



February 18, 2016

Filed Electronically

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

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).

1. The Writers Guild of Canada (WGC) is the national association representing more than 2,200 professional screenwriters working in English-language film, television, radio, and digital media production in Canada. The WGC is actively involved in advocating for a strong and vibrant Canadian broadcasting system containing high-quality Canadian programming.

Introduction

2. In Broadcasting Notice of Consultation CRTC 2016-22 (the Notice), the Commission announced that it had received an application from Shaw Communications Inc. (SCI) on behalf of Shaw Media Inc. and its licensed subsidiaries (SMI)(collectively, "Shaw") 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). Both the application and the Notice referred to this as an intra-corporate reorganization, which would not result in a change in effective control of the undertakings because they would continue to be exercised by JR Shaw throughout.
3. The WGC **opposes** the transaction as it is currently contemplated. We submit that the size and scope of this transaction is significant, and the effects it will have on the Canadian broadcasting system will also be significant. As such, we believe that the Commission should hold a public hearing

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in this matter to closely examine those effects and to determine whether or not the transaction, as currently contemplated, is in the public interest.

The size and scope of the transaction is significant

4. The WGC submits that this transaction will have a significant impact on the Canadian broadcasting system. As we stated in the “Procedural Request for a Public Hearing”, dated January 26, 2016, of which the WGC was a signatory, following approval of the transaction, Corus would: own substantially more non-sports specialty services than any other broadcaster¹; become an even larger vertically-integrated broadcaster, producer and distributor²; dominate the market for children’s, women’s and lifestyle programming³; aggressively move to implement its strategy of owning and controlling more programming⁴; subsume another broadcast ownership group which has different CPE and PNI obligations; and increase content sharing across a substantially greater number of services⁵.
5. The Commission has stated that it will examine the application to ensure that it is in the public interest.⁶ The transaction as proposed is valued at \$2.65 billion, and is therefore one of the largest in Canadian history—perhaps the second largest by any significant margin, after only the 2013 Bell-Astral transaction.⁷ This cannot represent anything but a major shift in how the Canadian broadcasting system is operated.

Change in operational/programming control

6. Transactions engaging the Commission’s Tangible Benefits Policy⁸ and Diversity of Voices Policy⁹ generally do so on the basis of a change in ownership or effective control. The term “effective control” is defined in the applicable regulations, and the Commission has determined that both Shaw and Corus are effectively controlled by JR Shaw.
7. Nevertheless, one of the most significant effects of the transaction will be the consolidation of Shaw and Corus’s programming operations at Corus. While it may be true that “effective control” as currently defined does not change under the application, it is also true that Shaw and Corus will undergo significant change at the level of operational and programming control. Shaw and Corus are

¹ Excluding sports services: the bigger Corus would operate 35 specialty services (18 Cat. As; 17 Cat. Bs) vs. Bell’s 30 (20 Cat. As; 9 Cat. Bs; 1 Cat. C). Source: CRTC - Individual Pay, Pay-Per-View, Video-on-Demand and Specialty Services Financial Summaries for 2010-14.

² 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>.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Supra*, Note 1

⁶ On 13 January 2016 at 9:22 am, the Commission posted the following statement on Twitter: “2/2 #CRTC will follow its usual practice, which is to examine transactions closely to ensure they are in the public interest #Corus #Shaw.”

⁷ Broadcasting Decision CRTC 2013-310, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>

⁸ Broadcasting Regulatory Policy CRTC 2014 -459, <http://www.crtc.gc.ca/eng/archive/2014/2014-459.htm>

⁹ Broadcasting Public Notice CRTC 2008-4, <http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm>

separately managed at this time, and Shaw emphasized this separation at the public hearing to examine its acquisition of Canwest Global Communications Corp. in 2010¹⁰ as follows:

143 [MR. BRAD SHAW:] But you know as far as Corus goes, you know, there is a separate board of directors, public, separate management, separate strategy.

144 When I look at Shaw in my position we have Shaw Direct and Shaw Cable compete day in, day out for customers; may the best division win. You know we don't see this as any different.

...

146 So we are competing within Shaw now. We plan to continue to compete. We will compete with Corus on all levels and believe it's healthy for the system to have that competition.¹¹

8. Under Shaw's current application, that "healthy competition" will be eliminated. This will have significant repercussions on the production of Canadian programming, perhaps chief among them a reduction in the number of opportunities that screenwriters and/or producers have to pitch new projects. For example, channels such as Shaw's Lifetime and HGTV currently have different programming staff and program commissioners than Corus's W Network. These program commissioners, as Shaw stated above, have different strategies—they have different personalities, different priorities, different working styles, and in all likelihood would make different choices in commissioning programming. They are effectively two "pitch opportunities" for screenwriters and/or producers. One of those opportunities will be lost through this transaction. Further, with the elimination of the genre exclusivity policy,¹² any future potential competition between Shaw and Corus in the same programming genres will be a forgone opportunity.
9. The significance of this change should not be underestimated. The lifeblood of the production sector, both economically and creatively, is the development process, which includes the ability to take new ideas to prospective buyers. The entertainment industry is full of stories of successful projects that were at one point rejected by broadcasters or studios, often multiple times, before finally getting picked up.¹³ These stories remind us that the creative process is not a scientific formula, and some projects simply need to find the right "fit" of creative, financing, and commissioning broadcaster. But this process is threatened by an ever-shrinking pool of program commissioners. Simply put, the proposed Shaw-Corus transaction results in the oft-repeated adage, "one less door to knock on." After a decade's worth of disappearing doors, we submit that the Commission should seriously consider the impact yet another consolidation at the programming level will have on the sector.

