shaw/Canwest–Corus merger, asset sale, or asset swap to occur without a full CRTC public process. Based on the discussion between the Commission and Shaw executives on the final day of the hearing, it is unclear whether such a process would be required since there would be no change in effective control.
11. However, the CMPA agrees with the view expressed by Shaw that given that a combination of Shaw/Canwest and Corus would constitute “a substantive economic shift”, CRTC approval would be required. The Association urges the Commission to make it a condition of approval of this transaction that any future asset sale, swap, or combination between Shaw/Canwest and Corus be subject to a full CRTC process and Commission approval.
12. Of more immediate concern to the CMPA is the potential, and indeed likelihood, for a Shaw/Canwest programming service to acquire rights to an independently produced program for the benefit of both Shaw/Canwest and Corus, or vice versa, whether directly or by securing sublicensing rights from the independent producer.⁵
13. Our concerns were only heightened at the public hearing when Shaw/Canwest executives stated that content sharing between Shaw/Canwest and Corus and/or joint licensing or sublicensing between the two corporate groups should not be prohibited. In fact, the suggestion made that cooperation between Shaw/Canwest and Corus regarding programming matters can be beneficial to independent producers is an oversimplification of the program rights market.
14. The CMPA acknowledges that cooperation between competing broadcast groups can be beneficial to independent producers when they act as financing partners in a production (as is the case with the pay TV broadcast window) or when producers are able to retain and control second and third broadcast windows (directly or through sublicensing) for their programming. However, as the Association has repeatedly noted in CRTC proceedings in recent years, one of the most devastating effects of increasing broadcaster consolidation on the independent production sector has been the erosion of second and third broadcast windows, which has all but eliminated revenue that was once a critical piece of the financing of independently produced Canadian programming.
15. The example provided by Shaw/Canwest during the reply phase of the public hearing reinforces this reality. Unfortunately, the Commission was misinformed when it was told that the broadcast by various Corus channels of the independently produced Canadian drama “Falcon Beach”, which was developed and produced for Global Television, created additional opportunities for the producers of the program. In fact, Canwest/Global took sublicensing rights for the series with no additional

⁵ Sublicensing occurs when a broadcaster is granted the right to sublicense the rights that it has acquired to other programming services within its own broadcast corporate group, or, in more extreme cases, to sublicense the rights to any other broadcaster.

compensation to the producers, which actually limited opportunities for the producers. This is exactly the kind of aggressive licensing practice that the CMPA is attempting to limit with its proposed safeguard.

16. In this regard, the CMPA wishes to clarify that prohibiting programming overlap between Shaw/Canwest's and Corus' services can limit opportunities for producers in cases where they retain and control second and third broadcast windows. As noted above, however, producers have all but lost their ability to retain such rights due to broadcaster consolidation. It is, therefore, more important to ensure that producers be able to control exploitation of their programs via multiple broadcast windows.
17. Given all of the above, the CMPA urges the Commission to take appropriate regulatory steps to ensure that the programming services between the Shaw/Canwest and Corus broadcasting groups remain truly operationally separate, and fully competitive, with each other, including:
 - require Shaw/Canwest, **by condition of licence**, to operate a separate programming department (separate broadcast executives with decision-making power) and a separate legal/business affairs department from Corus; and
 - prohibit Shaw/Canwest, **by condition of licence**, from acquiring rights to an independently produced program for the benefit of both Shaw/Canwest and Corus, whether directly or by securing sublicensing rights from the independent producer.

Terms of Trade Needs a Deadline and a CRTC Observer

18. In our initial written intervention in this proceeding, the CMPA explained that whatever its benefits, broadcaster consolidation has had significant negative consequences for the independent production sector. Most notably, it has led to relentless and continuing erosion in the ability of independent producers to either retain, or receive equitable compensation for, the rights to their programming. This, in turn, has consequences that extend far beyond the independent production sector.
19. When rights are consolidated in the hands of a single player, it directly impacts the ability of all other investors – both public and private – to achieve a return on their investment. The lower the rates of return, the less that can be reinvested back into Canadian programming. Moreover, when no measures are in place to protect the public's investment in Canadian content, the policy rationale for allocating scarce public dollars in support of that content begins to erode. This has a destabilizing, corrosive impact on the entire broadcasting system.
20. In the context of this transaction, we indicated that an independent producer who attempts to negotiate with a giant vertically and horizontally integrated Shaw/Canwest will be at an enormous – if not insurmountable bargaining disadvantage. We were also concerned that Shaw had failed to make a single reference to Terms of Trade in its original application, notwithstanding the fact that, as noted above, under the Commission's Diversity of Voices regulatory policy the existence of effective Terms of Trade agreements is one of the factors that the Commission determined it would consider when assessing transactions of this nature.

