CMPA
Canadian Media
Producers Association
Ottawa | Toronto | Vancouver

18 February 2016

Ms. Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Ms. May-Cuconato:

Re: Broadcasting Notice of Consultation CRTC 2016-22: Application by Shaw Communications Inc. (SCI) on behalf of Shaw Media Inc. and its licensed subsidiaries (SMI), for authority to effect a multi-step intra-corporate reorganization by transferring all the voting shares of SMI to Corus Entertainment Inc. or one of its subsidiaries (Corus).

Application 2016-0055-2

> *While the Commission recognizes that strong companies are necessary to ensure the fulfilment of the objectives of the Act,* ***it must balance this against the negative consequences for independent producers*** *and the impact on diversity of programming that excessive market power could bring.*[1]

1. This is the intervention of the Canadian Media Producers Association (CMPA)[2] in response to the above-noted application (SCI Application or Application).

2. For the reasons set out below, the CMPA **opposes** the SCI Application.

3. The CMPA further submits that it would be in the public interest for the Commission to conduct a full oral public hearing to review the SCI Application. The CMPA wishes to appear at that public hearing.

[1] Broadcasting Public Notice CRTC 2008-4, *Regulatory policy - Diversity of voices* [DOV Policy], http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm, at par. 85. Emphasis added.

[2] The Canadian Media Producers Association (formerly the Canadian Media Production Association) is Canada's leading trade association for independent producers, representing more than 350 companies engaged in the development, production and distribution of English-language television programs, feature films and digital media. The CMPA works on behalf of members to promote and stimulate the Canadian production industry. Our goal is to ensure the continued success of Canada's independent production sector and a future for content that is made by Canadians for both Canadian and international audiences.

EXECUTIVE SUMMARY

E1. The SCI Application raises fundamental issues about how best to ensure a robust Canadian broadcasting system that serves the needs of Canadians. If approved, this transaction will make Corus an even stronger and more successful broadcaster. Strong and successful broadcasters are essential to both a healthy and sustainable independent production sector and to a Canadian broadcasting system that best serves Canadian audiences. But should the merged Corus-SMI use its size and strength to impose unreasonable and inequitable program licensing terms on independent producers, then Corus's post-transaction strategy for success will come at the expense of the independent production sector and its ability to make a significant contribution to the Canadian broadcasting system, as mandated by the *Broadcasting Act*. Such an outcome would not only be damaging for independent producers, but would be to the detriment of Canadian audiences and contrary to the public interest.

E2. The SCI Application proposes no competitive safeguards to ensure balance in Corus's relationship with independent producers. The CMPA accordingly **opposes** the SCI Application. If, however, the Commission ultimately chooses to approve the Application, a **condition of such approval** should be that Corus negotiates an agreed-upon set of competitive safeguards with the CMPA. Since such negotiations are unlikely to be successful without a deadline, the Commission should further require that an agreement be concluded before Corus's forthcoming licence renewal hearing, failing which the Commission should establish appropriate competitive safeguards as part of its determinations in Corus's renewal decisions.

E3. The Commission's involvement is essential to ensure that appropriate competitive safeguards are in place by the time the CMPA's current Terms of trade agreement with Corus expires, as Corus will never agree to such safeguards without the Commission requiring it to do so. Most importantly, requiring Corus to agree to such safeguards is the only way to mitigate the substantial harm that a merged Corus-SMI would inevitably have on the Canadian independent production sector and, ultimately, on the range and quality of content available to Canadian audiences.

E4. Notwithstanding their common ownership, the manner in which Corus and SMI are managed and operated is unique within the Canadian broadcasting system. The Commission should take this uniqueness into account when applying its related policies and when considering the imposition of appropriate safeguards.

E5. The ability to decide the strategic decision-making activities and manage and run the day-to-day operations of Corus and SMI rests with two entirely different boards of directors and management teams, notwithstanding the common share ownership of Corus and SMI's publicly traded parent, SCI. We therefore contend that **control in fact** of SMI will be transferred to Corus if the transaction proceeds. Accordingly, this transaction is not a simple and straightforward "corporate re-organization" as SCI

claims. Instead, Corus's effective takeover of the broadcasting assets and operations of SMI makes the SMI Application, for all practical and policy purposes, a **transfer of control** which should be treated as such.

E6. The Commission confirmed at the outset of its 2013 decision approving the second BCE Inc.-Astral Media transaction (BCE-Astral2) that its prior approval of ownership transactions is required not only when there is a proposed change of control, but also "where persons wish to acquire or increase their holdings in broadcasting licensees above certain thresholds".

E7. Thus, regardless of whether the SCI Application involves a proposed transfer of control, the Commission's past practice indicates that transactions of this size and significance require careful scrutiny to ensure that approval, if granted, would serve the public interest.

E8. The Commission's policies directly applicable to its consideration of ownership transactions are its *Tangible Benefits Policy* and *Diversity of Voices (DOV) Policy*.

E9. While the Commission originally established its *Tangible Benefits Policy* as a proxy for holding competitive hearings to reassign licences that have been sold, the policy has taken on a substantially larger role in the current broadcasting ecosystem, particularly given the massive consolidation that has occurred amongst broadcasters in recent years. Given the Commission's mandate to ensure that all significant transactions are in the public interest, the obligation of broadcasting companies effecting massive consolidation to give back to the broadcasting system should be tied to the practical impact such consolidation will have on the system, and not to the sole question of who may, in narrow legal terms, end up exercising control of the consolidated entity after the transaction is completed.

E10. The *DOV Policy* is meant to address concerns which may arise whenever "a proposed acquisition may result in a person gaining a dominant position in the television sector," and not solely in cases where a change of control occurs. It is the practical reality of market dominance that triggers diversity of voices concerns, not how that dominance was attained.

E11. The *DOV Policy* states that "[d]iversity of programming can mean several things, such as the expression of Canadian voices amidst foreign ones, the availability of different genres and formats, or the airing of content made by a variety of producers, including independent producers." Notably, the Commission's *DOV Policy* provides that, in order to assess the impact of consolidation on the independent production sector, the Commission will consider "…the existence of effective terms of trade agreements between licensees and independent producers."

E12. When the Commission approved the BCE-Astral2 application, it made it clear that it would not have done so had it not imposed safeguards necessary for the implementation of Canada's broadcasting policy. One of these safeguards was the requirement that the Astral services BCE was acquiring adhere to a Terms of trade agreement with the CMPA, a requirement that BCE readily accepted.

E13. The Commission followed a similar approach when it subsequently reviewed the 2013 Corus-TELETOON transaction. To address Corus's uniquely advantageous market position, the Commission stated that it was "necessary to establish safeguards to limit the potential for anti-competitive behaviours by Corus." Specifically, it was the Commission's view that "conditions structuring negotiations and detailing obligations in that regard, as well as those relating to concluding terms of trade, are appropriate measures to ensure that the Canadian broadcasting system remains competitive."

E14. In announcing the 2011 Group licence renewal hearing, the Commission advised all the applicants that, in the event that they had not reached a terms of trade agreement with the CMPA prior to the hearing, it would require them to file substantive proposals as part of the record of the hearing, and would then establish appropriate provisions for terms of trade as part of its licensing decisions.

E15. Forcing the applicants to conclude terms of trade agreements or risk having the Commission establish its own terms of trade provisions was instrumental in bringing Corus and the other large private English-language broadcast groups to the table with the CMPA to mutually negotiate and conclude terms of trade agreements in advance of the 2011 hearing. In fact, had the CRTC not required the broadcasters to enter into terms of trade agreements with the CMPA in 2011, it is a virtual certainty that no agreements would have ever been concluded.

E16. Last year, in a *Let's Talk TV* decision, the Commission decided to relieve the broadcasters of their obligation to adhere to a terms of trade agreement by condition of licence because "broadcasters and producers now have the clarity and experience they need to negotiate any future agreement among themselves." It is clear, however, that Corus has no intention of negotiating a renewed terms of trade agreement or an equivalent set of competitive safeguards with the CMPA unless it is compelled to do so by the Commission.

E17. Given the dominance Corus will have if this Application is approved, 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. The SCI Application must be reviewed in the context of how a merged Corus-SMI would exercise its dominant market position in its dealings with independent producers and other key stakeholders in the system. It is the conclusions drawn from this analysis that will enable the Commission to determine whether or not the transaction is in the public interest.

