



January 28, 2014

Filed Electronically

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

Dear Mr. Traversy:

Re: Broadcasting Notice of Consultation CRTC 2013-558

Call for comments on the Commission's approach to tangible benefits and determining the value of the transaction – Reply Comments

1. The Writers Guild of Canada (WGC) is pleased to provide its comments in the reply phase of this proceeding.
2. We have read with interest the comments filed by other parties in this proceeding. We note several important points made in other submissions, as described in greater detail below. In general, however, our views remain largely as presented in our initial submission to this proceeding of January 13, 2014. The WGC continues to believe that the preliminary view of the Commission as presented in Broadcasting Notice of Consultation CRTC 2013-558 (the Notice) is a reasonable one, provided that the concerns stated in our January 13, 2014 submission are addressed.

The Tangible Benefits Policy should be maintained

3. Shaw Communications Inc. (Shaw) and Rogers Media Inc. (Rogers) propose in their submissions eliminating the tangible benefits policy entirely. Shaw argues that competition and "market based investment" is an appropriate substitute for the tangible benefits policy. Rogers focuses on the other financial resources available to the creation of Canadian programming, and argues that these resources are sufficient to achieve the objectives of the *Broadcasting Act*.
4. The WGC strongly disagrees with the positions of Shaw and Rogers in this respect. The tangible benefits policy remains a crucial source of support for Canadian programming, and we believe that the policy should be maintained. The Commission has repeatedly reaffirmed the appropriateness of the tangible benefits policy over multiple decisions during the last 25 years, including implicitly in this very consultation. The WGC believes that this approach has been and continues to be correct.
5. The underlying rationale for the tangible benefits policy, as the Commission states in the Notice, is to "ensure that the transfer is in the public interest" in the absence of a competitive process.¹ Contrary to the statements of Shaw, it is this that motivates the tangible benefits policy, not the presence or

¹ Broadcasting Notice of Consultation CRTC 2013-558, paragraph 4.

absence of competition in the sector generally. As the Commission has itself stated, “The mere fact of the presence of real or potential competition does not exempt a programming service from requirements related to tangible benefits”². While competition on many fronts exists and may have grown since 1989, purchasers still do not compete with each other for the purchase of a broadcasting licence when there is a transfer of control. Broadcasting licences remain valuable public property, and this is as true in 2014 as it was 25 years ago.

6. With regard to Rogers’ argument, while several financing options have grown or become newly available since 1989, a number of other factors has also emerged during that time. These include the rising cost of producing quality television programming and market fragmentation, which has made producing high-budget content an increasingly risky proposition. Factors such as these make funding support for Canadian content from tangible public benefits even more important. We would argue that the growth of the financial resources that Rogers points to in its submission³ is precisely the reason for Canada’s recent success in content production. Hits like *Flashpoint* and the currently feted *Orphan Black* would likely not have happened without tangible benefits packages *in combination with* many or all of the support mechanisms on Rogers’ list. Expensive, high-quality content requires the full toolkit of regulatory supports, and Canadian hits are a demonstration of that toolkit in action. We submit that these success stories are a reason to stay the course, not to reverse it. In fact, one of the financial resources Rogers mentions—the Canada Media Fund (CMF)—has indicated that it expects a drop in its revenues next year as required financial contributions from broadcasting distribution undertakings (BDUs) plateau or decline.⁴ In this context, financial resources for Canadian programming may be becoming *less* stable, and therefore are in need of available resources.
7. We also note the arguments of the Public Interest Advocacy Centre, Consumers’ Association of Canada, Council of Senior Citizens’ Organizations of British Columbia, and the National Pensioners Federation (PIAC/CAC/COSCO/NPF), in particular with regard to the following:

...because of the continuing consolidation of the broadcasting industry, the Commission’s tangible benefits scheme has served as a compensatory measure for the transfer of licences between parties and a method of discipline on the potential anti-competitive effects of these transactions.⁵
8. While the Commission has not itself stated that “compensation for the negative effects of consolidation” is a rationale for the tangible benefits policy, it is notably a factor in transfers of ownership. The Commission has clearly indicated its concerns about consolidation, in the creation of the *Regulatory framework relating to vertical integration*⁶ and its application in decisions like the one approving the Bell-Astral transaction⁷.
9. The WGC also opposes the proposal of Corus Entertainment Inc. (Corus) for a “regressive format” in calculating the quantum of tangible benefits.⁸ Corus provides no detailed rationale for applying such a deep “discount” on large transactions—presumably the only rationale is simply to lower tangible

² Broadcasting Decision CRTC 2004-502, *Transfer of effective control of Craig Media Inc. to CHUM Limited; and Acquisition of assets - reorganization of Toronto One*, 19 November 2004, paragraph 22.

³ Comments in this proceeding of Rogers Media Inc., paragraph 21.

⁴ CMF staff have made oral statements to this effect during its 2013 Consultation Tour (<http://www.cmf-fmc.ca/about-cmf/outreach-consultation/consultation-tour-2013/>); and by implication in its consultation materials, such as its Funding Mechanisms Working Group of October 10, 2013 (<http://www.cmf-fmc.ca/documents/files/about/ind-outreach/2013-14/cmf-briefing-note-oct-10.pdf>), at page 5: “In a context of declining revenues, the CMF may wish to re-examine its funding formulas and standard recoupment policy with the objective of increasing its recoupment.”

⁵ Comments in this proceeding of PIAC/CAC/COSCO/NPF, paragraph 5.

⁶ Broadcasting Regulatory Policy CRTC 2011-601.

⁷ Broadcasting Decision CRTC 2013-310.