21. We therefore requested that:
- (a) Shaw be required, **by condition of licence**, to conclude a Terms of Trade agreement with the CMPA within sixty days of the Commission's approval of the transaction; and
 - (b) A member of the Commission's Alternative Dispute Resolution department attend the negotiations in an observer capacity so as to facilitate the conclusion of an agreement within the proposed sixty-day timeframe.
22. Our concerns about Shaw's commitment to Terms of Trade were only amplified by statements made by Shaw and Canwest executives at the public hearing. In response to repeated direct questioning, one executive after another refused to commit to concluding a Terms of Trade agreement with the CMPA within a prescribed timeframe, whether within the sixty days proposed by the CMPA, or in time for licence renewals, as suggested by the Commission Chairman. Rather, Shaw and Canwest executives were only willing to commit to providing "updates" and "positive reports" regarding Terms of Trade negotiations by the licence renewal hearings to be held in the spring of 2011. Moreover, in the case of Shaw affiliate Corus, there is outright antipathy for Terms of Trade, as made clear by its public request to the Government of Canada that it direct the Commission to abandon its current Terms of Trade policy.
23. In our initial written intervention, we urged the Commission to ask Shaw at the public hearing to identify what specific commitments it was willing to make to conclude Terms of Trade with the CMPA. We warned that "the independent production sector will not remain viable based on the expression of mere good intentions by Shaw to negotiate Terms of Trade." And yet, at the public hearing, an expression of good intentions was all that Shaw and Canwest executives were willing to provide to the Commission.
24. The CMPA is, therefore, all the more appreciative of the Chairman's statements at the public hearing that providing "updates" is not sufficient and that the Commission expects that Shaw/Canwest conclude a Terms of Trade agreement with the CMPA. In response to the Chairman's clearly stated preference that Terms of Trade be part of the licence renewal process, and for both pragmatic and procedural reasons, we proposed at the public hearing that Shaw/Canwest (and, by extension, the other private broadcast groups) be required to file final Terms of Trade agreements with the Commission as part of their licence renewal applications, which we understand are due November 1st.
25. This proposed timeframe would lend much-needed urgency to the negotiations. Just as importantly, should discussions break down, it would also enable the parties to seek appropriate remedies from the Commission within the standard intervention/reply framework of the licence renewal process.
26. Regardless of the deadline specified by the Commission, the CMPA is fully committed to doing its part to reach a deal within the shortest possible timeframe. To demonstrate our commitment, we will attempt to re-energize and refocus negotiations by tabling a simplified proposal that aims to meaningfully address concerns raised both by the Commission in previous hearings and by the broadcasters at the negotiating table.

27. Finally, we would reiterate our request that a member of the Commission's Alternative Dispute Resolution department be present when Terms of Trade negotiations resume. Quite apart from the discipline that this would impose on all parties, it would also provide the Commission with a direct window into the negotiations themselves. In this way, the Commission would no longer be reliant on "updates" or "reports" by the parties regarding the state of negotiations, and would be better positioned to understand the key issues and positions taken at the negotiating table.
28. While not underestimating the challenges that remain, we are confident that the combination of a clear deadline and the presence of Commission staff at the negotiations will enable all of the parties to overcome the current impasse and conclude an agreement that is fair and equitable to both independent producers and broadcasters.

The Value of the Transaction and the Revised Proposed Tangible Public Benefits

Value of the Transaction

29. The CMPA is pleased that Shaw did not contest the "Document for discussion on the value of the transaction" circulated by the Commission at the public hearing that set a preliminary valuation of the assets being acquired by Shaw of \$2.047 billion.
30. However, the Association finds merit in the arguments put forward by the Directors Guild of Canada ("DGC") in this proceeding that the true value of the transaction is likely greater than \$2.047 billion. The CMPA has read the final comments to be submitted by the DGC and supports the positions taken therein.
31. The CMPA finds it difficult to accept the premise that the former Alliance Atlantis specialty television channels, valued at \$1.513 billion by the Commission in 2007, are worth only marginally more three years later at \$1.555 billion despite higher revenues and increased PBIT for the services as a whole. For example, the former Alliance Atlantis channels (including only those controlled by AA) collectively achieved a PBIT of \$54.9 million in 2007. In 2009, the last year in which data is publicly available, PBIT for these channels had more than doubled to \$116.9 million.
32. From our perspective, it is unfortunate that Shaw did not file, and the Commission did not require it to file, an independent valuation of the assets being acquired using appropriate multiples and comparable past transactions in order for parties to properly assess the true value of the Shaw-Canwest transaction.
33. In any event, we urge the Commission to conduct a thorough and fair analysis of the true value of the assets being acquired by Shaw for the purpose of assessing the value of tangible benefits. In this regard, we encourage the Commission to maintain its longstanding practice of not simply looking at the purchase price paid and the value of conditional future payments, operating lease commitments, and assumed debt and liabilities. In our respectful submission, a thorough and fair analysis should lead the Commission to conclude that the true value of the transaction is, in fact, greater than \$2.047 billion.