E18. If the SCI Application is approved there will be one less, unique (and very large) "door" for producers to knock on, and one less team of programmers working to differentiate their program choices to attract and benefit audiences.

E19. If Corus is allowed to acquire SMI, three broadcasters – Corus, Bell and Rogers – would account for 90% of all private broadcasters' spending on Canadian English-language television programming and would control over 80% of television viewing in the Canadian English-language market. It also means that Corus would itself control more than a third of such viewing (with Corus and Bell together controlling over 70%).

E20. Corus already dominates the English-language children's programming genre. With the purchase of the SMI stable of specialty services, Corus would also dominate English-language women's and lifestyle programming.

E21. The CMPA recognizes that the Commission's thresholds for reviewing applications which will increase horizontal media concentration are based on total television share of viewing to Canadian commercial television stations. However, as the Commission has confirmed, those thresholds are not by themselves determinative. In light of the policy concerns raised by this Application, the Commission should not only assess Corus' total television share of viewing, but also its share of the audience and the genres of programming most impacted by this transaction, as well as other indicators of market power, competition and ownership concentration.

E22. A merged Corus-SMI would mean that the new and much larger Corus would have substantially more negotiating power both because of its greater size and because it would become one of only four competitive program buyers in the English-language market. The result would be an effective oligopsony of buyers for Canadian independently-produced content.

E23. While 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 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.

E24. Corus has made it quite clear that, should the SCI Application be approved, it intends to take full advantage of its increased market power over independent producers by taking ownership and control of their programs. If Corus has free reign to implement its "own and control" strategy, it will increasingly convert what would otherwise be truly independently-produced programs into Corus service work, making those programs

"independently-produced" in name only. This would defeat the Commission's purpose in requiring broadcasters to commission from independent producers in the first place.

E25. If broadcasters are able to impose inequitable and unreasonable licensing terms onto independent producers, it will damage the producers' long-term incentive to innovate and invest in the production sector as they will be less likely to undertake the costs and risks associated with creating new, innovative programming. This reduction in innovation and investment would result in a decline in the quantity, quality and diversity of programming available in the market and would ultimately harm consumer choice.

E26. As was the case with Bell-Astral2 and the Corus-TELETOON transaction, the Commission should not approve the SCI Application absent safeguards designed to ensure the transaction will actually advance this country's broadcasting policy objectives, including the objective that the programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector.

E27. SCI claims that "existing safeguards are sufficiently robust to alleviate any concerns with respect to the market position of Corus/SMI both prior to and following the proposed reorganization." None of the safeguards referenced by SCI, however, have anything to do with the independent production sector. In fact, all of the referenced safeguards relate to SCI's status as a vertically-integrated broadcaster/BDU. In other words, they cover Corus-SMI's relationship with unaffiliated and independent BDUs. Nowhere in its Application does SCI reference Terms of Trade or any other safeguards to address Corus's relationship with unaffiliated and independent producers.

E28. For all of these reasons, the Commission should only approve the SCI Application if it follows its previous approach by requiring Corus to negotiate an agreed-upon set of competitive safeguards – whether through a renewed Terms of trade agreement, a Code of Practice, or the equivalent – before Corus's forthcoming licence renewal hearing. Should such negotiations not be successfully concluded prior to that hearing, the Commission should establish appropriate safeguards as part of its determinations in Corus's renewal decisions.

I. INTRODUCTION

4. The SCI Application, which is far from a simple "corporate reorganization", raises fundamental issues about how best to ensure a robust Canadian broadcasting system that serves the needs of Canadians. In the Application, SCI argues that nothing less than overwhelming dominance in key genres of programming will ensure Corus's success in an increasingly competitive environment. At the same time, however, the Application offers no answer to the question of how to balance this dominance with the need to preserve the fierce competition for ideas, talent and programs that is the hallmark of the independent production sector, enabling it to make a significant contribution to the Canadian broadcasting system. The Commission must therefore either deny the SCI Application, or implement competitive safeguards that will ensure that both Corus **and** independent producers are able to fulfil their role under the *Broadcasting Act* to provide Canadians with a diverse range of world-class programming from all regions of the country.

5. In Corus's own words, its proposed $2.65 billion purchase of SMI has the potential to be a "game changer" for the Canadian broadcasting system.[3] We agree. If approved, the transaction would mean, among other things, that Corus would:

- own substantially more English-language non-sports specialty services than any other broadcaster;[4]
- serve substantially more English-language non-sports specialty service subscribers than any other broadcaster;[5]
- become an even larger vertically-integrated broadcaster, producer and distributor;[6]
- dominate the market for women's and lifestyle programming, in addition to its existing dominance in children's programming;[7]
- aggressively move to implement its strategy of owning and controlling more programming;[8];

[3] Corus Presentation, FISCAL 2016 FIRST QUARTER EARNINGS AND TRANSACTION CONFERENCE CALL, 13 January 2016, http://seekingalpha.com/article/3808496-corus-entertainment-cjref-ceo-doug-murphy-on-q1-2016-results-earnings-call-transcript [Corus Presentation].

[4] Excluding sports services: the bigger Corus would operate 34 specialty services (16 Cat. As; 18 Cat. Bs) vs. Bell's 30 (20 Cat. As; 9 Cat. Bs; 1 Cat. C). Source: https://en.wikipedia.org/wiki/List_of_assets_owned_by_Corus_Entertainment and the SCI Application [SCI Application].

[5] Excluding sports services: the bigger Corus would have over 130M subscribers to its specialty services (100M to its Cat. As; over 30M to its Cat. Bs [no subscriber data available for Corus's Cat Bs] vs. Bell's 94.5M (79.M to its Cat. As; 6.9M to its Cat. Bs; and 8.2M to its Cat. C). Source: CRTC - Individual Pay, Pay-Per-View, Video-on-Demand and Specialty Services Financial Summaries for 2010-14.

[6] Corus Presentation, *supra* note 3.

[7] *Ibid*.

[8] *Ibid*.

- subsume another broadcast ownership group which has different CPE and PNI obligations;[9] and
- increase content sharing across a substantially greater number of services.[10]

6. This impressive list of post-merger gains suggests that, if approved, this transaction will make Corus an even stronger and more successful broadcaster. Strong and successful broadcasters are essential to both a healthy and sustainable independent production sector and to a Canadian broadcasting system that best serves Canadian audiences. But should the merged Corus-SMI use its size and strength to impose unreasonable and inequitable program licensing terms on independent producers, then Corus's post-transaction strategy for success will come at the of expense of the independent production sector and its ability to make a significant contribution to the Canadian broadcasting system, as mandated by the *Broadcasting Act*.[11] Such an outcome would not only be damaging for independent producers, but would be to the detriment of Canadian audiences and contrary to the public interest.

7. The SCI Application proposes no competitive safeguards to ensure balance in Corus's relationship with independent producers. In fact, the Application fails to even recognize that an already imbalanced relationship will become massively tilted in Corus's favour following the proposed transaction. Worse, Corus has publicly stated its intention to use this transaction as leverage to reduce independent producers to the role of service providers, where producers would assume all of the risks of program production, and Corus would reap all of the rewards by extracting the rights and revenues to producers' shows. This reflects a view where all that matters is what benefits Corus, regardless of the impact on its programming suppliers and on other stakeholders.

8. The decision to neither propose nor agree to negotiate a new set of competitive safeguards is not only a fatal deficiency in the SCI Application itself, it also represents a missed opportunity. Had Corus looked beyond its narrow self-interest and demonstrated an understanding that it operates in a regulated system of interdependent stakeholders, it would have taken a leadership role commensurate with its market dominance and proactively sought to put new competitive safeguards in place. Corus also could have joined with independent producers in ensuring that these safeguards addressed all parties' fundamental interests, and were even better tailored

[9] We note that determining the appropriate merged CPE and PNI obligations was an important matter which the Commission raised in approving the second BCE-Astral transaction: Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings - Change of effective control* (BCE-Astral2), http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm, at pars 206-210 [BCE-Astral2].

