Writers Guild of Canada

August 23, 2010

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

Submitted via E-Pass

Dear Mr. Morin,

Re: Broadcasting Notice of Consultation CRTC 2010-498 – Application No. 2010-0550-5 by Shaw Communications Inc. ("Shaw") for authority to transfer the effective control of Canwest Global's broadcasting entities ("Canwest") to Shaw (the "Application")

Executive Summary

1. The Writers Guild of Canada (the WGC) is the national association representing over 2000 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. The WGC wishes to **support** Shaw's acquisition of Canwest subject to the issues raised in this intervention.

2. The WGC requests the opportunity to appear at the public hearing scheduled to commence on September 20, 2010 in Calgary, Alberta in order to further elaborate on the following issues from the perspective of creators of Canadian programming.

3. The WGC believes that there are many intangible benefits associated with Shaw's purchase of Canwest. Canwest will continue as a national network, fully integrated with its specialty services acquired from Alliance Atlantis Broadcasting. It will have the financial support of Shaw Cable. It will fully Canadian-owned.

4. The WGC is concerned that there could be negative impacts on the Canadian broadcasting system from the creation of such a large vertically integrated company and asks that the CRTC impose certain safeguards such as conditions of licence which ensure that Canwest and Corus are separately owned, monitor activity to ensure there are no undue preference issues and strongly encourage terms of trade to protect rights markets and revenue streams to producers and creators of Canadian programming.

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5. The WGC does not have the financial resources nor the access to detailed financial data necessary to do an independent review of Shaw's valuation of the Canwest assets. Instead, we trust that the CRTC will conduct its usual thorough review of the valuation and ensure that it is consistent with CRTC policy and precedent. In particular we also draw the CRTC's attention to a report submitted by the WGC, DGC, ACTRA and CMPA and attached as Schedule 1 which addresses certain issues regarding the appropriate valuation of the Canwest assets. The WGC submits that the valuation would appear to be at least $2.005 billion which would result in a tangible benefits package of at least $200 million.

6. The CRTC's benefits policy is an essential tool for ensuring that acquisitions benefit the Canadian broadcasting system and serve the public interest. Without a competitive bid process this policy is essential to ensure that shareholders are not the only winners when a purchaser acquires ownership or control over broadcasting assets. We urge the CRTC to fully enforce its benefits policy as articulated in policy directives and recent precedent. We again draw your attention to the Report attached as Schedule 1 which refutes the assertion of Shaw that due to Canwest's 'financial distress' no tangible benefits are payable.

7. Specifically, the WGC recommends making the following adjustments to the benefits package proposed in the July 12 Benefits Proposal:

   - Ensure that benefits are incremental, spent pro rata over a 7 year term, have a significant commitment to independent production and commence upon approval of the transaction.
   - Canwest benefits are calculated exclusive of Alliance Atlantis benefits, which are to be assumed by Shaw.
   - Disallow the $23 million to Digital Transmitters as a cost of doing business and reallocate those funds to Scripted Programming.
   - Increase allocation to production and development of Scripted Programming to approximately 65% of tangible onscreen benefits
   - Work with the WGC to create a Development program that will be effective in increasing high quality scripted programming
   - Restrict acceptable New Media Content expenditures to actual new media content and consider transferring those funds to the Bell Broadcast and New Media Fund or the Canada Media Fund
   - Disallow the $43 million to morning newscasts as a cost of doing business and reallocate those funds to Scripted Programming.

Intangible Benefits

8. As Shaw has pointed out in its application, there are many intangible benefits to the Canadian broadcasting system that arise from Shaw's acquisition of Canwest. Primary among these benefits is the continuation of Canwest, one of Canada's valued national networks, with the financial backing of one of Canada's biggest broadcast distribution undertakings. The acquisition ensures that Canwest, including both its conventional and specialty networks, will continue to offer Canadians choice of programming across the country. Canwest took on substantial debt to acquire the Alliance Atlantis services because it knew that a diversified multiplatform strategy was essential to its long term growth. That strategy has the opportunity to be maintained and the efficiencies fully realized through this purchase. Other purchase alternatives could have resulted in the breakup of the assets with some prospective purchasers likely to only be interested in buying the more valuable specialty services.

9. Shaw is a Canadian company and by its acquisition it is buying out a significant non-Canadian ownership interest, namely Goldman Sachs, which caused great concern for many members of the industry. The WGC opposed the Canwest acquisition of the Alliance Atlantis specialty services because we were of the opinion that the interest of Goldman Sachs gave it control in fact over Canwest. Foreign ownership and control in fact of Canwest will no longer be a concern once this transaction is approved.

10. The WGC does have some concerns about consolidation. It is possible that such a large player could dominate the market from content through to delivery to the consumer. We encourage the CRTC to closely monitor the market after the acquisition to ensure that there are no undue preference issues during the licence term. We would be most concerned about Shaw's cable or internet business providing favourable terms or access to Canwest entities, or due to its market power setting lower prices or licence terms for programming. Terms of trade with Canwest would alleviate these concerns and help to ensure an appropriate flow of revenues to producers and creators of Canadian programming. In the meantime we ask that the CRTC monitor licence fees and rights acquired by Canwest going forward to assist in determining if the new integrated entity is having a negative impact on the Canadian broadcasting system.

11. We are also concerned about the potential for loss of diversity of voices should Shaw's sister company Corus Entertainment be at any time combined with Canwest. The domination of specialty services by Corus and Canwest together could lead to a distinct lack of competition in certain genres. While Shaw has stated that the two companies are separate public companies and will at no time be operated as one, we suggest that the CRTC consider setting as a condition of approval that Shaw commit that it will at no time combine the assets of Corus and Canwest or operate the services as one company and that these requirements become a condition of licence for Canwest.

Valuation

12. As a small non-profit professional guild, the WGC does not have the financial resources to provide the CRTC with a detailed financial review of the valuation of the Canwest acquisition. We trust that the CRTC will conduct its usual due diligence to ensure that the data provided is accurate, appropriately considered and properly accounted for and

shall advise stakeholders should it determine if the valuation is appropriate or requires revision. In the meantime, the WGC, DGC, ACTRA and CMPA have pooled their resources to come up with the report found at Schedule 1 (the "Report") relating to Shaw's arguments about "value of the transaction" and "financial distress". The conclusion of that joint Report is that the value of the transaction should be no less than $2.005 billion and that the "financial distress" argument is not applicable in these circumstances. The analysis contained in that Report provides the Commission with detailed reasons why Shaw's arguments with respect to these two issues should be rejected.

13. In particular we draw the Commission's attention to the Report's detailed analysis that the value of the Goldman Sachs interest is not only part of the assets being acquired but a precondition of the transaction. Shaw argued that only that portion of the asset which transferred control to Shaw should be subject to valuation, however at no time has that logic been part of CRTC policy. In fact, the CRTC decision to look through step transactions to assess the entire acquisition speaks against only valuing the amount that transfers control. If the CRTC approved the method of valuation proposed by Shaw it would inevitably lead to manipulation of transactions to minimize the transfer to those assets required to provide control to the purchaser, thereby substantially reducing benefits packages. This would not be to the benefit of the Canadian broadcasting system.

14. The WGC therefore submits that the valuation of the Canwest assets should be no less than $2.005 billion and therefore that the required benefits package should be no less than $200 million. However, as the Commission may determine from their review that the valuation should be higher than $2.005 billion, and this is considered in the Report, the WGC's proposals for amendments to the benefits package are in general terms and not limited to dollar amounts.

Benefits Policies

15. Shaw has argued that "the Commission's general policy with respect to requiring "clear and unequivocal television tangible benefits should not apply in this transaction" and that the CRTC "benefits policy is, by definition, a policy. It is not codified or fixed."[1] This is Shaw's argument for proposing a potential benefits package for this transaction that is not consistent with the CRTC's benefits policy. The WGC takes great exception to this argument.

16. Policy is not law but that does not mean that stakeholders get to choose when to follow policy. The CRTC is empowered to enforce the broadcasting policies of the *Broadcasting Act* and make regulations, guidelines and statements to enforce those policies. Since its inception, the CRTC has endeavoured to make its decisions consistent and transparent in order to provide stakeholders with predictability and impartiality. The benefits policy has evolved as required by circumstances and changing business practices. These policies have been summarized from time to time during policy directives. To assist stakeholders these directives and relevant decisions have

[1] Supplementary Brief, pg. 19

been summarized on the CRTC website under Key Television Policies[2]. As well, a prudent purchaser would review recent transactions to identify applicable precedent. In particular Canwest's purchase of Alliance Atlantis Broadcasting[3], Rogers' purchase of City-TV stations[4] and CTV's purchase of CHUM specialty services[5] all inform a prospective purchaser on details of the benefits policy which will be applied by the CRTC to ensure that it is treating all stakeholders fairly and equally.

17. The Commission formalized existing practice for considering applications for transfer of ownership or control of broadcasting undertakings in Public Notice CRTC 1989-109. In the absence of a competitive process that would ensure that applicants were the best possible new purchasers, the Commission required that applications must "demonstrate that the proposed transaction is in the public interest". Applications are to do so by proposing "a specific package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system". These are tangible benefits in addition to any intangible benefits arising from the transaction. Public Notice CRTC 1993-68 further elaborated on what would be considered acceptable tangible benefits and when they should apply. In Public Notice CRTC 1999-97, otherwise known as the 1999 TV Policy, the benefits policy was further elaborated on with, in particular, the expectation that the tangible benefits package would be 10% of the value of the transaction.