¹⁰ Broadcasting Notice of Consultation CRTC 2010-498, <http://www.crtc.gc.ca/eng/archive/2010/2010-498.htm>

¹¹ Transcript, Hearing, 21 September 2010

¹² Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV - The way forward - Creating compelling and diverse Canadian programming*, <http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm>

¹³ For example, at the *Prime Time in Ottawa* conference, February 3-5, 2016, John Young of Temple Street Productions described how *Orphan Black* was pitched and rejected numerous times before finding its current home on Space.

10. We submit that this distinction between corporate ownership and other aspects of diversity in the broadcasting system has been recognized as important by the Commission in the Diversity of Voices Policy. In that Policy, the Commission stated:

Diversity 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.

...

The Commission recognizes that a plurality of ownership does not necessarily guarantee a diversity of programming in the system and that large corporate entities may have a greater ability to provide high quality news and entertainment programming. However, as the Commission heard at the Public Hearing, ownership consolidation within the private element can raise concerns about reduced local reflection, particularly in news coverage. As part of its mandate, the Commission encourages and supports content that will provide audiences with programming from a Canadian perspective and that offers local, regional and national reflection.

In the Commission's view, the Canadian broadcasting system should ensure that audiences have access to a diversity of programming - especially national, regional and local content.¹⁴

11. The Commission generally dealt with the question of programming diversity in the Diversity of Voices Policy through rules related to ownership and effective control of broadcasting undertakings. That does not mean, however, that ownership is the only measure of control. Further, both the regulatory and commercial landscape has changed significantly since the Diversity of Voices Policy was issued. For one thing, the Commission in 2008 was able to say this:

As has been noted earlier, the Commission's current regulatory framework for discretionary services ensures a diversity of programming and genres regardless of ownership.¹⁵

12. As noted above, the genre exclusivity policy was eliminated this past year. In eliminating genre exclusivity, the Commission found that it was no longer required to ensure programming diversity, and that the market would accomplish that goal.¹⁶ It is not clear whether the Commission considered the issue in light of what was then a hypothetical Shaw-Corus transaction. In the absence of this transaction, Shaw and Corus might have competed against each other in the same broad programming genres—like drama, children's programming, or other genres—for the same audiences, thereby increasing diversity of programming and benefitting Canadian audiences. That opportunity will now be diminished, if not forgone entirely.

¹⁴ Paras. 18, 20-21

¹⁵ Para. 76

¹⁶ Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV - The way forward - Creating compelling and diverse Canadian programming*, at para. 250, <http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm>,

13. In short, the WGC submits that ultimate ownership or effective control is not the only measure of diversity of voice, and that the Commission should consider the change in programming and operational control in this transaction in determining whether it is in the public interest.

Application of the Tangible Benefits Policy

14. The WGC's concerns with respect to diversity of programming would have been at least partially mitigated through the application of the Tangible Benefits Policy. While tangible benefits do not, by themselves, "solve" issues of programming diversity, they do provide at least partially offsetting benefits to the system. For example, in Bell-Astral, 100% of incremental spending on programs of national interest had to be produced by independent producers.¹⁷ And under the current Tangible Benefits Policy, benefits are largely directed to the Canada Media Fund and Certified Independent Production Funds, which in turn are used to fund a variety of programming system-wide. These measures advance the principle of diversity of voices in the broadcasting system.

15. The WGC understands that the Tangible Benefits Policy may not apply to the proposed transaction, however, if there is no change in ownership or effective control, as determined by the Commission. Nevertheless, the WGC submits that the current transaction is unprecedented, in that it is an extremely large, multi-billion dollar transaction which involves a change of control at the programming/operational level, even if not at the ultimate corporate ownership level.

16. While the Tangible Benefits Policy, strictly interpreted, may not apply in this case, we note that the Commission may consider other alternatives to ensure the transaction is in the public interest, and that the Commission is not bound by its own policies in this respect. As the Commission stated in its first decision denying the application by BCE Inc. (BCE), on behalf of Astral Media inc. (Astral), for authority to change the effective control of Astral's broadcasting undertakings:

The Commission also takes into account its guidelines, in the form of regulatory policies, information bulletins or other non-mandatory measures, when exercising its discretionary authority to approve a proposed ownership transaction. Guidelines serve, among other things, to inform applicants about the criteria the Commission will consider in its decision-making process and consequently to ensure a level of consistency and transparency.