[10] Corus Presentation, *ibid*., above Note 3. We note that, in Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV - The way forward - Creating compelling and diverse Canadian programming* (BRP 2015-86), the Commission stated its view that "original first-run Canadian productions add more value to the system; the excessive repetition and recycling of programming appears to do little to achieve the objectives of the Act." http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm, at par. 191 [BRP 2015-86].

[11] *Broadcasting Act*, s. 3(1)(i)(v).

to the multi-platform, on-demand environment of the digital age. Instead, as is outlined in this submission, Corus (and SMI) have decided to conduct themselves in a manner that confirms the worst fears of independent producers about what will await them if this Application is approved without competitive safeguards.

9. A robust Canadian broadcasting system depends on **all** of its constituent elements being healthy and able to make their contributions to the creation of the very best "made in Canada" content for Canadian audiences. The SCI Application, if approved as filed, would instead reduce the diversity and quality of programming available to Canadian audiences and substantially weaken a vital element of our regulated system - the independent production sector.

10. The CMPA accordingly **opposes** the SCI Application. If, however, the Commission ultimately chooses to approve the Application, a **condition of such approval**[12] should be that Corus negotiates an agreed-upon set of competitive safeguards with the CMPA.[13] Since such negotiations are unlikely to be successful without a deadline, the Commission should further require that an agreement be concluded before Corus's forthcoming licence renewal hearing,[14] failing which the Commission should establish appropriate competitive safeguards as part of its determinations in Corus's renewal decisions.

11. To be clear, **this submission does not seek to reverse the Commission's decision in Broadcasting Regulatory Policy CRTC 2015-86** (BRP 2015-86) to relieve Corus of its condition of licence requiring it to adhere to a Terms of trade agreement with the CMPA.[15] The CMPA recognizes that it may not have the benefit of the Commission's regulatory enforcement of its current Terms of trade agreement with Corus. However, the Commission's involvement is essential to ensure that appropriate competitive safeguards are in place by the time the current Terms of trade agreement expires, as

[12] We note that the Commission has previously required the filing of new or amended documents as a condition of approving an ownership transaction, See Broadcasting Decision CRTC 2007-429, *Transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to CanWest MediaWorks Inc.*, http://www.crtc.gc.ca/eng/archive/2007/db2007-429.htm.

[13] Such safeguards could took take the form of a renewed Terms of trade agreement, a Code of Practice, or the equivalent. Terms of Trade serve as a framework to balance the relationship between broadcasters and producers in the negotiation of development and licensing agreements for producers' programs. Among other things, these safeguards address the rights and revenue streams a broadcaster can acquire or participate in depending on the level of the broadcaster's financial contributions to the project. In 2011 the CMPA entered into Terms of trade agreements with Bell Media Inc., Rogers Media Inc. and SMI. At the same time, the CMPA entered into a separate but identical agreement with Corus. The two agreements, however, contain the same substantive terms. See Private Broadcasters Agreement, June 2011, http://www.cmpa.ca/sites/default/files/documents/terms-of-trade/2011-04-26-Terms-of-Trade-Agreement-Astral-Bell-Rogers-Shaw.pdf [Private Broadcasters Agreement].

[14] In Broadcasting Notice of Consultation CRTC 2016-44, *Call for licence renewal applications - Submission of renewal applications for television licences owned by large English- and French-language ownership groups that will expire in 2017*, http://crtc.gc.ca/eng/archive/2016/2016-44.htm, the Commission called for the submission of renewal applications for television licences owned by the large English and French-language ownership groups that will expire in 2017.

[15] BRP 2015-86, *ibid.*, above Note 10, at par. 141.

Corus will never agree to negotiate safeguards without the Commission requiring it to do so. Most importantly, requiring Corus to agree to such safeguards is the only way to mitigate the substantial harm that a merged Corus-SMI would inevitably have on the Canadian independent production sector and, ultimately, on the range and quality of content available to Canadian audiences.

12. In addition, given the far reaching public policy implications of this transaction – for both the independent production sector and Canadian audiences – it is essential that the Commission hold a full oral public hearing where stakeholders and members of the general public can be heard. Such a hearing would enable the Commission to develop a complete public record upon which to assess whether the proposed "game changing" transaction is in the public interest. An oral public hearing should also considerably assuage stakeholders' concerns that the Commission has already pre-judged this matter based on its positive Twitter response to Corus's announcement of its proposed purchase of SMI.[16]

II. THE UNIQUE NATURE OF THE TRANSACTION

> *The Commission must consider each application on its merits, based on the circumstances specific to the application. In addition, the Commission must be assured that approval of a proposed ownership transaction furthers the public interest as expressed in the objectives of the Act and will not impede the ability or willingness of the licensee to meet its obligations under the Act. These obligations include those that arise from conditions of licence, regulations or directions made by the Governor in Council pursuant to the Act.*[17]

13. Notwithstanding their common ownership, the manner in which Corus and SMI are managed and operated is unique within the Canadian broadcasting system. The Commission should take this uniqueness into account when applying its related policies and when considering the imposition of appropriate safeguards.

14. While the Commission has confirmed that both Corus and SMI are ultimately controlled by Mr. JR Shaw,[18] it has also long accepted that the two entities are managed and operated independently of each other; thus the Commission treats them as separate

[16] On 13 January 2016 at 11:11 am, the Commission posted the following statement on Twitter: "Transaction announced today shows that Corus/Shaw believe strongly in the future of broadcasting in Canada #CRTC." Notably, this statement mirrors SCI's assertion at par. 28 of its Application that "The Reorganization reflects Shaw's confidence in the future of media assets and indeed the Canadian broadcasting system".

[17] Broadcasting Decision CRTC 2013-737, *TELETOON/TÉLÉTOON, TELETOON Retro, TÉLÉTOON Rétro and Cartoon Network – Change of effective control,* http://www.crtc.gc.ca/eng/archive/2013/2013-737.htm, at par. 13 [Corus-TELETOON]

[18] Broadcasting Notice of Consultation CRTC 2016-22, http://www.crtc.gc.ca/eng/archive/2016/2016-22.htm.

Broadcast Ownership Groups for the purpose of licensing and regulating their respective programming undertakings.[19]

15. It was Corus itself that convinced the Commission that the two entities are so distinct as to warrant separate and distinct regulatory treatment. Specifically, as part of the 2011 Group Licence Renewal process,[20] Corus filed a legal opinion which presented a number of arguments to support its contention that the two entities should be regulated independently of each other notwithstanding that they are both legally controlled by the same party.[21] These arguments are effectively summarized in the following two paragraphs from the six-page legal opinion:

> Since Corus and Shaw Media compete with each other, the directors of Corus cannot cooperate with Shaw Media as a single group under the Commission's group-based licensing policy without compromising their fiduciary obligations. The directors must advance Corus' strategic interests ahead of Shaw Media's interests. They must necessarily protect Corus' confidential competitive information from being disclosed to Shaw Media. They must also avoid conflicts of interest that would necessarily arise between Corus and Shaw Media relating to the allocation of resources (both the benefits and costs) among the two competitors as part of the licensing process. In particular, Corus (and indirectly its stakeholders) simply cannot assume responsibility for meeting all or any of Shaw Media's licence obligations. Corus has a separate board of directors from Shaw Media that permits the directors of Corus to comply with their fiduciary duty to act in the best interests of Corus without regard to the interests of its competitor, Shaw Media. The fact that the two companies have a common shareholder is ultimately irrelevant because they have very different shareholder and non-shareholder constituencies. Under corporate law, it is improper to compel Corus to cooperate with Shaw Media in a licensing process when to cooperate with a competitor is necessarily contrary to the interests of Corus.
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> **As a practical matter the management teams operate separately and in fact the companies compete with each other for programming, audiences and advertisers.**[22]

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[19] Broadcasting Decision CRTC 2011-441, *Group-based licence renewals for English-language television groups – Introductory decision*., http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm, at par. 8.
[20] Broadcasting Notice of Consultation CRTC 2010-952, *Notice of Hearing - Group-based licence renewals for English-language television groups* (BNOC 2010-952), http://www.crtc.gc.ca/eng/archive/2010/2010-952.htm.
[21] Letter to the Commission dated 2 February 2011 from Andrew MacDougall, of the law firm Osler, Hoskin & Harcourt LLP, *ibid*., Corus Reply, Appendix "A".
[22] *Ibid*., at pp 4-5. Emphasis added.