⁸ Comments in this proceeding of Corus Entertainment Inc., page 8.

benefits payments. Corus' example of the "regressive" formula on a \$2-billion transaction would result in a \$75-million benefits package, compared with a \$200-million benefits package under the current calculation. The reduction of a benefits package in a large transaction by almost two-thirds would be a dramatic alteration of the benefits policy. On the contrary, the WGC believes that a large transaction naturally calls for a proportionally large benefits package, to ensure that it is in the public interest. Without a meaningful contribution in direct relation to the size of the transaction, we submit that the benefits policy would not be fulfilling its objectives.

The proposed allocation of funds between the CMF and CIPFs

10. In the Notice, the Commission expressed its preliminary view that, of the amount of tangible benefits allocated to third-party funds, no less than 80% should be allocated to the CMF and no more than 20% could be allocated to the various certified independent production funds (CIPFs). Several parties to this proceeding proposed a different allocation in this respect. The Bell Broadcast and New Media Fund proposed that "a Broadcaster could apply to the CRTC to allow up to 50% of the 80% of tangible benefits that are proposed to be allocated to third-party funds, be allowed to be allocated to the CIPFs, with CRTC approval". Many broadcasters, including Shaw Media, Rogers Media, Corus Entertainment, and the Independent Broadcasters Group, advocated for complete flexibility, such that 100% of the allocation to third-party funds could be directed to CIPFs. Bell Media, on the other hand, noted that the Commission's preliminary view appears to be a reasonable breakdown.
11. The WGC recognizes the value the CIPFs bring to the diversity of financing options for Canadian programming. We also understand the concerns some interveners have with the majority of benefits monies going to the CMF. The CMF does not provide funding in all genres of programming, and the way the CMF Performance Envelope system currently operates does result in significant funding to the largest broadcasters.⁹
12. That said, the WGC still believes that the Commission's preliminary view represents a reasonable, balanced approach. The CMF is Canada's flagship funder of television programming which, as the Commission stated in the Notice, "supports the production of a variety of programming and other content across all audiovisual media platforms". The CMF operates and provides funding in both official languages and supports production from across Canada. We believe these factors make the CMF an appropriate vehicle through which to implement the bulk of the Commission's "Focus on Funds" approach in its tangible benefits policy.
13. If, however, the Commission chooses to grant greater flexibility in this regard, we believe that the CMF should retain a significant and meaningful role in the tangible benefits policy. Given its size and importance, we submit that the CMF should receive at least a majority of benefits monies allocated to third-party funds. We also submit that this should be done in reference to the concerns the WGC presented in its initial submission, particularly with regard to official language and digital media. As we stated in our initial comments in this proceeding, the 10% limitation on benefits monies to digital media remains appropriate and should be maintained, regardless of the chosen ratio of CMF/CIPF funding.

"Changes of Control" versus "Transfers of Control", and "Negative" control

14. The WGC supports the comments of the Directors Guild of Canada (DGC) related "changes" versus "transfers" of control¹⁰ and to acquisition of "negative" control¹¹. The WGC agrees with the DGC that such changes in control should attract benefits, and that the present proceeding provides the Commission with the opportunity to address this issue.

⁹ <http://www.cmf-fmc.ca/documents/files/env-admin/allocations/2013-14-pep-allocations.pdf>

¹⁰ Comments in this proceeding of the Directors Guild of Canada, paragraphs 27-31.

¹¹ Comments in this proceeding of the Directors Guild of Canada, paragraph 32.

Value of the transaction

15. The WGC does not generally possess the expertise to meaningfully comment on questions of valuation of transactions, and has not provided detailed comments on valuation in this proceeding. We do note, however, that several parties¹² have proposed a method of valuation, described by Rogers as follows:

...for transactions requiring a full valuation analysis,...the applicant and the Commission [should] jointly retain a third party accounting firm to perform the valuation. The cost of the third party valuator would be paid by the applicant, but the valuation report—which would be consistent with well-established accounting practices—would be binding on both the Commission and the applicant.¹³

16. The WGC does not support this proposal. Valuation of the transaction remains a crucial component of the determination of an appropriate tangible benefits package, which is in turn a crucial component of a public hearing on the issuance of a broadcasting licence, which all members of the public should have an opportunity to participate in. We believe that the above proposal raises significant questions of procedural fairness under administrative law principles.

17. Firstly, the WGC submits that being bound by a third-party accounting firm to value transactions could amount to a delegation of the Commission's authority, and a fettering of the Commission's discretion, granted to it under the *Broadcasting Act*. It is an established principle of administrative law that when a decision-making administrative tribunal such as the CRTC exercises its discretion, it must do so according to what it believes to be correct under the law, and not according to what others may think. While the Commission can and does obtain the advice of other individuals and parties on many matters, including valuation, we believe that being bound to accept a third-party valuation would improperly fetter the discretion of the Commission, which is the body authorized to implement broadcasting policy under the Act.

18. Secondly, while the WGC does not typically comment on valuation issues, we would like to retain the possibility to do so in the future should an appropriate issue arise. The proposal to conduct the valuation assessment entirely through a third-party valuator would effectively exclude the views of the Canadian public on this issue, essentially eliminating valuation from the public process. We submit that valuation is an important component of the review of any transfer-of-control application, and it should remain the subject of a public process along with the other components of the application.

Conclusion

19. We thank the Commission for the opportunity to provide these reply comments in this proceeding.

Yours very truly,



Maureen Parker
Executive Director

c.c.: National Council, WGC

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¹² Including: Bell Media Inc., at paragraph A15 of its comments in this proceeding; Rogers Media, at paragraphs 76-78 of its comments; and Shaw Media, at the Appendix to its comments, at Q.16.

¹³ Comments in this proceeding of Rogers Media, paragraph 77.