18. Further details of the benefits policy can be found in Commission decisions and will be referred to where necessary below in our discussion of the details of Shaw's proposed benefits package. As stated above it is essential to fairness and transparency that the Commission apply precedent and, where necessary, adapt precedent to specific circumstances of the applicant or the seller. In the interest of fairness, those circumstances must be clear and unique in order to justify deviating from policy.

19. Shaw has argued both that as merely 'policy' the benefits policy does not have to be followed and also that due to the financial distress of Canwest the benefits policy should not be applied. As set out in the Report referred to above, Canwest cannot be said to be in financial distress and the exemptions to the benefits policy which are on record do not apply to this transaction. We submit that Shaw has not met the necessary test to justify either ignoring the benefits policy or being exempt from it. Shaw further argues that the Canadian broadcasting system has benefitted from the intangible benefits associated with saving Canwest from bankruptcy or a breakup of the assets and that therefore no tangible benefits need be paid. This argument misreads the intention of the benefits policy which is to ensure that there are both tangible and measureable benefits in the

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[2] http://www.crtc.gc.ca/eng/5000/tv3.htm

[3] Broadcasting Decision CRTC 2007-429, transfer of effective control of Alliance Atlantis Broadcasting Inc. to CanWest MediaWorks Inc., December 20, 2007

[4] Broadcasting Decision CRTC 2007-360, transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media, September 28, 2007

[5] Broadcasting Decision CRTC 2007-165, transfer of effective control of CHUM Limited to CTVglobemedia Inc., June 8, 2007

public interest as well as any intangible benefits which might arise from the purchase. We encourage the Commission to ensure that the Shaw acquisition of Canwest is in the public interest by enforcing Commission benefits policy in its entirety.

Allocation of Shaw-Canwest Benefits Policy

20. Though Shaw initially argued that the CRTC's benefits policy should not apply or that Shaw should be exempted, over the course of deficiency correspondence with the CRTC, Shaw proposed a 'full and final' benefits proposal[6] (the "July 12 Benefits Proposal"). It is not clear whether Shaw has committed to this benefits package or whether it is only a proposal conditional upon the CRTC requiring full application of the benefits policy. We note that the subject Public Notice refers only to the original $23 million proposed in the application. The July 12 Benefits Proposal does not adhere to all of the specifics of the CRTC benefits policy but it does reflect some of those policies. The WGC recommends that in a number of key areas the CRTC should require amendments to the July 12 Benefits Proposal prior to approving the benefits package as a condition of approval of the transaction.

21. CRTC policy requires that the tangible benefits package be 10% of the value of the transaction. Should that value be set by the CRTC at $2.005 billion then the benefits package would be just over $200 million. We leave to the CRTC, taking into consideration the arguments contained in the Report attached as Schedule 1, to set the full value of the transaction and urge the Commission to set the tangible benefits package at 10% of that value.

22. As the Commission well knows, it is CRTC policy to require benefits to be exclusive of any outstanding benefits that are assumed by the purchaser. As clearly stated in Public Notice CRTC 1993-68:

> "The Commission expects the purchaser of an undertaking to fulfil any benefits commitments that the current licensee of the undertaking has not fulfilled. The Commission considers that benefits commitments are part of the obligations of a licensee and should be implemented regardless of ownership changes. **The Commission will therefore maintain its practice of questioning the prospective purchaser in a transaction on its intentions with respect to the seller's unfulfilled benefits commitments. The Commission notes that commitments to carry out such unfulfilled benefits are not considered to be benefits on the part of the purchaser**."

This policy has been applied whenever there have been outstanding benefits, including most recently when Rogers acquired the ailing CITY-TV stations, which were encumbered by existing and almost completely unspent benefits from the acquisition of

[6] correspondence from Cynthia Rathwell, Vice-President Regulatory Affairs and Programming, Shaw Communications Inc, to Lyne Renaud, Director Ownership and Acquisitions, Policy Development and Research, CRTC, dated July 12, 2010

the Craig stations[7]. Therefore, it is clear that the outstanding Alliance Atlantis benefits of approximately $95 million should be continued and not counted as part of the benefits package for this transaction. We further note that as the Commission did not think it necessary to give Rogers relief from assuming the existing benefits package due to the financial distress being felt by the CITY-TV stations it would not be appropriate for the Commission to offer Shaw the relief from the Alliance Atlantis benefits that it is requesting.

23. Shaw has asked that the benefits package not be finalized until one year from the Commission's approval of the transfer of control as it does not yet have enough detailed information on Canwest's financial status to be able to decide how to best spend the benefits package. There is no precedent for delaying implementation of a benefits package for a full year after approval nor is there a justifiable excuse in this situation. There is a clear and pressing for a greater expenditure by conventional broadcasters on Canadian programming and in particular Canadian drama. In 2009 private conventional broadcaster spending on Canadian drama dropped 56% to just over $23 million while spending on non-Canadian drama increased 16.8% to $572 million[8]. Canwest's detailed reports on their programming expenditures are available to the CRTC and we assume to Shaw. We find it hard to believe that there is any relevant expenditure data that has not been revealed to Shaw through their due diligence process during this acquisition.

24. Shaw has further asked that the benefits package be spent over a ten year term. Not only is there no precedent for extending a benefits package over longer than the five to seven year term set out in the policy, the Commission explicitly rejected the same request from Canwest:

> "Though the Commission appreciates that the creative process is dynamic and difficult to predict, it notes that tangible benefit packages in the past have been managed successfully within the five- and seven-year periods. The Commission is not convinced that the advantages CanWest claims would result from a ten-year period are sufficient to warrant a deviation from the accepted five- or seven-year norms.[9]

Canwest had also argued that a longer term was required due to the length of time that it takes to develop, produce and market a program. While it often takes years to develop and produce Canadian programming this common hurdle has not stopped other broadcasters from spending their benefits packages during a seven-year term and will not prevent Shaw from doing so as well. Proper planning will allow Shaw to implement and spend the benefits package fully by the end of a seven-year term.

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[7] Broadcasting Decision CRTC 2007-360, transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media, September 28, 2007

[8] CRTC Financial Summaries

[9] Broadcasting Decision CRTC 2007-429, transfer of effective control of Alliance Atlantis Broadcasting Inc. to CanWest MediaWorks Inc., December 20, 2007 para 80

25. In recent years some broadcasters have dragged their feet on spending benefits packages with the result that new purchasers have been saddled with substantial unpaid benefits. In response, the Commission in the Canwest acquisition of the Alliance Atlantis services[10] required that benefits be spent equally over the seven year term, provided that the first year's term could be under spent as programs were established. The WGC encourages the Commission to apply that precedent to this case and require that the benefits be spent equally over the seven-year term, taking into consideration a start-up year to establish the programs.

26. The benefits proposal makes only general commitments to the independent production community. According to precedent[11] 85% of onscreen benefits should be spent on independent production. This element of benefits policy speaks directly to s. 3(i)(v) of the *Broadcasting Act* which requires programming of the Canadian broadcasting system to include a 'significant contribution from the Canadian independent production sector'. We urge the Commission to require such a commitment to independent production for the entire benefits package to ensure that they truly benefit the larger Canadian broadcasting system rather than just Canwest or Shaw.

27. It is equally important that spending under any benefits package be incremental to broadcasters' existing or required spending on Canadian programming. The CRTC should continue its policy of requiring annual reports identifying incremental spending on programming benefits as compared to base spending as required under the 2010 TV Policy.

28. The following comments relate to specific aspects of Shaw's proposal as set out in the July 12 Benefits Proposal.

Digital Transmitters

29. Shaw has proposed that $23 million of tangible benefits go to the cost of installing digital transmitters in non-mandatory markets. This is clearly an inappropriate allocation as it does not qualify as a tangible benefit. From the beginning, capital expenditures have been seen as self-serving and not of benefit to the Canadian broadcasting system as a whole: "Capital expenditures for items such as replacement transmitters are also usually viewed by the Commission as being part of a normal capital expenditure program. If replacements are needed, they are required irrespective of a transfer; if they are not needed, there is no discernible benefit to the public."[12] The foregoing quote from CRTC Public Notice 1989-109 is directly on point. If these digital transmitters are needed then they are required and therefore are a normal capital expenditure.

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[10] ibid para 81

[11] e.g. Broadcasting Decision CRTC 2007-360, transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media, September 28, 2007 para 38

[12] Public Notice CRTC 1989-109

30. In fact, in previous hearings before the Commission Shaw has stated several times that the specific capital expenditures required by broadcasters to upgrade their analog transmitters to digital are a normal cost of doing business. For example, in Shaw's comments in the 2006 TV policy review, Shaw wrote:

> [F]ee for carriage or any other economic reward should not be linked with making the decision to broadcast in digital or offer HD programming. **These are investments that broadcasters will need to incur to operate in a competitive digital world** and they should not be subsidized by cable and DTH customers.[13] [emphasis added]

31. After arguing that the cost to transition to digital is a required cost of doing business for broadcasters, it is inconsistent for Shaw to now argue that this cost is a tangible benefit to the Canadian broadcasting system. The WGC therefore recommends that the $23 million that Shaw has allocated to Digital Transmitters be allocated instead to Scripted Production. By precedent[14], the Commission has approved allocations of 65% of onscreen tangible benefits to drama in recent transactions. The WGC encourages the Commission to maintain that ratio in approving the allocation to Scripted Production. For example, if benefits are $200 million then the allocation to drama (development and production) would be $130 million. Adding the allocation for Digital Transmitters to Scripted Production would assist in reaching that ratio.