16. The Commission has confirmed that the ability to determine or decide the strategic decision-making activities of an enterprise or manage day-to-day operations of an enterprise can constitute control in fact of that enterprise:

> There is no one standard definition of control in fact but generally, it can be viewed as the ongoing power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of an enterprise. It also can be viewed as the ability to manage and run the day-to-day operations of an enterprise.[23]

17. The ability to decide the strategic decision-making activities and manage and run the day-to-day operations of Corus and SMI rests with two entirely different boards of directors and management teams, notwithstanding the common share ownership of Corus and SMI's publicly traded parent, SCI. The following factors, some of which are identified in the above-noted legal opinion, support our contention that **control in fact** of SMI will be transferred to Corus if the transaction proceeds:

- While Mr. JR Shaw has control over a substantial portion of the voting interests in both Corus and SMI's publicly traded parent, SCI, an overwhelming majority of the equity interests in each of Corus and SCI are held by a large and diverse group of public retail and institutional shareholders.

- The boards of directors of each of SMI and Corus have no overlapping directors and operate independently of each other.

- Each of Corus and SCI/SMI has different Chief Executive Officers and entirely different senior management teams.

- The governing statutes of Corus and SMI require their directors to manage or supervise the management of the business and affairs of the corporation.[24] In exercising these powers, the boards of each entity have a fiduciary obligation to act in the best interests

[23] Broadcasting Decision CRTC 2008-69, *BCE Inc., on its behalf and on behalf of certain of its affiliates, licensees of broadcasting and distribution undertakings*, http://www.crtc.gc.ca/eng/archive/2008/db2008-69.htm, at par. 30, citing from *Decision No. 297-A-1993 (In the Matter of the review by the National Transportation Agency of the proposed acquisition of an interest in Canadian Airlines International Ltd. carrying on business under the firm name and style of Canadian Airlines International or Canadian by Aurora Investments, Inc., a wholly-owned subsidiary of AMR Corporation), 27 May 1993.*

[24] *Business Corporations Act*, RSA 2000, c B-9, s. 101(1); *Canada Business Corporations Act*, RSC 1985, c C-44, s. 102(1).

of the corporation, not any particular shareholder or stakeholder.[25]

- The board of directors of each of Corus and SMI has the power to, among other things, determine the strategic direction of the corporation, declare dividends, issue shares, approve acquisitions and divestitures and enter into material contracts and other arrangements on behalf of the corporation. With the exception of electing directors and approving certain fundamental transactions (such as sales of substantially all of the assets of the corporation or amendments to the corporation's constating documents) required by law to be approved by shareholders, the shareholders of Corus and SMI do not determine or decide the strategic decision-making activities of the corporations or manage and run the day-to-day operations of the corporations.

- Mr. JR Shaw is not involved in the operations of Corus and, other than rights as a shareholder, does not have any contractual veto, pre-emptive, observer or other rights.

- Each of Corus and SCI/SMI has very different non-shareholder constituencies comprised of creditors, employees, suppliers and customers. The boards of each entity have an obligation to consider the interests of these divergent constituencies in carrying out their duties as directors.

- Each of Corus and SMI compete with each other for programming, audiences and advertisers.

18. Accordingly, this transaction is not a simple and straightforward "corporate re-organization" as SCI claims. Instead, Corus's effective takeover of the broadcasting assets and operations of SMI makes the SMI Application, for all practical and policy purposes, a **transfer of control** which should be treated as such.

[25] *Business Corporations Act*, RSA 2000, c B-9, s. 122(1)(a); *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(1)(a). *BCE Inc v 1976 Debentureholders*, [2008] 3 S.C.J. No. 37.

III. THE COMMISSION'S OBLIGATION TO REVIEW THE SCI APPLICATION IN THE PUBLIC INTEREST

> *The issues raised by this application involve many intersecting objectives and policies and speak directly to the health and sustainability of the Canadian broadcasting system. A transaction of this magnitude goes beyond an operational decision on a change in ownership; indeed, its impacts would shape the structure of the industry over the coming years.*[26]

19. This statement, which the Commission made in the course of denying the first (2012) BCE Inc.-Astral Media application (BCE-Astral1), applies equally to the current SCI Application.

20. The Commission confirmed at the outset of its 2013 decision approving the second BCE Inc.-Astral Media transaction (BCE-Astral2)[27] that its prior approval of ownership transactions is required not only when there is a proposed change of control, but also "where persons wish to acquire or increase their holdings in broadcasting licensees above certain thresholds, even if those licensees form part of a larger unlicensed commercial enterprise."[28]

21. Thus, regardless of whether the SCI Application involves a proposed transfer of control, the Commission's past practice indicates that transactions of this size and significance require careful scrutiny to ensure that approval, if granted, would serve the public interest.

22. The Commission further stated in BCE-Astral2 that

> The review of ownership transactions is an essential element of the Commission's regulatory and supervisory mandate under the *Broadcasting Act* (the Act)…**This analysis is of particular importance when dealing with a large transaction that has the potential to reshape the Canadian broadcasting system.**..
>
> The Commission must consider each application on its merits, based on the circumstances specific to the application. In addition, **the Commission must be assured that approval of a proposed ownership transaction furthers the public interest as expressed in the objectives of the Act**…[29]

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[26] Broadcasting Decision CRTC 2012-574, *Astral broadcasting undertakings – Change of effective control* (BCE-Astral1), http://www.crtc.gc.ca/eng/archive/2012/2012-574.htm, at par. 50.
[27] BCE-Astral2, *ibid*., above Note 9.
[28] *Ibid*., at par. 11.
[29] *Ibid*., at pars 15 -16. Emphasis added.

23. Corus's $2.65 billion purchase of SMI has the potential to be a "game changer" for the Canadian broadcasting system. The proposed transaction will result in Corus becoming one of the largest and most powerful broadcasting entities in the country which will impact both the independent production sector and Canadian audiences. Thus, the Commission's analysis of this large transaction to determine if approving it would be in the public interest is indeed "of particular importance".

24. The Commission should, therefore disregard SCI's attempt to expedite the regulatory approval process by saying that the "[r]eorganization does not raise any policy issues related to concentration" because it "does not involve a change in effective control of any broadcasting undertaking."[30] It is clear that the preservation of a robust Canadian broadcasting system requires an evaluation of all its constituent elements to ensure that regulatory decisions create the conditions necessary for **all** stakeholders to succeed.

A. The Public Interest Test

> *The Commission considers that convergence, integration and scale may lead to a point at which the size of an entity on a national level becomes so large that it hinders effective and healthy competition among Canadian broadcasters. The Commission…considers that a transaction of this magnitude would adversely affect competition and diversity in the Canadian broadcasting system and thereby threaten its ability to achieve the policy objectives set out in the Act. The Commission is mindful that a healthy communications system also requires entities of various sizes that are able to compete and innovate in a fair environment.*[31]

25. As the Commission stated in Bell-Astral2, in assessing whether a proposed transaction is in the public interest, it takes into account

> …a wide set of factors as reflected in the Act, including the nature of programming and service to the communities involved, as well as regional, social, cultural, economic and financial considerations. Therefore, an appropriate tangible benefits package is only part of the applicant's obligation to demonstrate that the transaction is in the public interest. In rendering a decision, the Commission must be persuaded that the proposed transaction benefits Canadians and their broadcasting system.[32]

[30] SCI Application, Supplementary Brief (SCI Application), at par. 40.
[31] BCE-Astral1, *ibid*., above Note 26, at par. 63.
[32] BCE-Astral2, *ibid*., above Note 9, at par. 21. Emphasis added.

26. The Commission's policies directly applicable to its consideration of ownership transactions are its *Tangible Benefits Policy*[33] and *Diversity of Voices (DOV) Policy*.[34]

i) Tangible Benefits Policy Considerations

27. While the Commission originally established its *Tangible Benefits Policy* as a proxy for holding competitive hearings to reassign licences that have been sold, the policy has taken on a substantially larger role in the current broadcasting ecosystem, particularly given the massive consolidation that has occurred amongst broadcasters in recent years. In practical terms, the *Tangible Benefits Policy* has become a critical means of ensuring that increased broadcaster consolidation and vertical integration not only serve the corporate economic interests of the transacting parties but also advance Canada's cultural and social broadcasting policy objectives by funding the creation of new Canadian programming and supporting related educational and civil society initiatives.