The Commission must, however, consider each application on its merits, based on the circumstances specific to the application. The Commission may not use such instruments to limit the discretion granted to it by Parliament.¹⁸

17. The WGC submits that the Commission should consider whether or not the spirit of the Tangible Benefits Policy should apply to an unprecedented transaction where programming and operational control is being consolidated to the degree that is contemplated in the current application.

¹⁷ Broadcasting Decision CRTC 2013-310, para. 176, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>

¹⁸ Broadcasting Decision CRTC 2012-574, *Astral broadcasting undertakings – Change of effective control*, <http://www.crtc.gc.ca/eng/archive/2012/2012-574.htm>, paras 10-11

Calculating new CPE and PNI spending levels for the combined Shaw-Corus designated group

18. The WGC submits that the combination of Corus and Shaw Media's television undertakings into one corporate group will effectively result in a new Shaw-Corus designated group under the CRTC's group-based licensing regime and, as such, a new calculation of CPE and PNI expenditure levels is required. This is consistent with the approach used by the Commission in recent transactions, as discussed below. As the Commission is aware, the Corus and Shaw Media groups currently each have the same CPE spending requirements (30% of previous year's group revenues) but they have different PNI spending requirements (12% for Corus and 5% for Shaw Media).
19. In its application, Corus did not propose revised group CPE and PNI spending requirements for the television programming services that will be part of the new Shaw-Corus designated group. Rather, Shaw proposed that this be dealt with "in the context of group-based licensing during the upcoming licence renewals for the Corus and Shaw Media programming undertakings."¹⁹ The WGC urges the Commission not to defer this issue to the next group licence renewal process, as the outcomes of that process will not take effect until September 1, 2017, at the earliest.
20. In the context of its application seeking authority to transfer effective control of certain of its broadcasting undertakings to BCE Inc. (BCE), Astral Media Inc. (Astral) expressed the view that its CPE and PNI expenditure requirements remained appropriate for the new Astral group. As the Commission noted in Broadcasting Decision CRTC 2013-310, however, Astral provided no evidence to substantiate this claim. In its decision the Commission stated that the proposed divestiture of several of Astral's television services "would substantially change the composition of the Astral group of services."²⁰ As such, it was necessary to perform a new calculation to determine the new Astral group's CPE and PNI expenditure percentages. Accordingly, the Commission directed BCE to file proposed conditions of licence relating to CPE and PNI for the remaining television services in the Astral group (i.e., following the divestitures proposed by BCE and approved in Broadcasting Decision CRTC 2013-310).
21. The Commission later conducted the same CPE and PNI spending level recalculation in its approval of Corus' acquisition of effective control of Teletoon and its related television services.²¹
22. In both the BCE-Astral and Corus-Teletoon cases, as a consequence of the Commission's analysis, the CRTC increased both Astral and Corus' designated group PNI requirements, and imposed the new higher levels by condition of licence. The timing of the implementation of those new PNI levels remains unclear to us, but it certainly did not wait until the next group licence renewal period, and we submit it should not wait the year or more that Corus now proposes.
23. Accordingly, the WGC urges the Commission to follow the same approach and use the same methodology in assessing the Shaw-Corus transaction with respect to recalculating CPE and PNI expenditure levels for the new Shaw-Corus designated group as it did in the recent BCE-Astral and Corus-Teletoon cases outlined above.

¹⁹ Application Documents, Appendix 1 – Supplementary Brief, para. 41

²⁰ Broadcasting Decision CRTC 2013-310, para. 208, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>

²¹ Broadcasting Decision CRTC 2013-737, <http://www.crtc.gc.ca/eng/archive/2013/2013-737.htm>

Remaining tangible public benefits owed by Shaw Media

24. In its application, Corus notes “that the remaining portion of the tangible benefits obligations allocated to Shaw Media will be assumed by Corus following the Reorganization.”²²
25. The WGC was pleased to see this, but recommends the Commission remind Corus that remaining tangible benefits obligations be met in the timeline originally approved by the Commission. We raise this issue because it appears as though the timing of on-screen/programming-related benefits spending associated with the Shaw-Canwest, Shaw Media-Mystery, and Shaw Media-The Cave (now H2) transactions combined have lagged somewhat as of August 31, 2014.²³

The Commission should hold a public hearing

26. For all of these reasons, and given the importance of the proposed transaction, we submit that the Commission should hold a public hearing to consider the issues raised by it. Broadcasting Information Bulletin CRTC 2008-8-2 states:
17. Share transfer applications are reviewed using a notice of consultation (notice of hearing) where the application:
- a. has been dealt with via notice of consultation (notice of applications received) and generates interventions that raise substantive concerns as determined by the Commission and which warrant further discussion at a public hearing;...
27. The WGC submits that its intervention raises substantive concerns which warrant further discussion at a public hearing. We therefore request a public hearing.

Yours very truly,



Maureen Parker
Executive Director

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National Council, WGC

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²² Application Documents, Appendix 1 – Supplementary Brief, para. 48

²³ We note that 2015 tangible benefits reports are not yet available on the CRTC’s website. See the *Canadian Television Benefits Monitor: Tracking Spending on Television Benefits Packages, 2015 Report (Spending data up to August 31, 2014)*, published by Boon Dog Professional Services Inc.