



September 27, 2013

Mr. John Traversy  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Traversy:

**Re: Broadcasting Notice of Consultation CRTC 2013-448, Item 3: Application by Corus Entertainment Inc. (Corus) for authority to acquire the broadcasting undertakings Historia and Series+ Applications 2013-0597-0, 2013-0600-4, and 2013-0611-8**

1. The Canadian Media Production Association (the CMPA)<sup>1</sup> wishes to provide the following comments regarding the above-noted application.
2. The CMPA does not take a position on whether or not the Commission should authorize Corus to purchase the two noted specialty services currently jointly-owned by Shaw Media Inc. (Shaw) and Bell Media Inc. (Bell). Instead, this submission is focused solely on arguing that the Commission should base the size of the applicable tangible benefits package on the full value of the transaction, and not just on the value of Bell's ownership of the two services, as Corus proposes.
3. Please note that we would only wish to appear at the 5 November 2013 hearing concerning this item if, in the opinion of the Commission, its determinations in response to this particular application could set a precedent respecting the applicability of the Commission's Tangible Benefits Policy to any future application respecting a possible merger of Shaw and Corus. In our view, the Commission should not dispose of that important issue at this time, and certainly not absent an opportunity for all interested and potentially affected parties to comment on the matter.

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<sup>1</sup> 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. The CMPA's 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.

4. In any event, the CMPA submits that the Commission can require Corus to pay benefits on the full value of the transaction which is the subject of the application currently before it without any need to address that more complex and potentially far-reaching issue.
5. Corus argues that the value of the Shaw ownership share of the two services should be excluded from the benefits calculation because its purchase of that share simply constitutes a corporate reorganization. We disagree.
6. First of all, we submit that this is not simply a re-organization of assets within a single corporate entity. Corus and Shaw are two separately-traded companies. The fact of the matter is that Corus, a separately traded entity which for years has very publicly positioned itself as independent from Shaw, had to pay Shaw for its share of the licences (which Corus has valued at almost \$139 million). That process is not consistent with a simple corporate reorganization.
7. We understand that it may be in the best interests of Corus' shareholders to describe this aspect of the transaction as a corporate re-organization in order to try to reduce the applicable benefits payable here. However, even if this aspect of the transaction could somehow qualify as a simple re-organization, that is not the point, and need not be decided here. Instead, we submit that the sole issue here is whether, under the Commission's Tangible Benefits Policy, benefits are payable based on the value of the *entire transaction*, which encompasses the value of all the ownership interests Corus is seeking to obtain. For the reasons set out below, we submit that benefits are indeed payable based on the value of the entire transaction.
8. Corus claims that the value of this transaction is \$277.2 million. As always in ownership transactions, the CMPA relies ultimately on the Commission's expertise to determine the true value of the assets being transferred in these circumstances. Regardless, the associated benefits package should still amount to 10% of the final and full amount; based on Corus' valuation claim, the benefits package should therefore amount to \$27.72 million, not half of that as Corus seeks.
9. Corus' argument that its benefits obligation should be cut in half appears to be based on its view that, because Shaw and Corus are affiliated, a standalone transfer of Shaw's wholly-owned broadcasting undertakings to Corus would not trigger benefits and so the same should hold true with respect to the transfer to Corus of Shaw's 50% interest in the jointly-owned Historia and Series+.

10. In response, the CMPA first wishes to highlight that this is not a case involving a standalone transfer of wholly-owned Shaw services to Corus.<sup>2</sup> As stated above, the CMPA submits that the question of whether or not benefits should be payable if such a transaction were ever to occur raises a number of complex interpretive and public policy considerations that must not be determined implicitly without specific reference to the issue and explicit opportunity to comment via formal notice. We also note that the Commission has indicated that it wishes to review its benefits policy in the near future. According, that upcoming proceeding or an actual transaction, should it occur, would be the appropriate setting to examine such a major policy issue. In other words, addressing that specific question is best left for another day and another proceeding, when and if necessary, so as not to pre-judge the issue and thereby unfairly prejudice interested stakeholders as well as minority shareholders on that important matter.
11. Second, the answer to that question is, in any event, irrelevant in the present circumstances, since the Commission recently confirmed its practice to require benefits based on the entire value of the regulated assets being transferred *regardless* of whether or not a transaction includes share transfers that, if affected separately, might not in themselves attract benefits.
12. Specifically, in its 2011 decision approving BCE's purchase of CTV, the Commission included the value of The NHL Network and Viewers Choice in calculating the applicable benefits payable despite BCE's arguments that its acquisition of minority interests in those services did not amount to a change in their control (and so would not in itself attract benefits). In making this determination, the Commission stated that "...it is the Commission's practice in transactions involving multiple assets to include minority interests in broadcasting undertakings in the transaction value."<sup>3</sup>
13. The Commission had also followed that same practice in earlier decisions, as identified in a paper presented at the April 2012 Law Society of Upper Canada Communications Law and Policy Conference:

In the BCE-CTV Decision of 2000, the Commission noted that CTV Inc. had "controlling and minority interests in a large number of licensed pay and specialty television undertakings", and went on to accept as the value of the transaction "[t]he amount paid by BCE for the shares of CTV Inc. [which] totals approximately \$2.3 billion." In the TQS transaction the following year, in which Cogeco and CTV (as BCE's subsidiary) purchased TQS assets following Quebecor's required divestiture, minority interests were again included in the

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<sup>2</sup> In fact, by using this argument, Shaw may be testing the waters for a future Shaw and Corus transaction by seeking a precedent that avoids benefits on a larger transaction long speculated to happen at some future date.