28. Given the Commission's mandate to ensure that all significant transactions are in the public interest, the obligation of broadcasting companies effecting massive consolidation to give back to the broadcasting system should be tied to the practical impact such consolidation will have on the system, and not to the sole question of who may, in narrow legal terms, end up exercising control of the consolidated entity after the transaction is completed.

ii) DOV Policy Considerations

29. In its Application, SCI asserts that "[a]s the reorganization does not involve a change in effective control of any broadcasting undertakings, it would not trigger an examination under the [*DOV Policy]*."[35] This is an unduly narrow interpretation of what the policy requires and ignores several policy considerations that must be considered when assessing the impact of a proposed transaction.

30. The *DOV Policy* is meant to address concerns which may arise **whenever** "a proposed acquisition may result in a person gaining a dominant position in the television sector,"[36] and not solely in cases where a change of control occurs. **It is the practical reality of market dominance that triggers diversity of voices concerns, not how that dominance was attained.**

31. To that end, one of the Commission's five objectives for its *DOV Policy* is to ensure that any further consolidation in the Canadian broadcasting system provides a net benefit to

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[33] Broadcasting Regulatory Policy CRTC 2014-459, *Simplified approach to tangible benefits and determining the value of the transaction,* http://www.crtc.gc.ca/eng/archive/2014/2014-459.htm.
[34] DOV Policy, *ibid*., above Note 1.
[35] SCI Application, *ibid*., above Note 30, at par. 40.
[36] DOV Policy, *ibid*., above Note 1, at par. 84.

Canadian audiences and to the creation of Canadian programming.[37] This objective references "further consolidation" in the system without limiting the concept only to change of control transactions.

32. The other four objectives identified in the *DOV Policy* are:

- To provide access, within the Canadian broadcasting system, to a diversity of voices through broadcasting services from the public, private and community elements;
- To ensure plurality of ownership within the private element of the Canadian broadcasting system;
- To ensure that audiences have access to a diversity of programming - especially national, regional and local content;
- To restrict ownership only when it is necessary to achieve the above objectives and to do so in a manner that is simple, clear and effective.[38]

33. As stated in the last bullet above, the Commission will only restrict ownership transfers where the circumstances make it necessary to achieve its *DOV Policy* objectives, as was the case with the first BCE-Astral Media application. In denying that application, the Commission expressed the following concerns relating to the additional marker power BCE Inc. would gain from the transaction:

> In English-language television, a combined BCE/Astral would control an unprecedented amount of total revenues and viewing. In addition, BCE would increase its already significant share of Category A discretionary services which, as must-carry services, would give BCE considerable negotiating power with other distributors. The acquisition of Astral would add popular and successful discretionary television services, resulting in an increased presence by BCE in the most attractive genres – movies, sports and premium content – that drive a significant component of demand for Canadian television services. These genres are consistently popular with Canadian viewers and feature exclusive and/or live programming unavailable elsewhere. Finally, the ability to negotiate for every program rights window with programming suppliers and advertisers, when combined with BCE's size and ability to "bulk buy," could ultimately reduce, rather than increase competition.[39]

[37] *Ibid*., at par. 25.
[38] *Ibid*.
[39] BCE-Astral1, *ibid*., above Note 26, at par. 55.

34. In a similar way, a merged Corus-SMI would control a substantial amount of total revenues and viewing; Corus would increase its already significant share of long-standing and popular discretionary services which would give it considerable negotiating power with distributors;[40] the acquisition of SMI would add popular and successful discretionary television services, resulting in an increased presence by Corus in the attractive women's and lifestyle genres; and the ability to negotiate for every program rights window with programming suppliers, when combined with the size of merged Corus-SMI and its ability to "bulk buy," could ultimately reduce, rather than increase competition.

IV. THE COMMISSION'S HISTORICAL APPLICATION OF THE PUBLIC INTEREST TEST AND THE INTRODUCTION OF TERMS OF TRADE

> *The Commission generally considers that factors such as convergence, integration and scale may lead to an entity's becoming so large that it is provided with the opportunity and incentive to give itself or others an undue preference. This could impede the efficient delivery of programming at affordable rates and reasonable terms of carriage to the detriment of a competitive and dynamic marketplace in the Canadian broadcasting system. Ultimately, this could also have consequences on the availability and diversity of programming for Canadians.*[41]

35. The *DOV Policy* states that "[d]iversity of programming can mean several things, such as the expression of Canadian voices amidst foreign ones, the availability of different genres and formats, **or the airing of content made by a variety of producers, including independent producers**."[42]

36. The *DOV Policy* also states:

> …the Commission is concerned that increased consolidation in the television sector as a whole could result in a reduction in diversity for Canadian viewers. **Such consolidation could also result in increased difficulties for independent producers in negotiating reasonable terms for their programming**.[43]

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[40] Notwithstanding that these services will lose their must-carry status at their next licence renewals their incumbency and brand value would still give a merged Corus-SMI considerable negotiating power with distributors. See Broadcasting Regulatory Policy 2015-96, *Let's Talk TV - A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, http://www.crtc.gc.ca/eng/archive/2015/2015-96.htm.

[41] Corus-TELETOON, *ibid*., above Note 17, at par.46.

[42] DOV Policy, *ibid*., above Note 1, at par. 18. Emphasis added.

[43] *Ibid*, at par. 77. Emphasis added.

37. Notably, the Commission's *DOV Policy* provides that, in order to assess the impact of consolidation on the independent production sector, the Commission will consider "the existence of effective terms of trade agreements between licensees and independent producers."[44]

38. In BCE-Astral2, the Commission, stated that, in its examination of the proposed transaction, it had focused on the following two issues:

- potential impacts on the Canadian broadcasting system; and
- proposed benefits of the transaction for the Canadian broadcasting system.[45]

39. When considering the potential impacts of the transaction on the Canadian broadcasting system the Commission has considered, amongst other things:

- concentration of ownership – television:
  - diversity of voices;
  - vertical integration and remedies against anti-competitive behaviours;

- other issues relating to television:
  - terms of trade agreements;
  - impact on independent production.[46]

40. When the Commission approved the BCE-Astral2 application, it made it clear that it would not have done so had it not imposed safeguards "necessary for the implementation of the broadcasting policy set out in section 3(1) of the Act" which would

> …ensure that Canadians receive the benefits of a large, vertically integrated company creating and distributing programming, while at the same time facilitate the provision and distribution of a wide range of varied and comprehensive programming on reasonable terms.[47]

41. One of these safeguards was the requirement that the Astral services BCE Inc. was acquiring adhere to a Terms of trade agreement with the CMPA, a requirement that BCE Inc. readily accepted. [48]

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[44] *Ibid*., at par. 89.
[45] BCE-Astral2, *ibid*., above Note 9, at par. 30.
[46] *Ibid*., at par. 31.
[47] *Ibid*., at par. 27.
[48] The Astral services had previously been subject only to an "expectation" in that regard. See Broadcasting Decision CRTC 2012-241, *Astral Media inc. – Group-based licence renewals*, http://www.crtc.gc.ca/eng/archive/2012/2012-241.htm.