Revised Proposed Tangible Public Benefits

34. The CMPA commends Shaw for proposing an enhanced tangible benefits package during its reply at the public hearing, particularly the proposed increase in benefits funding of \$55 million for the development and creation of programs of national interest to be produced exclusively by independent producers.
35. While Shaw's latest proposal represents a significant step forward from its original offer to allocate only \$23 million to tangible benefits, the CMPA respectfully submits that the revised proposal still fails to comply with the Commission's longstanding benefits policy in several respects, as follows:
- First, the quantum of the revised benefits package (i.e., \$180.1 million) still falls short of the Commission's policy of requiring benefits amounting to at least 10% of the value of the transaction;
 - Second, certain proposed benefits are self-serving corporately for Shaw and Canwest and are the cost of doing business, and therefore should not qualify;
 - Third, an insufficient quantum of the proposed benefits package will go to "on-screen" programming initiatives; and
 - Fourth, an insufficient quantum of the proposed benefits dollars will flow to third parties, such as independent producers.

No Discount on Benefits is Warranted

36. While the CMPA acknowledges that the Commission has discretion as to how it implements its tangible benefits policy, we respectfully submit that the circumstances of this transaction do not warrant an exception to, or flexibility from, the normal application of the Commission's benefits policy. The core question in this proceeding is the same as with any other transfer of ownership: Is this the best possible proposal for the system in the circumstances? The CMPA submits that Shaw's latest tangible benefits proposal is not the best possible proposal for the system.
37. As we stated at the public hearing, it is our view that no discount on benefits is appropriate in this case. Canwest as a whole, or any of its individual divisions on their own, are not failing undertakings. Shaw has itself acknowledged that interest payments on Canwest's huge debt load, not its operating performance, forced Canwest into CCAA protection. We are deeply concerned that if the Commission were to grant Shaw's request for a discount on tangible benefits, it would be setting a dangerous precedent. It would essentially be rewarding broadcasters for failed business decisions, while at the same time penalizing other broadcasting industry players.
38. As noted above, the CMPA submits that a thorough and fair analysis of the true value of the Shaw-Canwest transaction should lead the Commission to conclude that the real value is greater than \$2.047 billion. Whatever final value it ascribes to this transaction, however, the CMPA urges the Commission to require a tangible benefits package amounting to a full 10% of the established value.

While a Normal Capital Expenditure, the Proposed Digital Transmitter Benefit Could Warrant a Policy Exception

39. The CMPA continues to maintain that Shaw's proposal to spend \$23 million to convert Canwest's remaining 35 non-mandatory transmitters to digital in smaller markets across Canada is inconsistent with the CRTC's policy to reject normal capital expenditures as tangible public benefits. The Commission's policy is as follows:
- Proposed expenditures that fall within the parameters of what can be considered normal capital expenditures are also generally rejected by the Commission as benefits of a transfer... Capital expenditures for items such as replacement transmitters are also usually viewed by the Commission as being part of a normal capital expenditure program. If replacements are needed, they are required irrespective of a transfer; if they are not needed, there is no discernible benefit to the public.⁶
40. In our view, this proposed benefit initiative is self-serving to Shaw and Canwest and, therefore, should not qualify as an eligible tangible benefit. By Shaw's own past admission, this proposed initiative is a cost of doing business.
41. However, the Association recognizes that the transition to digital television is an important public policy issue and that converting additional transmitters to digital beyond mandatory markets will benefit those Canadians who will lose access to over-the-air television services when analog transmission ceases beginning September 1, 2011.
42. Accordingly, should the Commission require a tangible benefits package valued at a full 10% of the value of the transaction, which we submit is higher than \$2.047 billion, it may be appropriate for it to provide, in the context of this transaction, an exception to its policy to reject normal capital expenditures as tangible public benefits.