<u>Scripted Production</u>

32. The WGC supports the allocation of benefits funding to the production of Category 7 scripted programming however the allocation is insufficient. As stated above, an appropriate allocation to drama would be 65% of onscreen benefits. This is necessary because drama is the hardest genre to finance in order to produce high quality programming that can compete with high budget U.S. programming for audiences. Budgets for Canadian dramas have been increasing each year[15] while resources have failed to keep up. As stated above, Canadian conventional broadcasters have in fact been spending less each year on Canadian drama while they allocate more resources to relatively cheaper U.S. drama imports resulting in private conventional spending on non-Canadian drama at a ratio of 24 times spending on Canada drama[16]. Drama is still the primary driver for audiences and needs specific support.

33. As mentioned above, if the onscreen benefits are $200 million then the allocation to drama production (including the allocation to development) would be $130 million.

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[13] Shaw Communications initial comments filed pursuant to *Broadcasting Notice of Public Hearing CRTC 2006-5* – Review of certain aspects of the regulatory framework for over-the-air television, September 27, 2006, at para 26.

[14] e.g. Broadcasting Decision CRTC 2007-360, transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media, September 28, 2007 para 38

[15] Median one hour budget for adult drama was $1.6 million in 2009 up from $1.2 million in 2005 according to WGC internal statistics

[16] CRTC Financial Summaries

Whatever the final amount arrived at by the Commission, the WGC recommends that precedent be followed and the approximately 65% be allocated for drama production and development.

Development

34. The WGC supports the allocation of benefits spending to development of Category 7 scripted programming but the allocation is insufficient. There is not enough development financing resources in the Canadian broadcasting system. Development is an essential stage in the creative process. Screenwriters frequently have to self-finance the early stages of development (i.e. concept, outline, first draft) in order to develop a project to the stage where it can interest a producer. Screenwriters are the only talent group regularly expected to work for free. The producer needs to see a fleshed out concept or even a first draft script to be able to attract development financing. That development financing is required to develop the script to the point where it can attract production financing and be produced. Only the best scripts should be produced and broadcast and without sufficient development financing writers are hard pressed to reach that standard.

35. While workshopping and demoing a program are useful, funded development should focus on actual script writing in order to provide the most benefit to the development process and to have something to workshop or demo. Access to development funds should be available to screenwriters without requiring a producer attached to the project. This would allow the broadcaster to work directly with screenwriters and showrunners to fully realize their creative vision and ensure that the project is a good fit with the broadcaster before involving a producer. Once realized, the projects can be assigned to a producer who undertakes further development or production as necessary. We recommend further that should Canwest decide to pass on any project that it has funded prior to production then the rights should revert to the screenwriter or producer, with standard repayment provisions if the project went into production elsewhere. This would bring more high quality scripts into the Canadian broadcasting system. The WGC would like to work with Shaw to work out the details of this program including addressing the issues set out above. The WGC has worked successfully with CTV in the development and continuation of CTV Writer Only benefit program and we are optimistic that a similar relationship can be worked out with Shaw.

Third Party Promotion

36. The WGC supports the allocation to third party promotion of scripted programming. Broadcasters need to do more to support Canadian drama to ensure that Canadian audiences know that they have the choice to watch these programs. While promotion should be a cost of doing business we support the allocation of funds to help with third party promotion.

New Media Content

37. Shaw is recognizing how audiences are shifting to digital platforms by allocating funds to New Media Content to Compliment Domestic Programming. We support the concept of this allocation but have some concerns with those details that were provided in the proposal. It is not clear to us what category of ‘domestic programming’ the July 12 Benefits Proposal refers to. We suggest that the New Media content should be associated only with scripted programming produced under this benefits package to ensure that the new media content is both incremental and of benefit to the broadcasting

system as a whole. The reference to 'initiatives flowing from the benefits package' is too vague and could lead to new media content related to news programming (if deemed acceptable) or promotion. Given the new rules for programming funded by the Canada Media Fund which require associated digital media for all CMF categories of programs, funding for associated digital media for these categories, and in particular drama, should be a priority.

38. Accordingly, a number of the suggested categories for spending on New Media Content are inappropriate as they are not content related or are not 'new media'. For example, 'mobile or VOD applications' and 'promotion of domestic programming on social networking sites' are both inappropriate categories for spending as neither are related to content creation. As well, we question '3D HD content' as that does not appear to be an extension of existing television programming on a new media platform but another form of television programming.

39. It may be easiest for Shaw to allocate these funds to an existing fund which finances associated new media content such as the Bell Broadcast and New Media Fund or the Canada Media Fund. These two funding agencies have experience with appropriate categories for creating new media or digital content and have detailed guidelines to assist producers and broadcasters in applying for funding. They have staff who are experienced in reviewing applications and budgets for new media production. They would ensure that content funded with these benefit monies were incremental and of benefit to the whole Canadian broadcasting system. One option could be allocating the funds to Bell Broadcast and New Media Fund or Canada Media Fund with the condition that those funds are segregated and accessible only by projects that will be broadcast on a Canwest service.

Morning Newscasts

40. Allocating $43 million to morning news casts is an inappropriate allocation of benefits funding as morning news casts are a cost of doing business. The fact that Canwest has terminated morning news casts does not make them any less essential. In order for Canwest to be truly competitive with CTV and CITY-TV stations in its markets, it must have morning news casts to compete with Canada AM and Breakfast Television, respectively.

41. Further, morning news casts are clearly not produced by independent producers but by in-house production teams. As such morning news casts are only of benefit to Canwest and not the Canadian broadcasting system as a whole. Funding morning news casts would be a self-serving allocation of benefits.

42. The WGC recommends that the allocation to morning news casts be disallowed and the funds re-allocated to the production and development of scripted programming as necessary to meet the ratio of 65% of onscreen benefits.

Conclusion

43. The WGC supports Shaw's acquisition of Canwest subject only to Shaw and the Commission positively addressing the issues raised in our intervention. With the

Commission's due diligence we expect the Commission to arrive at an appropriate valuation for the transaction and subsequently a fairly calculated tangible benefits package allocated according to Commission policy. Tangible benefits should adhere to CRTC policy and precedent, covering the following essential elements:

- 10% of the value of the transaction
- On top of any pre-existing benefits belonging to the seller
- Incremental
- No expenditures which are the cost of doing business
- 85% allocation to independent production
- 65% allocation to drama
- Spent over a 7 year term
- Spent equally over the term after a first year for start up

44. We look forward to working with Shaw and the newly invigorated Canwest as we all work towards the goal of a strong Canadian broadcasting system offering Canadian audiences the choice a wide variety of high quality Canadian programming.

45. We thank you for this opportunity to provide you with our comments.

Yours very truly,

Maureen Parker
Executive Director

c.c.: National Council, WGC
Kelly Lynne Ashton, Director of Policy, WGC
Cynthia Rathwell, Vice-President Regulatory Affairs and Programming, Shaw Communications Inc. [Cynthia.rathwell@shawdirect.ca]

SCHEDULE 1

INTERPRETATION OF THE CRTC'S POLICY RELATING TO THE "VALUE OF THE TRANSACTION" AND THE APPLICATION OF THE CRTC'S TANGIBLE BENEFITS POLICY TO FINANCIALLY "AT RISK" LICENSEES IN THE CONTEXT OF THE SHAW/CANWEST TRANSACTION

A joint report prepared by the ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS (ACTRA), CANADIAN MEDIA PRODUCTION ASSOCIATION (CMPA), DIRECTORS GUILD OF CANADA (DGC), and WRITERS GUILD OF CANADA (WGC)

August 23, 2010

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EXECUTIVE SUMMARY

1. This joint report prepared by the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA); Canadian Media Production Association (CMPA); Directors Guild of Canada (DGC); and Writers Guild of Canada (WGC) (hereinafter referred to as the "Joint Report") demonstrates that the arrangements of February 11-12, 2010 and May 3, 2010 were inextricably tied together and should be treated by the Commission as a single "transaction" for purposes of its "value of the transaction" analysis. This is true whether viewed from the perspective of a review of the actual documentation, or from the comments of senior Shaw executives at the time of the completion of the transaction on May 3, 2010. This Joint Report also considers and rejects Shaw's arguments that the Commission's benefits policy should be interpreted in a manner that takes into account the financial situation of Canwest and avoids the payment of tangible benefits or seeks to reduce the quantum of such benefits.

THE "VALUE OF THE TRANSACTION" SHOULD BE NO LESS THAN $2 BILLION

2. The Shaw Support Agreement and the Shaw Subscription Agreement were made expressly subject to the resolution of the issues between Canwest and Goldman Sachs. The February arrangements were therefore effectively meaningless, with or without Commission approval, in the absence of finalizing the overall transaction, which meant finalizing an agreement with Goldman Sachs or pursuing the matter through the courts, a process with an uncertain outcome and a lengthy timeline. Furthermore, at the time of the completion of the transaction on May 3, 2010, Goldman Sachs was attempting to have the February arrangements set aside.