42. The Commission followed a similar approach when it subsequently reviewed the 2013 Corus-TELETOON transaction. In approving that transaction, the Commission noted it had

> …implemented a number of support mechanisms for independent and original production, as proposed by interveners, as well as safeguards against anti-competitive behaviours, to mitigate the potential negative impacts of the transaction...that may result from Corus's market power.[49]

43. The Commission observed that (even at that time) Corus held "a significant suite of television services" and that, "[m]oreover, Corus is affiliated with Shaw, which is a vertically integrated entity with a significant presence in both the programming and distribution sectors." The Commission then stated that "[t]hese circumstances place Corus in a uniquely advantageous position in the market."[50]

44. To address Corus's uniquely advantageous market position, the Commission stated that it was "necessary to establish safeguards to limit the potential for anti-competitive behaviours by Corus." Specifically, it was the Commission's view that "conditions structuring negotiations and detailing obligations in that regard, **as well as those relating to concluding terms of trade**, are appropriate measures to ensure that the Canadian broadcasting system remains competitive."[51]

45. As part of its review of SCI's 2010 application to purchase Canwest Global Communications Corp (Canwest), the Commission stated its expectation that SCI negotiate terms of trade with independent producers in advance of the then-upcoming 2011 licence renewal hearing.[52] In approving the SCI-Canwest application, the Commission advised SCI that, in the event that no terms of trade agreement was reached prior to that hearing, it would require SCI to file substantive proposals to the Commission as part of the record of the hearing, and would then establish appropriate provisions for terms of trade as part of its determinations set out in its licensing decision.[53]

46. Subsequently, in announcing the 2011 licence renewal hearing, the Commission advised all the applicants that they would be subject to the same approach.[54]

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[49] Corus-TELETOON, *ibid*., above Note 17, at par. 38.
[50] *Ibid*., at par. 47.
[51] *Ibid*., at par. 48. Emphasis added.
[52] Broadcasting Decision CRTC 2010-782, *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries*, http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm, at par. 59.
[53] *Ibid*., at par. 60.
[54] BNOC 2010-952, *ibid*., above Note 20.

47. Forcing the applicants to conclude terms of trade agreements, or risk having the Commission establish its own terms of trade provisions, was instrumental in bringing Corus and the other large private English-language broadcast groups to the table with the CMPA to mutually negotiate and conclude terms of trade agreements in advance of the 2011 Group Licence Renewal hearing.[55] In fact, had the CRTC not required the broadcasters to enter into terms of trade agreements with the CMPA in 2011, it is a virtual certainty that no agreements would have ever been concluded.

48. The Commission most recently acknowledged the importance of terms of trade in BRP 2015-86, pointing out that such safeguards in the U.K. "set a transparent basis for commissioning deals to mitigate the exercise of broadcasters' negotiating power" and "helped to stabilize and capitalize the independent production sector, facilitating its ability to compete globally, and to clarify digital rights."[56]

49. The Commission further noted that the Terms of trade agreement currently in place provides broadcasters and producers "with the baseline obligations they require to ensure that the [sic] content is widely available and properly monetized."[57]

50. At the same time, the Commission decided to relieve broadcasters of their obligation to adhere to a terms of trade agreement by condition of licence because "broadcasters and producers now have the clarity and experience they need to negotiate any future agreement among themselves."[58]

51. As outlined in Section VI below, it is clear that Corus has no real intention of negotiating a renewed terms of trade agreement or an equivalent set of competitive safeguards with the CMPA unless it is compelled to do so by the Commission.

V. THE PUBLIC INTEREST TEST AND THE SCI APPLICATION

> *With respect to market dominance, the Commission recognizes 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.*[59]

[55] Private Broadcasters Agreement, *ibid*., above Note 13.
[56] BRP 2015-86, *ibid*., above Note 10, at par. 133.
[57] *Ibid*., at par. 140.
[58] *Ibid*., at par. 141.
[59] DOV Policy, *ibid*., above Note 1, at par. 37.

52. Given the dominance Corus will have if this Application is approved, 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. These concerns are amplified by the fact that the SCI Application, if approved without competitive safeguards, would result in the substantial weakening of the independent production sector – the single greatest driver of programming diversity, innovation, regional expression, employment and excellence in the Canadian broadcasting system.

53. The big broadcasters are giants in the Canadian marketplace thanks to the privileged access to Canadian audiences they enjoy by virtue of being affiliated with vertically integrated BDUs and having benefited from many years of regulatory protection – such as, until recently, "must-carry" status for a number of their services. In contrast, independent producers operate in a fiercely competitive global market and succeed or fail simply by producing the best shows relative to their competitors.

54. The ability of independent producers to innovate and produce a slate of diverse and compelling programs is primarily dependent on their retention of the international exploitation rights to their shows. Without the ability to generate "long-tail" international revenues, producers are reduced to a "project-to-project" business model that retards investment in the development of new productions. In many respects, the development phase is the most important phase in production – it is the industry's version of research and development. International revenue also enables producers to invest in a slate of projects, thereby better ensuring sustainability and reducing the likelihood that their viability will hinge on the success or failure of a single show.

55. The current Terms of trade agreement ensures that the big broadcasters cannot appropriate international revenue streams for themselves by virtue of their dominant market position.[60] Rather, the broadcasters are rewarded with a share of those revenue streams when they contribute a share of the project financing large enough to commercially justify so-called "back-end" profit participation on the exploitation revenue generated by the program.[61]

56. Perhaps the single best indicator of the importance of independently-produced programming is the fact that it has been central to the popularity of several of SMI's and Corus's most successful brands. Such programs as the dramas *Rookie Blue* and *Lost Girl*, lifestyle shows such as *Property Brothers* and *Love it or List it* and children's programming such as *Max and Shred* and *Almost Naked Animals* have all been ratings hits and fostered strong audience attachment for Global TV, Showcase, W Network and YTV.

[60] Private Broadcasters Agreement, *ibid*., above Note 13, at Art. 6(d).
[61] *Ibid*., at Art. 8.

57. The independent production sector also is uniquely positioned to provide the widest possible diversity of programming to the Canadian broadcasting system, including programs that reflect each of Canada's distinct regions. Independent production companies, primarily small and medium sized business, are located across the country, and infuse the projects they produce with the distinctive voice that is unique to their part of Canada. This is in contrast to Canada's big broadcasters, including SMI and Corus, where programming decision-making is centralized in Toronto.

58. It is for all of these reasons that it is not sufficient for SCI to demonstrate that approval of this transaction would be good for **Corus**. Publicly-traded companies will always see the attainment of market dominance as being in their self-interest – and all the more so if this dominance is given a regulatory stamp of approval. Rather, the SCI Application must be reviewed in the context of how a merged Corus-SMI would exercise its dominant market position in its dealings with independent producers and other key stakeholders in the system. It is the conclusions drawn from this analysis that will enable the Commission to determine whether or not the transaction is in the public interest.

A. Impact of the Proposed Corus-SMI Transaction on the Independent Production Sector

i) Corus's Dominance in the Broadcasting Sector

> *…any merger of two broadcasting groups raises the concern that there will be "fewer doors left to knock on" for independent producers. In addition to the reduction in the number of decision-makers to whom they can pitch their proposals, independent producers that do not have a historical relationship with the acquiring entity may find themselves left at a disadvantage.*[62]

59. As confirmed in the Corus legal opinion noted above, Corus and SMI currently compete with each other for programming and audiences. The CMPA can attest to this fact as our members have benefited from being able to negotiate better deals when the two broadcasters find a particular project mutually attractive and subsequently offer more competitive terms in order to obtain the project.

60. If the SCI Application is approved, this competition will end. There will be one less, unique (and very large) "door" for producers to knock on, and one less team of programmers working to differentiate their program choices to attract and benefit audiences.

[62] BCE-Astral2, *ibid.*, above Note 9, at par. 95.

61. Corus and SMI currently represent two of the five largest buyers of English-language programming in the already massively-consolidated Canadian broadcasting system (the other three being Bell, Rogers and the Canadian Broadcasting Corporation (CBC)).

62. If Corus is allowed to acquire SMI, three broadcasters – Corus, Bell and Rogers – would account for 90% of all private broadcasters' spending on Canadian English-language television programming and would control over 80% of television viewing in the Canadian English-language market. It also means that Corus would itself control more than a third of such viewing (with Corus and Bell together controlling over 70%).[63] The only other significant buyer of English-language programming, CBC, accounts for approximately 10% of English-language viewership.

63. In the *DOV Policy*, the Commission established viewership thresholds to help it assess the impact of transactions which will increase horizontal media concentration. While the *DOV Policy* states that this approach "is appropriate in examining the impact on diversity of voices of any change in effective control"[64], this does not preclude the Commission from considering such thresholds for other significant transactions if circumstances warrant.

64. Under the *DOV Policy*, the bottom end viewership threshold is 35% or more of the total television audience share, barring other policy concerns. In its Application, SCI claims that "with the termination of Corus's pay television operations on March 1, 2016, Corus/Shaw Media's combined share of English language television viewing will be approximately 34.5%..."[65]

65. We submit that "approximately 34.5%" is so close to the threshold level of 35% as to warrant the Commission's review.