The Allocation of Proposed Benefits is Inconsistent with Current Commission Practice

43. The CMPA is concerned that Shaw's latest proposed tangible benefits package does not allocate a sufficient quantum of benefits funds to "on-screen" programming initiatives. The revised proposal is inconsistent with the Commission's benefits policy, which requires that approximately 85% of benefits funds flow to on-screen programming initiatives.
44. The Commission recently reaffirmed this longstanding requirement when it required ZoomerMedia Limited to increase the ratio of on-screen to social benefits from 70%:30% to approximately 85%:15% in its acquisition of the broadcasting assets of S-VOX.⁷

⁶ *Public Notice CRTC 1989-109*, Elements assessed by the Commission in considering applications for the transfer of ownership or control of broadcasting undertakings, September 28, 1989.

⁷ *Broadcasting Decision CRTC 2010-193*, March 30, 2010.

45. According to our calculations, only 79% of the revised benefits funds will flow to on-screen initiatives, and this assumes that all new media initiatives (i.e., the full \$18 million proposed) will flow to such initiatives. However, as the Commission is aware, Shaw has proposed to direct some of the new media funds to promotion and other non-programming initiatives.
46. It would be perplexing to the CMPA if the Commission were to provide Shaw with an exception to the normal ratio of 85% on-screen:15% social for tangible benefits, particularly given that it reinforced this longstanding requirement only a few months ago when it approved a transaction of much smaller size involving a much smaller broadcasting group (i.e., ZoomerMedia).
47. The CMPA is also concerned that Shaw's latest proposed tangible benefits package remains weighted too heavily towards self-serving initiatives, rather than benefits directed to third parties, in accordance with longstanding CRTC policy.
48. According to our calculations, only 54% of the revised benefits funds will flow to third parties, and this assumes that all new media initiatives (i.e., the full \$18 million proposed) will flow to third-parties. However, Shaw has suggested that some of the new media funds could flow to initiatives related to the proposed benefit initiative to introduce or re-introduce morning news programs in various markets, which would not likely be produced by third-parties.
49. In fact, the CMPA is generally concerned about the lack of clarity and specificity provided by Shaw regarding exactly where, and to what, the new media benefit dollars will be directed.
50. Accordingly, the CMPA urges the Commission to continue with its longstanding approach to tangible benefits as outlined above and require a benefits package in this transaction that conforms to this traditional approach. Specifically, the CMPA recommends that, as a condition of approval of the transaction, Shaw be required to:
- expend an additional minimum \$24.6 million in tangible benefits (assuming a transaction value of \$2.047 billion) on programs of national interest or related new media programming initiatives to be produced exclusively by independent producers; and
 - allocate the full \$18 million (or higher) proposed for new media initiatives to incremental new media content creation, such as the development of short features or "webisodes" or other interactive content related to programs of national interest funded through the benefits package. All of the new media benefits funds should flow to independent producers to ensure maximum benefit for the system.
51. The CMPA submits that it would be appropriate to formalize any requirements related to benefits flowing to independent producers into a condition of licence to provide the independent production community with a greater degree of transparency and predictability, as the Commission did in its decision approving Canwest's acquisition of Alliance Atlantis' broadcasting assets.⁸

⁸ *Broadcasting Decision CRTC 2007-429*, Transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to Canwest MediaWorks Inc., December 20, 2007, at paragraph 87.

52. Finally, the Association continues to observe that self-directed benefits packages have given broadcasters an increasing amount of power over producers wishing to access benefits funds with respect to licence terms. Since benefits funds provide an injection of rare incremental money into the system for the creation of Canadian programming, and producers are eager to access the funds given the limited amount of funding in the system, broadcasters are able to dictate licence terms to producers even more than usual, particularly in light of the lack of independent guidelines for many self-directed funds, beyond a level of expenditure requirement on independent production.
53. Accordingly, it may be appropriate for the Commission to require that a portion of tangible benefits be directed to arm's-length independent production funds, such as the Independent Production Fund or the Shaw Rocket Fund.

Conclusion

54. In summary, the CMPA does not oppose Canwest's broadcasting assets being transferred to Shaw, provided that the issues and concerns detailed in our written interventions, including this one, and expressed during our appearance at the public hearing are meaningfully addressed. Canadian independent producers look forward to an expanded and strong relationship with Shaw as it works to develop new business models for Canadian broadcasting built on making Canadian programming its number one priority.
55. The CMPA appreciates the opportunity to file these final comments on Shaw's application to acquire effective control of Canwest's broadcasting assets. A copy of this submission has been sent to Shaw.

All of which is respectfully submitted.

Yours truly,

[Original signed by Norm Bolen]

Norm Bolen
President and CEO

c.c.: Cynthia Rathwell Vice-President, Regulatory Affairs and Programming, Shaw Direct (via email: Cynthia.Rathwell@shawdirect.ca)

*** End of Document ***