3. When the transaction was completed on May 3, 2010, Shaw's senior management participated in a conference call with financial analysts. They indicated that this was an "optimal" time to conclude the transaction because, among other reasons, Shaw:

    (a) could eliminate the financial players (including Goldman Sachs) who could make their lives difficult if they tried to run Canwest without owning 100% of it;

    (b) wanted to crystallize the price as valuations are, they believe, at the bottom of the economic cycle right now and there is tremendous leverage and upside for Shaw;

    (c) eliminated the "litigation risk" which, at a minimum, would have dragged on the process and kept Canwest in the CCAA process and at worst, might have resulted in the Canwest properties going to auction;

    (d) would have had to pay more had they waited for a subsequent opportunity;

    (e) said that there were "tremendous benefits" to having 100% control of the content since "they can do what they want with it";

(f) is paying only 6 times EBITDA for the Canadian television subsidiary, which includes Global and TVtropolis, and 9.7 times EBITDA for the former Alliance Atlantis properties, which two years ago traded hands for 17 times EBITDA; and

(g) noted that there have been significant costs that have been taken out of the business during the restructuring process.

4. Shaw's rationales for a "value of the transaction" of only $506 million are flawed. The suggestion that the February part of the transaction was conclusive is incorrect, as it was expressly made subject to the resolution of the Goldman Sachs issues. The latter occurred on May 3, 2010 and resulted in the completion of the transaction that is before the Commission.

5. It would make a mockery of the Commission's "value of the transaction" rules if the Alliance Atlantis assets were valued by the Commission at $1.5 billion in 2007 and effectively zero in 2010. Even though Shaw acknowledges that in arriving at the purchase price of $2.005 billion it attributed 9.5 times EBITDA (or $1.7 billion) to those properties, Shaw is requesting that the Commission place a value of $506 million on the transaction.

6. These two components of the same transaction occurred within 80 days of one another and the second component was a requirement of the first, which was preconditioned on a settlement of the Goldman Sachs issue.

7. The fact that Goldman Sachs is a non-Canadian is irrelevant. The Commission has never discounted that part of the value of a transaction that was represented by a non-Canadian. It is the transaction that is important, not the nationality of the vendor of a portion of the shares.

8. Shaw could not have continued on "indefinitely" to run the Canwest stations/services with Goldman Sachs as a minority shareholder. First, the February arrangements would not have permitted Shaw to acquire those assets (even with CRTC approval) in the absence of a settlement with Goldman Sachs. Second, if Canwest had been permitted to resile from the contract (i.e., a court victory for Shaw/Canwest), Shaw would still have had a very disgruntled minority shareholder with numerous minority rights. This would not have been an acceptable outcome. Shaw acknowledged that it was greatly preferable to have 100% ownership and be rid of the financial partners. Third, by delaying, Shaw noted in the conference call that it would have had to pay more for the asset. Fourth, there was no guarantee that Shaw would have been successful in the litigation.

THE FAILING UNDERTAKING ARGUMENT IS NOT AVAILABLE IN THIS CASE

9. Shaw is seeking an interpretation of the benefits policy that would allow it to rely on its "intangible" benefits to the exclusion of the payment of tangible benefits. Shaw highlights a number of small transactions in which the service in question and/or the

purchaser were in difficult financial situations and where the Commission had said that tangible benefits were not required.

10. A close review of each of those cases demonstrates that the circumstances that led the Commission to refrain from requiring benefits do not apply in this case. In some cases, the amounts were trivial; in others the values of the transactions were actually negative. In the case of TQS, the service had been in a precarious financial situation throughout its 18 years in broadcasting and had almost always had a negative PBIT.

11. Shaw also pointed to the Commission's radio and television policies for support as to why it should not have to pay tangible benefits. Both exceptions found in those policies are inapplicable to Shaw. In radio, three years of negative PBIT is required while in television, a station must be earning less than $10 million a year in revenue and must also qualify for the Small Market Programming Fund, which Canwest's stations do not.

12. This is very different from the Canwest situation. As the CRTC noted in one of its deficiency questions in its letter to Shaw of 14 May 2010, overall Canwest stations have a positive pre-tax margin and even when disaggregated into CTLP Conventional, CTLP Specialty and CW Media, each of these groups of services shows a positive pre-tax profit.

13. In fact, Shaw's Senior VP and CFO on the May 3, 2010 conference call indicated that the CW Media properties accounted for more than 85% of the value of this transaction and that they enjoyed margins in excess of 40%. Even Canwest's television stations have started their anticipated rebound.

14. The financial results for the 9 months ended May 31, 2010 show that CTLP earned operating profit of $99 million while CW Media earned $169 million for a total for the nine months of $268 million. This is already significantly higher than the full year projections of $188 million submitted by Shaw in its deficiency response of 21 July 2010. If the three quarter number of $268 million is annualized by grossing it up by 4/3rds, the projected profits would be $357 million. This is not the type of circumstance that should result in an exemption from the payment of tangible benefits totalling 10% of the value of the transaction.

15. Finally, to the extent that the Commission has, in the past, considered as well the financial circumstances of the purchaser, Shaw itself is also a strong entity financially. Indeed, it has indicated that its financial muscle should be considered an intangible benefit of this transaction.

16. Accordingly, none of the circumstances are in place that would justify the application of the benefits policy in a manner that would allow for an exception to be made for the requirements that tangible benefits in an amount of 10% of the value of the transaction be paid.

PART ONE
INTRODUCTION

17. This Joint Report considers certain issues relating to the Commission's assessment of the "value of the transaction" in connection with the transfer of control of licensed broadcasting assets. More specifically, this Joint Report disputes the assertion of Shaw Communications Inc. ("Shaw") that the value of the transaction with respect to its acquisition of 100% of the shares of a Restructured Canwest for approximately $2 billion should be assessed at $506 million. Rather, the value of the transaction should be assessed at no less than $2.005 billion for the reasons set out in this Joint Report.

18. This Joint Report also considers and rejects Shaw's suggestion that Canwest's "financial distress" should result in no (or a reduced amount of) tangible benefits being paid with respect to this transaction.

PART TWO
THE VALUE OF THE TRANSACTION

A) Commission Policy Relating to the "Value of the Transaction"

19. As the Commission does not solicit transfers of control, and in the absence of a competitive bidding process for the licences being transferred, the Commission must ensure that the transaction is the best possible one in the circumstances, is commensurate with the size and scope of the transaction, and assists in the achievement of the objectives of the *Broadcasting Act* (the "Act"). In 1999, the Commission announced that henceforth, parties acquiring control of conventional television and/or specialty television assets would be required to contribute 10% of the "value of the transaction" toward Commission approved public benefits that would assist in the satisfaction of the Act's objectives. In Broadcasting Public Notice CRTC 1999-97, 11 June 1999, the Commission stated,

> *22.* The Commission hereby amends its benefits policy in respect of all transfers of ownership or control involving television broadcasting undertakings, including conventional, pay, pay-per-view and specialty television undertakings. It will generally expect applicants to make commitments to clear and unequivocal tangible benefits representing a financial contribution of 10% of the value of the transaction, as accepted by the Commission. This policy will apply to any application filed on this date or after.

20. What constitutes the "value of the transaction" was not defined in the 1999 document but has evolved over time through Commission pronouncements and cases relating to transfers of control.

21. One issue that has become clear is that the Commission is concerned with the notion that acquiring companies might separate transactions into portions and attempt to pay benefits only on the portion that takes them into a control position.

22. An example would be where an acquiring company divides its purchase of a target's voting shares into 3 steps. The first tranche results in the acquisition of a 48% interest, the second a 3% interest while the third is for the remaining 49%. The acquirer could argue that it only has to pay benefits on the 3% purchase price of the transaction that took it to a control interest of over 50%. That would clearly be an abuse of the benefits process and a violation of the principles involved in the Commission's "value of the transaction" approach.

23. This issue of a segmented or creeping acquisition of control was discussed by the Commission in the 2006 Bell Globemedia (BGM) case. In Broadcasting Decision CRTC 2006-309, 20 July 2006, the Commission noted the following concerns of interveners;

> Interveners also expressed concern about the effect that a decision by the Commission not to require benefits in this instance would have on future transactions. The Unions were concerned that this would open the possibility for corporations to execute changes of ownership in multiple steps (multi-step transactions), and thereby avoid paying tangible benefits until the purchase of a percentage that would provide a shareholder with effective control. The result would be a benefits package that would reflect the value of only the last step, as opposed to a benefits package on the entire transaction. The CFPTA [sic] recommended that, in the event that benefits were not required in this case, the Commission should reassess the Benefits Policy to ensure that this loophole was closed.

24. The Commission referred to its call for comments in Broadcasting Notice of Public Hearing CRTC 2006-5 in which it had specifically asked for public comments on what changes should be made to the benefits policy. In the resulting public notice, Broadcasting Public Notice CRTC 2007-53, the Commission again picked up the issue of multi-step transactions, saying,

> 113. Several industry associations, including the Directors Guild of Canada, the Alliance of Canadian Cinema, Television and Radio Artists, the CFTPA, and the Coalition of Canadian Audio-Visual Unions, urged the Commission to revise the benefits policy to prevent the recurrence of a situation similar to an ownership transaction approved in Decision 2006-309, involving Bell GlobeMedia Inc. (now known as CTVglobemedia Inc.). In that case, no benefits were required because the transaction constituted a "change" rather than a "transfer" of control.

> 114. The Commission is of the view that the circumstances of the Bell Globemedia Inc. transaction were very unique, and that the possibility of such a situation recurring is very unlikely. The Commission does not consider that decision to be a precedent. Therefore, it does not consider that a change to the benefits policy is warranted. **The Commission also notes that, in Decision 2006-309, it acknowledged the concerns expressed by parties concerning multi-step transactions and reserved the right, in the case of such transactions, to review the entire sequence of previous transactions to determine the appropriateness of any proposed benefits package.** [emphasis added]

25. Therefore, all parties were put on notice that the Commission has "reserved the right… to review the entire sequence of previous transactions". In the present case, such a review leads inexorably to the conclusion that the acquisition of the interests previously held by Goldman Sachs entities (the longer names of the Funds managed by Goldman Sachs are omitted and the name Goldman Sachs is used instead throughout this Joint Report and the assumption of the debt in Canwest Media Inc. (CMI) by Shaw constitute part of the value of the transaction.