66. Corus already dominates the English-language children's programming genre, as it owns six of the top ten children's services[66] and holds a 54% share of the English-language children's audience to Canadian programs.[67] In approving Corus's 2013 purchase of the TELETOON services, the Commission noted that the combined Corus-SMI audience share "in the animation and children's programming sectors is significant".[68] This was one reason why the Commission determined that the Corus-TELETOON transaction "warranted the Commission's careful examination."[69]

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[63] CRTC Communications Monitoring Report 2015, Table 4.2.14, http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr4.htm#a42.
[64] DOV Policy, *ibid*., above Note 1, at par. 83.
[65] SCI Application, *ibid*., above Note 30, at par. 40.
[66] 1. Treehouse 2. YTV 4.TELETOON 6. Disney Channel 8. Nickelodeon 9. Cartoon Network. Source: Corus Presentation supra note 3, slide 11.
[67] Corus Share of Viewing to all English-language TV, 2014-15 Broadcast Year, September to August, Viewing Share (%), Ages 2-11 in BDU Homes. Source: CMRI (Numeris).
[68] Corus-TELETOON, *ibid*., above Note 17, at par.36.
[69] *Ibid*.

67. With the purchase of the SMI stable of specialty services, Corus would also dominate English-language women's and lifestyle programming, owning the top six channels among women[70] and holding a 48% share of the English-language adult female audience to all programs on Canadian specialty services.[71] Corus would also own almost all of the English-language lifestyle programming services, namely:

fyi	Lifetime
Slice	DIY
HGTV	Cosmopolitan TV
Food Network	
OWN	
W Network	

68. The CMPA recognizes that the Commission's thresholds for reviewing applications which will increase horizontal media concentration are based on total television share of viewing to Canadian commercial television stations. However, as the Commission has confirmed, those thresholds are not by themselves determinative. Instead, as the Commission stated in BCE-Astral1, those thresholds are intended to help guide Commission analysis of horizontal media consolidation.[72] And, as the Commission also stated in BCE-Astral1:

> …given the size and nature of the proposed transaction, the Commission considers that it should rely on multiple indicators of market power, competition and ownership concentration, rather than be limited to the television market share thresholds set out in the DOV policy.[73]

69. In light of the policy concerns raised by this Application, the Commission should not only assess Corus' total television share of viewing, but also its share of the audience and the genres of programming most impacted by this transaction, as well as other "indicators of market power, competition and ownership concentration".

70. A merged Corus-SMI would mean that the new and much larger Corus would have substantially more negotiating power both because of its greater size and because it would become one of only four competitive program buyers in the English-language market. Moreover, this market shrinkage would also serve to substantially bolster the negotiating power of the other remaining large broadcasters because, in each case, the number of their major private sector competitors would also drop from four to three.

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[70] 1. W Network 2. Food Network 3. CMT 4. Showcase 5. HGTV 6. YTV, Corus Presentation, supra note 3, slide 11.
[71] Combined Corus-SMI Share of Viewing, 2009-15 Broadcast Years, September to August, Viewing Share (%), Females 25+ in BDU Homes. Source: CMRI (Numeris).
[72] BCE-Astral1, *ibid*., above Note 26, at par. 52.
[73] *Ibid*., at par. 54.

The result would be an effective oligopsony of buyers for Canadian independently-produced content.

71. While 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 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.

ii) Corus's "Own and Control" Strategy

72. Corus has made it quite clear that, should the SCI Application be approved, it intends to take full advantage of its increased market power over independent producers by taking ownership and control of their programs.[74] Corus repeatedly stated its intention to implement this "own and control" strategy during its call with financial analysts announcing the transaction:

> Turning to slide 17. **TV fuels our investment in owned content. As you know we call this our Corus advantage**. Our distinctive position as an integrated broadcaster, producer and distributor enables us to use our required Canadian Programming Expenditures or CPE to create valuable content for our domestic broadcast platforms and drive ratings. These same assets can then be distributed into the lucrative international marketplace as demand for content continues to grow worldwide.
>
> The CRCT's recent less talk TV decisions [*sic*] have established an even stronger ecosystem for the creation of quality Canadian content and we embrace it. **This combined with the increased CPE through our acquisition of Shaw Media enables us to accelerate this strategic priority to own more content**. Our original lifestyle content geared to women has proven to be a huge ratings driver for our networks and it has international appeal. We are leveraging our success in the kids space to extend this into the new area of content creation on search [ph] for reality. **This is our vertical integration model. It is a key competitive advantage and it represents a huge opportunity for us.**
>
> Turning to slide 18. This winning combination strengthens our unique competitive advantages and fully aligns with our strategic plans, positioning us for a bright future. **Our ability to own and control**

[74] SCI Application, *ibid*., above Note 18, at par. 24.

> **content has never been greater**. We are gaining a strengthened portfolio of premium brands bolstered by new partnerships and output deals, exclusive first run content and an ability to increase our global scale **and own content.**
>
> …
>
> From a strategic perspective we will achieve meaningful scale to deliver growth through; one, differentiated scale, giving us the scale to compete with the unique position with the women, kids and family that differentiates us from the competition.
>
> **Two, owning and controlling more content with the scale to accelerate domestic and global growth from a strong and growing content slate.**
>
> …
>
> **Well, by virtue of the fact that we want to double our revenues, we have effectively more than doubled our CPE spend and we will bring the bearer the same strategies we've employed at Corus to the combined entities, which basically if you recall what we're effectively doing is taking money we have to spend anyways and that would be an expense to anybody that wasn't wanting to own the content, and we produce it ourselves and distribute it internationally**.[75]

73. The analysts' call concluded with the following exchange between Scotiabank's, Jeff Fan, and Corus's CEO, Doug Murphy, where Mr. Murphy expanded on Corus's intent to use its increased post-merger leverage to structure deals that would allow Corus to own the copyright to programs created by independent producers:

> *Jeff Fan:*
> Great, and just maybe one quick one for you Doug. You talked quite a bit about ownership of content and control content being a key strategic priority. Can you just help me reconcile how this transaction with Shaw Media furthers that?
>
> *Doug Murphy:*
> Again, think of it this way. We have a – and I use broad numbers and they are directionally accurate, but they are not in specific accurate. Let's say we spend $100 in CPE on W for example. We would spend – and I'm just making this number up, $20 on programming **that we**

[75] Corus Presentation, *ibid*., note 3. Emphasis added.

> **would structure in such a way that we would own the copyright. So we would work with an independent producer, put together a deal based on the merits of the economics for both sides, but we would ensure that Corus would retain copyright for global exploitation**.
>
> Now we don't have $100 in W, we've just gone to $250. So now we can spend $50 if you just take the same percentage on the very same production model and therein increase our exposure to the global content marketplace.[76]

74. The only way Corus can "structure" deals to effectively implement its "own and control" strategy, is to force independent producers to relinquish the ownership rights to their intellectual property and the program exploitation revenue streams that flow from such ownership (e.g., international and domestic rights, merchandising rights, digital media production rights, etc.). These revenues are the lifeblood of stable, sustainable independent production companies.

75. SMI has already adopted a similar strategy. Since the Terms of trade agreement was established, SMI has increasingly been licensing programming from independent producers through its Producer of Record (POR) stream. SMI claims that the Terms of trade agreement does not apply to POR programs because the concepts or ideas originate with and are substantially developed by SMI, not the independent producer, and therefore such programs are not "independently produced".

76. Regardless of the applicability of Terms of Trade to these kinds of productions, our most recent information from members tells us that SMI is now only commissioning lifestyle programming under the POR stream. Lifestyle producers are effectively told to "take it or leave it" – if they want a broadcast licence from SMI, they must accept the POR deal terms. Attached as Appendix "A" to this submission is an excerpt from a chart created by SMI to illustrate the rights it is able to acquire under the Terms of trade agreement versus those rights available to it when the program is licensed in the POR stream. This chart clearly shows that under the POR stream, SMI is able to extract substantially more favourable terms from independent producers than it is able to do under the Terms of trade agreement.

77. In reality, POR is "own and control" by a different name. This commissioning strategy perfectly illustrates the lengths to which a powerful broadcaster will go to leverage its market power at the expense of the independent production sector.