<sup>3</sup> Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm>, at par. 12, second bullet.

share purchase price and, as a result, in the value of the transaction, and the decision again did not address this issue directly.<sup>4</sup>

14. We would also add to these examples the Commission's 2010 decision approving Shaw's purchase of Canwest, where the Commission's revised valuation of the transaction for benefits purposes covered all of Canwest's services, regardless of ownership levels.<sup>5</sup>
15. Application of the benefits test to the Shaw ownership share of Historia and Series+ is fully consistent with the Commission's rationale for the test. As originally constructed, the benefits test was meant to replicate a competitive licensing process for the undertakings being purchased, in which applicants would be required to demonstrate why their application for the licence(s) was in the best interests of the Canadian broadcasting system and in the public interest. If, in the present case, Corus had to participate in such a competitive process in order to acquire the Historia and Series+ licences, it would have to propose a substantial and complete benefits package to demonstrate the superiority of its application; a half-measured offer, as it currently proposes, would certainly not do the trick.
16. Indeed, the degree to which the benefits package corresponds to the transaction *when viewed as a whole* is at the foundation of the Commission's benefits policy. The Commission's holistic test is whether "the proposed benefits package is commensurate with the size and nature of the transaction and takes into account the responsibilities to be assumed, the characteristics and viability of the broadcasting undertakings in question and the scale of programming, management, financial and technical resources available to the purchaser."<sup>6</sup>
17. The *nature* of this current transaction is one whereby three distinct and separately-run, profitable companies are effecting the transfer of two clearly valuable licensed undertakings: two of those companies are working together to sell, and the third is buying. It is not Shaw buying Bell's share of the two services in order to take on full ownership (in which case, benefits would normally be paid based only on the value of Bell's share). Instead, it is Corus buying half of the services from Bell *and* the other half from Shaw.

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<sup>4</sup> *Tangible Benefits and the "Value of the Transaction": Lessons Learned*, by Grant Buchanan *et al*: Paper presented at the Sixteenth Biennial Communications Law Conference, Law Society of Upper Canada/Canadian Bar Association, April 26-27, 2012, Ottawa Ontario, at par. 106. The referenced CRTC decisions are Broadcasting Decision CRTC 2000-747, <http://www.crtc.gc.ca/eng/archive/2000/DB2000-747.htm>, and Broadcasting Decision CRTC 2001-746, <http://www.crtc.gc.ca/eng/archive/2001/db2001-746.htm>.

<sup>5</sup> Broadcasting Decision CRTC 2011-782, *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>.

<sup>6</sup> Public Notice CRTC 1989-109, *ELEMENTS ASSESSED BY THE COMMISSION IN CONSIDERING APPLICATIONS FOR THE TRANSFER OF OWNERSHIP OR CONTROL OF BROADCASTING UNDERTAKINGS*, <http://www.crtc.gc.ca/eng/archive/1989/PB89-109.htm>.

18. The distinctiveness of Bell and Corus is obvious; the distinctiveness of Shaw and Corus in these circumstances is just as clear. In fact, Corus went to great lengths in the 2011 Group Licensing Process to argue how distinct it is from Shaw, including filing a legal letter with the Commission to highlight that it has different shareholder and non-shareholder constituents from Shaw and competes with Shaw.<sup>7</sup> Amongst other things, that letter stated:

A narrow focus on the identity of the two companies' common shareholder and the result that they are technically affiliates completely disregards the interests of Corus' other shareholders and its other stakeholders such as creditors, employees, suppliers and customers. *The Commission must not lose sight of the fact that Corus and Shaw Media are two very different companies which must be run independently of each other consistent with the fiduciary duties of each board to its respective company.*<sup>8</sup>

19. The size of this transaction is \$277.2 million, not half of that. Without paying that full amount, Corus would not acquire the necessary shares from both Bell and Shaw to secure control of the two services.

20. In its application, Corus cites from a 2006 Commission decision<sup>9</sup> which it seems to argue has some relevancy to its argument respecting the appropriate size of the benefits package in this current transaction.

21. The CMPA notes, however, that, in that decision, the Commission, after assessing the entirety of transaction before it, determined that the transaction served to transfer control from one party to no specified party. Thus the facts of that case are completely opposite to those of the present case, where Corus' purchase will turn a situation in which no party apparently has control of the services into one where Corus has sole control. Accordingly, the CMPA is unable to see how that 2006 decision is of any help to Corus in the current circumstances.

22. If anything, that 2006 decision only reinforces that the Commission's benefits policy applies in situations where a person acquires the ability to cause the licensee or its board of directors to undertake a course of action<sup>10</sup> – which Corus will only now be able to do with respect to Historia and Series+ because it is acquiring both the Bell and Shaw ownership stakes in those services.

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<sup>7</sup> Letter to the Commission from Andrew MacDougal of Osler, Hoskin and Harcourt, LLP, dated 7 February 2011.

<sup>8</sup> *Ibid.*, at p. 4. Emphasis added.

<sup>9</sup> Broadcasting Decision CRTC 2006-309, *Bell Globemedia Inc., on behalf of its licensed subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2006/db2006-309.htm>; see Corus Supplementary Brief re its purchase of the Shaw shares, at pars 83-86.

<sup>10</sup> Broadcasting Decision CRTC 2006-309, *ibid.*, at par. 43.

23. For all the above reasons, the CMPA submits that the Commission should base the size of the tangible benefits package in these circumstances on the full value of the transaction, and not just on the value of Bell's ownership of the two undertakings, as Corus proposes.

Sincerely,

[*original signed by*]

Michael Hennessy  
President & CEO

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