26. The inclusion of debt in the calculation of the value of the transaction is well-settled. In Decision CRTC 2001-394, 5 July 2001, the Commission approved the acquisition of TVA by Videotron but took the opportunity to make clear that, among other items, debt was to be included in the calculation of the value of the transaction. It noted the following:

> 27. In previous decisions, the Commission has generally calculated the value of a transaction, for the purpose of establishing tangible benefits, on the basis of the percentage of equity held. **In most of the previous transactions, the value of the transaction was equivalent to the purchase price or to the amount actually paid by the buyer, and this amount usually included existing debt and any acquisition premiums.** The Commission made an exception in Decision CRTC 2000-86 dated 24 March 2000 and permitted a purchase price that excluded the long-term debt of NetStar Communications Inc., an undertaking acquired by CTV Inc. In accepting the applicant's arguments to this effect, the Commission stated, among other things: "The Commission will expect applicants, in future transactions, to demonstrate that the measure they have used to determine the value of the transaction is the most appropriate under the circumstances." [emphasis added]

27. The balance of this Joint Report will consider the factors that lead to the conclusion that the correct "value of the transaction" in this case is at least $2 billion.

B) The Transaction

28. The transaction that is under consideration began on October 5, 2009 when Canwest Global Communications Corp. ("Canwest") and a number of its 8% Noteholders represented by an Ad Hoc Committee entered into a Support Agreement. In that agreement, the Noteholders agreed to convert their outstanding debt obligations into equity of the Company. As part of the restructuring, Canwest and certain of its subsidiaries filed for creditor protection under the *Companies' Creditors Arrangement Act* (the "CCAA") via a pre-packaged arrangement on October 6, 2009 and Canwest, through its financial advisor, solicited Canadian interest regarding a possible equity investment in a Restructured Canwest.

29. At some point during the period between October, 2009 and February 11, 2010, certain interested parties were invited to bid on the Canwest properties. Goldman Sachs, the majority equity owner of CW Investments Inc. (parent company to the profitable former Alliance Atlantis properties) was excluded from those discussions as is made clear from the Goldman Sachs correspondence of February 11, 2010 and the letter of February 13, 2010 attached as Schedule 1[17] (the "Goldman Sachs correspondence").

30. On February 12, 2010, Shaw announced that it had had entered into agreements with Canwest and the Noteholders, represented by the Ad Hoc Committee, regarding the acquisition of a minimum 20% equity interest and 80% voting interest, which included effective control, of a Restructured Canwest. Shaw's press release at the time noted that Shaw's initial equity interest would exceed 20% depending on the number of Canwest creditors that elected cash rather than shares in Restructured Canwest.

31. It is on the basis of this February, 2010 agreement that Shaw takes the position that this conditional deal was all that was needed in order for Shaw to acquire control and that any other activities should be excluded from the Commission's calculation of the "value of the transaction." Since the amount that Shaw agreed to pay for its 20% interest was $85 million, and since its interest was 20% of the company, therefore Shaw's view was that the value of the transaction should be established at $475 million. In its Supplementary Brief filed 30 March 2010, Shaw stated the following,

> This process created a clear transaction value of $475 million, determined by the market after a thorough bidding process. That transaction value represents restructured Canwest's implied equity value based on Shaw's $95 million investment for 20% of restructured Canwest's implied equity value based on Shaw's implied value of the equity which major creditors of Canwest will accept in return for the forgiveness of debt owing to them….No

[17] These documents were schedules to the Tenth Report of FTI Consulting Canada Inc. in its capacity as monitor for the applicants dated February 14, 2010. Available online at http://cfcanada.fticonsulting.com/cmi/reports.htm.

> debt is being assumed as part of this transaction. Therefore, the full "implied equity value" in the restructured Canwest is $475 million.

32. In its letter of 20 May 2010 to the Commission Shaw changed this figure to $506 million, comprised of $442 million payable to bondholders, $38 million payable to other unsecured creditors, $2 million payable to Houlihan Lokey plus Shaw transaction costs of $24 million.

33. There was a significant problem with the February, 2010 deal, however. Goldman Sachs strongly objected to it and the acquisition threatened to become bogged down in litigation for a long time and with an uncertain result. This was openly acknowledged by Shaw not only in its Supplementary Brief of March 30, 2010 but in section 7 of the Shaw Support Agreement (attached as part of Shaw's application of March 30, 2010) that "**the satisfactory resolution of the issues with Goldman Sachs (either through renegotiation or Court-approved resiliation of the CW Investments Shareholders Agreement) is a precondition of the closing of the Acquisition".** [emphasis added].

34. This makes clear that the February "transaction" was effectively nothing more than an opportunity for Shaw to attempt to negotiate changes to the CW Investments Agreement with Goldman Sachs or to attempt to persuade the Court to allow for that agreement to be disclaimed or resiled from. The Shaw Support Agreement and the Shaw Subscription Agreement also make evident that the ensuing May 3, 2010 resolution with Goldman Sachs (discussed below) should not only be considered as part and parcel of the February "value of the transaction", but also that the February "deal" was meaningless if a settlement such as that which was reached on May 3, 2010 with Goldman Sachs had not been entered into.

35. Shaw admitted in its Supplementary Brief of March 30, 2010 that,

> 35. Shaw acknowledges that satisfactory resolution of the issues with Goldman Sachs (either through renegotiation or Court-approved resiliation of the CW Investments Shareholders Agreement) is a precondition to the closing of the Acquisition. Shaw is committed to resolving those issues and therefore urges the Commission to move forward expeditiously to consider the Application under its own process...
>
> 44. Goldman Sachs is now challenging the Court's order by seeking leave to appeal it to the Ontario Court of Appeal…
>
> 45. Shaw is committed to resolving the Goldman Sachs issues…

36. Thus it is clear that the payment to Goldman Sachs should be considered as part of the "value of the transaction". The acquisition of even the 20% of Restructured Canwest by Shaw could not and would not have ever been consummated without the resolution of the

Goldman Sachs issue, regardless of whether the CRTC approved Shaw's March 30, 2010 application.

37. Not only that, and this is critical to an understanding of the linkage of the February tentative deal with the May 3, 2010 transaction, but the entire auction process and the resulting sale to Shaw of the 20% interest in Restructured Canwest by Shaw was being challenged in court by Goldman Sachs. In other words, there was much more at stake for Shaw than merely the contract with Goldman Sachs' return in it. The Goldman Sachs correspondence provides the Goldman Sachs perspective.

38. As the acquisition is part of the CCAA restructuring of Canwest, the approval of the CCAA Court was required. As part of its litigation response and because the disclaimer or resiliation of the Goldman Sachs agreement was a condition of Shaw's agreement to acquire Restructured Canwest, Goldman Sachs opposed the February motion in the CCAA Court to approve the sale to Shaw. (The court documents filed by all parties are available on the website of the Court appointed Monitor, a company named FTI Consulting Inc., at www.cfcanada.fticonsulting.com/cmi/motions.htm). Although Shaw won the "first round" in that battle,[18] Goldman Sachs filed a motion, which was pending at the time of the May 3, 2010 settlement, seeking to appeal the approval order to the Ontario Court of Appeal. Even if the appeal had not been successful, Goldman Sachs had frequently stated that it would oppose in court any attempt by Canwest to disclaim or resile from the Goldman Sachs agreement.

39. Shaw was not taking any of this lightly. Indeed, as later became public, negotiations were being conducted under the guidance of the Chief Justice of Ontario, His Honour Chief Justice Warren Winkler. Shaw appreciated that if a resolution of the dispute with Goldman Sachs was not forthcoming, the matter could have dragged on in the courts for a long time. Not only that, the results could have been quite negative as far as Shaw's desired purchase of Canwest was concerned.

40. The mediation process led by Winkler, C.J.O. proved to be successful. It led in early May to the completion of the transaction that is now before the Commission. That transaction involves the acquisition of 100% of the shares of Restructured Canwest. The Shaw News Release dated May 3, 2010 is attached as Schedule 2. It reads in part,

> Shaw Communications Inc. ("Shaw") announced today that it has entered into **agreements to acquire for approximately $2.0 billion,** 100% of the over-the-air and specialty television businesses of Canwest Global Communications Corp. ("Canwest"), including all of the equity interests in CW Investments Co., the Canwest subsidiary that owns the specialty

[18] Order dated February 19, 2010 granted for reasons dated March 1, 2010, filed at www.cfcanada.fticonsulting.com/cmi/courtorders.htm).

> television channels acquired from Alliance Atlantis Communications Inc. in 2007 (the "CW Media Group") (the **"Transaction")**. The total consideration **includes approximately $815 million of net debt** at CW Media Group. [emphasis added]

41. One need go no further. What Shaw self-defines as the "Transaction" is a $2 billion transaction including $815 million of net debt at CW Media Group. The fact that there may be more than one "agreement" involved in what the Commission considers to be a single "transaction" is irrelevant. Virtually every transaction involves the negotiation and execution of more than one agreement, sometimes many more.