78. If Corus has free reign to implement its "own and control" strategy, it will increasingly convert what would otherwise be truly independently-produced programs into Corus service work, making those programs "independently-produced" in name only. This

[76] Corus Presentation, *Ibid*., note 3. Emphasis added.

would defeat the Commission's purpose in requiring broadcasters to commission from independent producers in the first place. For example, the Commission's requirement that 75% of the big broadcasters' expenditures for programming of national interest be directed to the independent production sector is effectively meaningless if producers are not, in fact, independent, but have instead been reduced to the role of service providers for the broadcasters. It is for this reason that the Commission has long recognized that the best means of ensuring a significant contribution to the Canadian broadcasting system by the independent production sector is through a combination of expenditure obligations and competitive safeguards. It is also why competitive safeguards are a necessity in the event that the Commission decides to approve the SCI Application.

B. Impact of the Proposed Corus-SMI Transaction on Canadian Audiences

79. If broadcasters are able to impose inequitable and unreasonable licensing terms onto independent producers, it will damage the producers' long-term incentive to innovate and invest in the production sector as they will be less likely to undertake the costs and risks associated with creating new, innovative programming. If producers do not own the intellectual property rights to their productions, and the associated rights to exploit such programs, they will be unable to sustain or grow their businesses.

80. Similarly, without the ability to earn the revenue from the exploitation of their intellectual property rights, independent producers will not have the requisite capital to reinvest in new projects.

81. Regional production companies will be the hardest hit by this development because they are generally smaller. Moreover, with Corus centralizing rights in Toronto, there will be a reduced range of world-class programming coming from all other regions of the country.

82. This reduction in innovation and investment would result in a decline in the quantity, quality and diversity of programming available in the market and would ultimately harm consumer choice.

VI. WHY SAFEGUARDS MUST CONTINUE TO ENSURE A ROBUST CANADIAN BROADCASTING SYSTEM

83. As was the case with Bell-Astral2 and the Corus-TELETOON transaction, the Commission should not approve the SCI Application absent safeguards designed to ensure the transaction will actually advance this country's broadcasting policy objectives, including the objective that the programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector.

84. A fundamental component of the Commission's regulatory "tool kit" which it has used to both achieve this independent production objective and to ensure diversity in the face of increased broadcaster consolidation is effective terms of trade agreements between licensees and independent producers.[77]

85. As previously referenced, Corus (and the other private broadcasters) are currently subject to a Terms of trade agreement with the CMPA – an agreement that Corus has repeatedly complained about, but which it freely signed as a sophisticated commercial actor, presumably in good faith.

86. While Corus relentlessly lobbied the Commission to extricate itself from a condition of licence requiring it to abide by its own agreement, it also elected not to approach the CMPA to enter into a renegotiation of its terms. Under the Terms of trade agreement, the parties may re-open the agreement at any time after two years following its coming into force. Corus's decision not to seek to renegotiate the Agreement is unfortunate. Not only could the Agreement be amended to better meet both parties' fundamental needs, but also to reflect the technological and market changes that have occurred since the Agreement was first concluded in 2011 – such as, for example, the launching of the subscription video-on-demand services CraveTV and shomi.

87. With these objectives in mind, on 27 January 2016, the CMPA wrote to Corus stating that, in light Corus's recent announcement of its intent to acquire SMI and the impact such acquisition would have on the broadcaster-independent producer relationship, the time had come to renegotiate the Terms of trade agreement.

88. On 12 February 2016, Corus responded to our request by suggesting that the renegotiation of Terms of Trade be added as an agenda item to our next Working Committee meeting. However, the purpose of the Working Committee is to resolve interpretation issues that have arisen under the existing Terms of trade agreement. Corus does not need a Working Committee meeting to determine whether or not it is prepared to negotiate a renewed agreement with the CMPA. Moreover, at the time that Terms of Trade were concluded in 2011, Corus insisted that it have a separate, standalone agreement, albeit one with substantially the same terms as the agreement with the other broadcaster signatories. Accordingly, Corus neither needs to consult with, nor obtain the consent of, the other broadcasters to negotiate a renewed Terms of trade agreement with the CMPA.

89. The advantage to Corus of "punting" this issue to a Working Committee meeting is that it allows Corus to claim, however implausibly, that it is contemplating negotiating a renewed agreement. In this way, Corus aims to sidestep having to make any firm commitment to the Commission that it will, in fact, conclude such an agreement, and do so within a reasonable timeframe.

[77] DOV Policy, at par 89, *ibid*., above Note 1.

90. This is further confirmed by the fact that SCI has done nothing to address broadcaster-producer safeguards in its Application. The SCI Application does not speak to the Commission's concern that "consolidation could also result in increased difficulties for independent producers in negotiating reasonable terms for their programming."[78] Instead, as noted, Corus confirmed its intent to "own and control" as much content as its new increased market leverage will permit.

91. SCI even goes so far as to claim that "existing safeguards are sufficiently robust to alleviate any concerns with respect to the market position of Corus/SMI both prior to and following the proposed reorganization."[79] None of the safeguards referenced by SCI, however, have anything to do with the independent production sector.

92. In fact, all of the referenced safeguards relate to SCI's status as a vertically-integrated broadcaster/BDU. In other words, they cover Corus-SMI's relationship with unaffiliated and independent BDUs. Nowhere in its Application does SCI reference Terms of Trade or any other safeguards to address Corus's relationship with unaffiliated and independent producers.

93. Corus's strategy appears to be to pretend as if the Commission did not in BRP 2015-86 set out a clear expectation that the parties will, on their own, reach a "future [Terms of Trade] agreement". The CMPA is fully prepared to return to the bargaining table but absent the Commission's intervention, we will sit at that table alone. If Corus refuses to negotiate new independent production safeguards, it will no longer face any reasonable constraints in exercising its substantial negotiating power to dictate the terms of program deals to its commercial advantage – and to the detriment of independent producers and the Canadian broadcasting system.

94. For all of these reasons, the Commission should only approve the SCI Application if it follows its previous approach by requiring Corus to negotiate an agreed-upon set of competitive safeguards – whether through a renewed Terms of trade agreement, a Code of Practice, or the equivalent – before Corus's forthcoming licence renewal hearing. Should such negotiations not be successfully concluded prior to that hearing, the Commission should establish appropriate safeguards as part of its determinations in Corus's renewal decisions.

VII. CONCLUSION

95. The fact that the SCI Application does not seek approval for a change of control does not mean that this transaction does not raise important public policy issues requiring the same careful scrutiny that the Commission has applied in reviewing past transactions that have resulted in increased industry consolidation.

[78] DOV Policy, at par.77, *ibid*., above Note 1.
[79] SCI Application, *ibid*, above Note 30, at par. 37.

96. In this case, two separately and independently operated and managed entities would become commonly operated and managed and two decision-makers, in both structure and practice, would become one. As such, the policy implications of the Corus-SMI transaction are identical to those where a change of control is effected.

97. The Commission has repeatedly identified terms of trade agreements as an important safeguard to prevent anti-competitive behaviour in the face of transactions that would substantially increase broadcaster consolidation. The Corus-SMI transaction, if approved, would represent a material change in circumstances since the Commission decided in BRP 2015-86 to rely on the parties to voluntarily "negotiate any future agreement among themselves". We submit that these new circumstances fully justify a reconsideration of this expectation that the broadcasters – and Corus in particular – will come to the bargaining table without the Commission requiring it to do so.

98. If the Commission chooses to approve the SCI Application and thus grant Corus substantially more power to impose its will on independent producers, we submit that a condition of that approval must be an enforceable obligation that Corus negotiate, in a fair and timely manner, a new set of competitive safeguards to govern its relationship with independent producers. Otherwise, approval of this Application would allow Corus to aggressively pursue its strategy to own and control yet more content in a manner that would be contrary to Canada's broadcasting policy objectives and Commission policies, particularly with regard to promoting a diversity of voices in the Canadian broadcasting system and ensuring that independent producers make a significant contribution to that system.

Sincerely,

[original signed by]

Jay Thomson, LL.B, LL.M
Vice President
Broadcasting Policy & Regulatory Affairs

Attach.

cc. Dean Shaikh, Shaw Communications Inc., dean.shaikh@sjrb.ca

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