42. The documentation that was submitted to the CRTC by Shaw following its May, 2010 "amendments" to the March 30 application is also very clear. In the Full and Final Mutual Release, Goldman Sachs agreed to withdraw its litigation and surrendered its rights (including a variety of puts and calls) under the CW Investment agreement. Under the Option Agreement, Shaw agreed to pay Goldman Sachs $709 million for its interest in CWI. The Shaw Subscription Agreement and Shaw Support Agreement from February 2010 were duly amended and the entire group of amended transaction documents was put to the Commission as part of the package for which the Commission's approval is sought.

43. All of these component parts are indivisibly tied together. The February 11, 2010 "acquisition" by Shaw was not an acquisition. It was an agreement to subscribe to a certain percentage of shares in a restructured Canwest **provided** that a number of events occurred. The February deal would never be consummated in the absence of the occurrence of those events, which were preconditions. The necessary events occurred on May 3, 2010 and resulted in the satisfaction of the necessary preconditions that allowed the February paperwork to be amended and for the transaction to proceed.

44. This was all admitted by Shaw in its News Release of May 3, 2010, attached as Schedule 2. It announced that it had entered into agreements to acquire for approximately $2.0 billion, 100% of the over-the-air and specialty television businesses of Canwest Global Communications Corp. "including all of the equity interests in CW Investments Co., the Canwest subsidiary that owns the specialty television channels acquired from Alliance Atlantis Communications Inc. in 2007". The News Release noted,

> Previously Shaw had announced an agreement with Canwest and certain holders of Canwest's 8.0% senior subordinated notes (the "Noteholders"), represented by the Ad Hoc Committee, regarding an minimum 20% equity investment in a restructured Canwest. **This agreement was approved by the Canwest Board and the Ontario Superior Court of Justice, but was subject to certain conditions, including the resolution of matters under the shareholders agreement with certain entities affiliated with Goldman Sachs Capital Partners (the "GS Entities") regarding Canwest's interest in CW Media Group. To resolve those**

> **issues, Shaw has entered into agreements pursuant to which Shaw will acquire the GS Entities' equity interest in CW Media Group for $700 million.** [emphasis added]

45. In summary, the resolution of these issues was a precondition to the closing of the February arrangements and must be considered as part of the value of the transaction.

C) Shaw's Comments Regarding the May 3, 2010 Completion of the Transaction

46. What had started out as a $95 million potential investment opportunity by Shaw had, by May 3, 2010, morphed into a $2 billion transaction. This, understandably, had stock analysts, and especially those who follow the Shaw stock, wondering what impact this purchase would have on Shaw and what Shaw senior management's intentions were. Shaw held a Conference Call at 5 p.m. on May 3, 2010, attended by approximately 235 people, and for which the complete transcript is available for purchase through Thomson Reuters.[19]

47. The call featured many interesting discussions, some of which bear directly on the issue of the "value of the transaction". In the introductory remarks, Shaw's Senior VP and CFO Steve Wilson addressed the issue of why Shaw felt it was so advantageous to abandon the idea of continuing with the February proposals (which would have involved at a minimum working with financial partners over a period of time) and instead switching gears and bidding for 100% of Canwest. Mr. Wilson noted the following:

> Let me maybe just talk before valuation on the question of why now and why have we decided not to go with the option route and proceed with financial partners over a period of time.
>
> Our view is that this gives as an opportunity to crystallize the value today which we think is an optimal time to do that. This has given us the ability to remove the financial players. Goldman Sachs certainly was a key to be able to solve the entire problem here, and we were pleased that we were able to come to an agreement with them that was satisfactory for both of us.
>
> So we have eliminated litigation risk which could have held Canwest up for some time in the CCAA process had allowed it, its employees to direct their energy with us to building a much stronger organization today right off the bat as that gives us the ability to take 100% control now without interim governance mechanisms with third parties.

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[19] http://www.alacrastore.com/cgi-bin/alacraswitchISAPI.dll?app=locker2&msg=ExecContent&topic=download&sk=csyoiuaatvadjvofoldpjxcnwpisrop&lockerfileid=8F92D660-07D4-4735-8DCF-0A198B8C74A0

We believe when we look at the outlook for the business that had we waited for at least a year or perhaps more under the previous agreements we had that we would have paid more for this asset as we believe that we are still in the bottom of the economic cycle here. We may have just rounded the corner but there is tremendous leverage and upside.

So it is a great benefit for us today to be able to do this deal at this price, take it out and own it, and really move forward with something that is very positive for all of us.

In terms the valuation, we are paying in aggregate approximately CAD2 billion for 100% of Canwest's broadcasting assets. In terms of the split, we are evaluating the Canadian television subsidiary which includes the conventional business and TVtropolis along with several other smaller specialty stations and approximately CAD250 million to CAD300 million. So I think it's important for people to understand that that portion of the business represents less than 15% of the purchase price here. The majority of the value is for the highly profitable and sought after portfolio of specialty channels and CW Media Group subsidiary which generate margins in excess of 40%...

So the approach we have taken here is that we have normalized and reduced the CW Media Group margin to be more conservative in our valuation analysis of this. I will also add that a consolidated normalized EBITDA of within the Canadian Television subsidiary, which includes Global and TVtropolis, is somewhere between CAD45 million and CAD50 million with room to grow. That means that when we say we are valuating the Canadian Television at CAD300 million it implies a transaction multiple of only six times EBITDA for that particular portion of the business.

We believe we are paying a reasonable take-out valuation multiple. I will say that currently on average the Canadian specialty channels, comparable Canadian specialty channels, are trading at approximately 8.5 times. On a blended basis then we are paying 9.5 times EBITDA for an implied 9.7 times for the specialty businesses alone. This represents a take-out premium of approximately 15% compared to the current trading multiples of other specialties.

Based on our review and our financial advisors we believe that this is much lower than the premium paid for comparable historical specialty transactions. The average over the last 10 years, for example, has been just over 15 times multiple for specialty channel

> transactions. So we are buying this at a time when both the multiples are low and the EBITDA has room for rebounds.
>
> I will also note that the original Alliance Atlantis transaction in 2007 was done at a valuation we are told of 17 times trailing EBITDA. So that will give you a sense of how far things have moved.
>
> …There have been significant costs which have been taken out of the business during the restructuring process and the Canwest team has done a great job of doing that. Their broadcasting business is well-positioned to perform as the economy and advertising market improves and so we are entering at a point of low multiples.
>
> Going forward we believe there is significant leverage in the Company's bottom line as the majority of revenue growth should flow through the EBITDA performance improving in the future.

48. This excerpt is illuminating. It discloses why Shaw rejected the notion of working with its financial partners and sought to purchase 100% of the company up front. There were two main reasons indicated in this excerpt by Mr. Wilson.

    (a) The most important reason for Shaw was to crystallize the value of the company at a time when multiples are at a low ebb. This means that Shaw can benefit from the coming rebound in values. Had Shaw waited, as Mr. Wilson indicated, Shaw believed it would have had to pay more as values rose.

    (b) The second reason was to eliminate the "litigation risk", which would have held up Canwest for some time in CCAA proceedings.

49. More detailed reasons were provided later in the call when Mr. Wilson elaborated as follows:

> …when you look at it, if we are in for just a little bit and we have to negotiate with Goldman Sachs and everybody else we get no control over the content…
>
> …the initial deal, the 20% for CAD95 million and control, that was a somewhat imperfect deal but that was the only deal that was on the table at the time. We entered at that time and we were able to negotiate with the bondholders to be able to bring this out of the private company, which we thought was very positive but it was the only game in town until we got into mediation with the Chief Justice.
>
> And so it would have seen us in a situation where we would have been governing the business with financial players going forward.

> That would have lasted for at least 12 months or more. The motive there obviously would be that we would pay more in the end and we believe that is the case with the EBITDA ramp and the potential for the multiples increase as well.
>
> So by crystallizing the value today and taking away all those complications and giving us the ability to do what we do well, which is operate businesses and take control of it now, give Canwest employees certainty. As Jim said, once we have 100% control we have got the content we can do what we want with it. There are tremendous benefits to that.
>
> And I don't think you should underplay either the litigation factor here. I mean, CW Media was not in the CCAA process. Goldman had a contract and there were many different views about what the potential outcome could have been in that. One of the potential outcomes could have been that these channels could have gone to auction and we wouldn't have had this opportunity with the loss that we have today.
>
> And that would have been a very unfortunate situation for us. So for all those reasons and buying it at today's value we think that this is absolutely the right thing to do.

50. This exchange elaborates on Mr. Wilson's previous comments. It demonstrates that, despite what might be said elsewhere, Shaw really would **not** have been happy having to work with financial partners. However, since that was the only possibility at the time, they took it. But they welcomed the chance to remove the concerns of having these parties with potentially disparate interests preventing Shaw from having the ability to do what it wanted to do with the Canwest assets. It also displays that Shaw was seriously concerned that, as a result of the litigation with Goldman Sachs, the former Alliance Atlantis properties might have been put up for auction and Shaw might have lost the opportunity to acquire them.

51. It is also noteworthy that Mr. Wilson specifically mentioned that Shaw might have had to pay more had they waited. This is not only as a result of increasing multiples but also as a result of the contractual obligations with Goldman Sachs.

52. It is critical to recall that the Goldman Sachs investment in CWI had two distinct components. There was a shareholding of approximately 65% of the economic interests (spread between voting and non-voting shares) and there was a contractual right to a guaranteed return. There is no suggestion in any of the court documents that Goldman Sachs' shareholding was going to disappear even if Goldman Sachs were to have lost the lawsuit insofar as it related to the contractual obligations of Canwest. As noted, the courtroom battles related to the contractual right of Goldman Sachs to a guaranteed rate of return. Shaw and Canwest were attempting to persuade the court that Canwest should

be allowed to resile from, or disclaim that contract. In other words, Goldman Sachs would not receive the guaranteed return that it had contracted for with Canwest.

53. Financially, the best case that Shaw could have hoped for would have been to prevail in that court case and eliminate both the obligation to pay Goldman Sachs its guaranteed return and to eliminate Goldman Sachs' various put and call rights. But even if Shaw had won that battle, which was far from a certainty, Shaw would still have had to deal with a powerful, disaffected minority shareholder with a battery of minority shareholder protections guaranteed under corporate law. The arrangement would have been dysfunctional as Shaw would have had to take precautions not to give Goldman Sachs (as the minority shareholder with the majority economic interest) any cause to seek an oppression remedy for any Shaw actions taken as the majority shareholder. Shaw would have needed to take Goldman's concerns into account in all of its decision-making. This would have been an unsatisfactory state of affairs for Shaw. And that is the situation if Shaw had been successful in its litigation. There is no guarantee that it would have been.

54. It is also important to keep in mind that Goldman Sachs was effectively acting as a bank. The contract was what guaranteed to Goldman Sachs its rate of return. The CRTC and the parties involved know what the prescribed formula for the rate of return was. The public, including interveners, does not. But it seems obvious that whatever that formula may contain, the rate of return that Shaw would have been required to pay Goldman Sachs would greatly exceed the rate that Shaw can borrow at in the market. Therefore, while Shaw may argue that it could have just waited and bought Goldman Sachs out later, there would have been a significant financial penalty for doing so, namely the difference between what Shaw can borrow at and Goldman Sachs' contractually guaranteed rate of return. This is yet another reason why Shaw decided to bid for 100% of Canwest's broadcasting assets in one transaction.

55. Finally, Shaw very much wanted to control 100% of the assets. Toward the end of the conference call, one of the analysts again returned to the need to own 100% of the company in order for Shaw to get the full benefit. Shaw President Peter Bissonnette responded as follows:

> Yes, 100%. We have never been really one to have sort of minority control and having 100% control really is we see an advantage. I think we set out for the driving force of this strategic rationale for this having the opportunity to have 100% to us is absolutely a blessing. When we are meeting with the Ad Hoc committee they were really torn about forgoing the value that they see is going to be created over the next year or so, but recognizing that there is a real benefit to the broadcasting system and to Shaw and to shareholders, as you appropriately said Jim, by having 100% ownership.
>
> We have the total flexibility…We have a total flexibility in how we apply content over the various platforms and that is a huge,

> huge advantage for us when we look to the demands that we are seeing from our customers for every type of content.

56. Shaw's Senior VP Planning, Mr. D'Avella, added the following comment:

> …if you own 100% of the enterprise or whatever the specific content play is, you are going to be in a much stronger position to determine how the economics are shared. It's essential when you are going to the table to actually buy these rights that you have got a clear view of what you want to do with them. And owning the entire enterprise gives us really that ability to actually do that.

57. In summary, Shaw has brought forward to the Commission a completely new proposal featuring new economics, the elimination of potentially problematic financial partners, the ability to move assets and programming around within the Shaw Group with impunity, and a basket of other upsides for Shaw and its shareholders. However, Shaw maintains that none of this should bear on the Commission's determination of the "value of the transaction". In the next section, some of the arguments that Shaw and its representatives have raised in that regard will be explored.

D) Shaw's Flawed Rationales for a "Value Of The Transaction" of $506 Million

58. When Canwest first acquired the assets of Alliance Atlantis in 2007, the Commission attributed a value of just over $1.5 billion to the specialty television assets. The Commission clearly considered the amount of debt and equity, including the GS investment, to be part of the value of the transaction and benefits were paid on that amount. To suggest that it just vaporized would make a mockery of the Commission's "value of the transaction" analysis.

59. As noted previously, in a section of the Supplementary Brief entitled, "Value of the Transaction", Shaw took the position that since it acquired a 20% interest in the restructured Canwest for $95 million, all one has to do is multiply by 5 to determine that 100% of the value of what it is acquiring is $475 million. [This was raised to $506 million on May 20, 2010] Notably absent are the whole Goldman Sachs component and the significant debt in the profitable company holding the former Alliance Atlantis assets.

60. As was seen in the transcript excerpts above, Shaw's Senior VP and CFO indicated that, of the $2 billion, approximately $250-300 million is attributable to Canwest's conventional and specialty services while the balance is attributable to the former Alliance Atlantis assets of which Goldman Sachs entities held an economic interest of approximately 65% as well as a guaranteed rate of return going forward. This means that, by Shaw's own admission, in the two years since Canwest purchased Alliance Atlantis, the value imputed to those assets has increased in value from $1.5 billion to a figure in the $1.7-1.75 billion range. And they have an EBITDA in the 40% range, according to Mr. Wilson.

61. Notwithstanding that the entire transaction began in February, 2010 with the first Shaw announcement and finished on May 3, 2010 with the second Shaw announcement, Shaw would have the Commission believe that the two events did not constitute part of the same transaction. Shaw began with zero percent of Canwest and emerged 80 days later with 100% of the company tied up yet Shaw maintains that the constituent elements do not constitute part of the same transaction.

62. Further, on page 21 of its 19 May 2010 deficiency response to the Commission, Shaw made the rather surprising suggestion that,

> "There can be no benefits attached to agreements with the non-Canadian entity Goldman Sachs because the interests acquired from Goldman Sachs do not confer upon Shaw any transfer of control. The Commission has previously determined that Goldman Sachs' equity and voting interests do not raise any foreign control issues."

63. This simply is not how the benefits policy works. For example, when Rogers acquired the interests of Shaw in Biography Channel Inc. in 2006[20], Rogers paid benefits on the amounts paid both for Shaw's shares and for the non-Canadian A&E's shares. The issue is not who owns the shares but rather whether the value attributable to them should be considered as part of the value of the transaction by the Commission. There is no question that Goldman Sachs is a non-Canadian but the amount paid to it still should be considered as part of the value of the transaction in this case. Shaw is acquiring a 100% interest of which a significant portion happens to be held by Goldman Sachs.

64. Shaw also argues, at the same page, that,

> "Shaw entered into new agreements on May 3, 2010 with Goldman Sachs and the bondholders after Shaw had previously entered into agreements to acquire ownership and control of the undertakings set out in Schedule 1 to the Application through the acquisition of Restructured Canwest. The fact that Shaw has agreed to now address the remaining interests of the bondholders and Goldman Sachs is not determinative of the issue of change of effective control."

65. Shaw omits some critical details. The previous agreements were made expressly subject to the resolution of the Goldman Sachs interests. They were NOT unconditional agreements. They were tied inextricably to Goldman Sachs and the resolution of their interests or the previous part of the transaction would not be able to close.

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[20] Broadcasting Public Notice CRTC 2006-319, 28 July 2006.

66. At page 22 of its deficiency letter of 19 May 2010 to the Commission, Shaw raised a new argument. It says that,

> "Shaw was content to proceed with its Application as filed on March 31, 2010 which clearly contemplated the acquisition of effective control of Restructured Canwest. It was possible that the current ownership arrangements with Goldman Sachs, other than the Shareholders Agreement, could have continued indefinitely. Under such a scenario, the subsequent decision by Shaw to acquire the equity and voting interest held by Goldman Sachs in CWI would not have constituted a change of control requiring Commission approval."

67. It therefore appears to be misleading to say that Shaw was content to proceed as it was. While it may have been "content" to do so, it was contractually unable to do so. Shaw has already acknowledged that it was not able to proceed without first dealing with the Goldman Sachs issue. More to the point, Shaw says that if it had allowed Goldman Sachs to stay in its investment, it could have bought them out later and then no benefits would have been payable. That may or may not be true but that certainly is not the transaction that the Commission is faced with adjudicating at the present time. Both parties chose to abandon the scheme set out in the CW Investments Shareholders Agreement and cut a new deal that involved an immediate payout. Shaw was able to acquire the benefits of 100% ownership immediately and eliminate a minority partner that could have caused it problems.

68. Moreover, as Shaw acknowledges, it would undoubtedly have had to pay more had it waited until 2011 or 2013 to have purchased Goldman Sachs' interest. As the Canwest experience has shown, a lot can happen in a couple of years. It was an elegant resolution of a roadblock that was otherwise a complete bar to the consummation of Shaw's February deal.

69. And, as noted, whether or not in a different deal in a different situation Shaw might have been able to wait for years before taking out Goldman Sachs' interest is completely irrelevant to the consideration as to whether the May 3, 2010 buyout of Goldman Sachs' interest is part of the value of this transaction in this case. The other possibility is NOT the transaction that the Commission is being asked to consider.

70. Shaw again acknowledged the nexus of the Goldman Sachs arrangement to the rest of the transaction when it admitted, at page 23 of its 19 May 2010 letter to the Commission that,

> The final restructuring of Canwest required the renegotiation or termination of the CWI Shareholders Agreement, pursuant to which Shaw acquired the shares of Goldman Sachs thereby removing the uncertainty created by the CWI Shareholders Agreement with respect to both the over-the-air and specialty services of Canwest.

71. How can Shaw argue that "it was content to proceed with the application of March 31, 2010 to acquire ownership and control of Restructured Canwest" while at the same time acknowledging that the final restructuring could NOT have occurred without the renegotiation or termination of the CWI Shareholders Agreement pursuant to which Shaw acquired the shares of Goldman Sachs? It appears disingenuous to conclude that the Goldman Sachs arrangements and the overall Canwest transaction are two disparate deals and not part of the same transaction.

72. What Shaw was getting in February for $95 million was the ability to control the Canwest properties and an option to fight over the former Alliance Atlantis properties with Goldman Sachs. In other words, not only did Shaw acquire up to a 20% voting interest in Restructured Canwest, but it also bought the right to pay out Goldman Sachs for whatever value was stipulated in its agreement with Canwest. It is to be recalled from the earlier discussion that the only way that Shaw would ever succeed in controlling 100% of the former Alliance Atlantis properties was to either buy out Goldman Sachs pursuant to Goldman Sachs' contractual entitlement or to find a way to disclaim or resile from that obligation.

73. Shaw clearly chose to avoid the vagaries and cost of litigation and simply buy Goldman Sachs out of its position. Accordingly, the purchase of the GS piece and the assumption of the underlying debt relating to the GS purchase must be seen as part of the "value of the transaction."

74. Moreover, Shaw has now applied to acquire the balance of the Goldman Sachs shares as part of the current CRTC process. It could have rolled the entire Goldman Sachs purchase into this proceeding but chose not to and paid Goldman Sachs out in early May. The timing of that payment is irrelevant to a determination of the value of the transaction.

75. Shaw makes an impassioned argument in the Supplementary Brief filed on March 30, 2010 to keep the company together. "The acquisition of Canwest's assets on a unified basis is essential" wrote Shaw. After listing a variety of reasons why this is so, Shaw concluded by noting that "the combined operation of the conventional and specialty services has enabled the continued realization of the benefits of operating efficiencies with the acquisition of Alliance Atlantis." Having acknowledged how critical the joint operation of the services would be, it is wholly inconsistent for Shaw to take the position that the value paid to Goldman Sachs and the assumption of the CMI debt should not constitute part of the value of the transaction.

76. It is not to be forgotten that, in addition to being asked to bless the acquisition of Restructured Canwest, the Commission is being asked, at the same time, as part of the same process, to approve the acquisition of the balance of the shares of CWI currently held by Goldman Sachs. This approval, coupled with the other requests being made by Shaw, will allow Shaw to emerge with 100% of the shares of the Restructured Canwest. The Goldman Sachs interest is part of the same option agreement pursuant to which Shaw agreed to pay $709 million on May 3, 2010.

77. As seen in the quotes from Shaw representatives above, there is significant value to owning 100% of a company's shares. Yet Shaw maintains that the Goldman Sachs piece should not be considered to be part of the same transaction.

78. And in Shaw's letter to the Commission dated 19 May, 2010, Shaw states that,

> [Step 2d)] Step 1C (the exercise of the Option to acquire remaining shares held by GSCP1 and GSCP2 in the capital of CW Investments Co.) will be completed concurrently with Shaw's acquisition of 100% of Restructured Canwest and CMI's shares in CW Investments Co.

79. This all leads one to question, how can the Goldman Sachs portion of the transaction NOT be considered part of the same overall transaction that is before the Commission for approval?

PART THREE
THE "FAILING UNDERTAKING" EXEMPTION IS NOT AVAILABLE IN THIS CASE

A) Introduction

80. In its Supplementary Brief of March 30, 2010, Shaw sought an "exemption" from the application of the Commission's benefits policy. It said, in paragraph 92, that, for reasons to be discussed below, "an exemption of the Acquisition from the application of the benefits policy would be warranted." Strangely, in its letter to the Commission of 19 May, 2010, [and at various times since] Shaw states, "Shaw is not requesting an 'exemption' but rather a flexible and reasonable application of the benefits policy."

81. On a practical level, the foregoing is a distinction without a difference. Shaw appeared to advance three reasons why it should not have to pay tangible benefits or at least pay lower benefits. The first was that the Commission has, in the past, exempted failing undertakings from the requirement to pay tangible benefits. The second was that the intangible benefits being offered by Shaw should be sufficient in this case to overcome the need for tangible benefits. The third was that this was such an unusual process, and the search by RBC Securities was so thorough that it was as if Shaw had responded to a call for applications and, as such, no benefits should be payable. This Joint Report will only address the first of those arguments, namely that of the "financial distress" argument.

82. It will be seen that the "financial distress" argument must fail. Canwest is not failing. The "precedents" turn out to have no applicability. The Commission policies cited by Shaw are inapplicable to this situation. And Shaw itself is not failing.

83. The reasons that Shaw advanced in support of its "financial distress" argument were as follows;

    (a) Canwest was highly leveraged and its capitalization had fallen;

(b) Canwest's entering into CCAA raises the spectre of station closures or at least diminished contributions to the Canadian broadcasting system;

(c) Canwest has already taken steps to sell several stations at fire sale prices;

(d) "Without a strong, long-term Canadian strategic investor such as Shaw to acquire control, there is no feasible prospect for Canwest to continue under its current ownership arrangements or maintain clear Canadian ownership. Re-establishing Canwest's long-term viability as a strong Western voice will require significant financial and strategic resources."; and

(e) "Long-term viability requires new strategic direction for Canwest and significant investments in new business models. The extinguishing of debt pursuant to the CCAA proceedings will not, in itself, return Canwest to financial or operational health."

84. Shaw added that, in view of the foregoing, the Commission's general policy with respect to requiring "clear and unequivocal television tangible benefits" should not apply. Shaw added that the circumstances take this outside the realm of an ordinary course transaction.

B) "Precedents" Cited by Shaw

85. Although Shaw's reasons seem to contain certain matters that do not appear directly relevant to the financial distress argument, Shaw did cite what it considered to be "precedents" to support its position. Shaw pointed in particular to the decisions relating to changes of control of TQS, CHEK-TV, CJNT-TV and CHCH-TV. Shaw also pointed to the Commission's approach of forgoing benefits for unprofitable TV stations.[21]

86. While it is clear that the Commission's benefits policy is flexible, it is not so flexible that it should not apply to this transaction. Each of the cases cited by Shaw can be easily distinguished on its circumstances.

87. In TQS, the Commission noted that TQS had been unprofitable for a long time, saying that,

> Since 1990, TQS has been in a precarious financial situation. This undertaking has experienced operating losses and almost always negative profit before interest and taxes (PBIT) over more than half of its 18 years of broadcasting. The only three broadcast years during which TQS was profitable were the three years from 2002 to 2004. Despite very satisfactory ratings, TQS has never been able to generate revenues comparable to the revenues of its competitors, which has lead to constant financial difficulties.

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[21] Broadcasting Public Notice CRTC 2007-53, 17 May 2007.

88. This is very different from the Canwest situation where, as will be seen below, each of the component parts is profitable, according to the Commission. Moreover, the Commission, in exempting the purchasers of TQS from the payment of benefits, noted the following,

> …In this case, since TQS has incurred deficits during the past three years and filed for protection under the Companies' Creditors Arrangement Act, Remstar sought an exemption from this requirement from the Commission.
>
> 17. The Commission notes the commitment by the applicant to contribute an amount of $1 million as tangible benefits and encourages it to do so. However, given the licensee's technical bankruptcy situation and the continuation of its operations under the protection of the Companies' Creditors Arrangement Act, the Commission is of the opinion that it is justified in making an exception to its policy. Accordingly, the Commission will not require the contribution of tangible benefits for this transaction.

89. Shaw is apparently not asking for an exception to the Commission's policy, as noted earlier, and its circumstances are very different as will be discussed in more detail below. Canwest is profitable and has excellent prospects as Shaw has admitted. However, in TQS, the Commission considered an 18 year time-line and the structural problem of trying to generate revenues comparable to those of its competitors in the Quebec market. Furthermore, the purchasers in that case did not have the financial resources of Shaw and apparently refused to supply financial statements.

90. Shaw also cited, as part of its plea for relief from the payment of intangible benefits, the sale by Canwest of CHEK-TV in 2009 (Broadcasting Decision CRTC 2009-699, 9 November 2009) to a company that was to be owned by a consortium of local investors, 39 employees of CHEK-TV and Communications Energy and Paperworkers Union locals. In that case, the purchase price was $2. The case is noteworthy for two reasons. First, the Commission did not hesitate to ascribe a "value of the transaction" that was significantly higher than the purchase price. Second, the Commission determined that the purchaser of CHEK-TV would not have to pay tangible benefits.

91. The purchasers provided a negative "value of the transaction" of $131,960. The Commission, on the other hand, made upward adjustments for lease commitments and for uncertain payments in respect of news production equipment and "re-set" the "value of the transaction" at $1,051,485.

92. The Commission noted that Canwest had planned to close the station and that this purchase would obviate that necessity. The intangible benefits offered by the applicant included the continuation of the television service, the preservation of employment opportunities, the enhancement of the diversity of voices and diversity of ownership in the Vancouver Island region, as well as the transition to digital broadcasting.

93. More germane to the present comparison, in exempting the purchaser from the payment of tangible benefits, the Commission highlighted the fact that the operation is currently losing approximately $12 million per year and has not shown any marked improvement in profitability over the past three years.

94. Thus, this case is very different from the current situation where, as will be seen, the combined Canwest operations may be expected to earn profits of $350 million this year and enjoy a PBIT in the 33% range.

95. The decisions surrounding the sale by Canwest of CHCH-TV Hamilton and CJNT-TV Montreal to the same numbered company Broadcasting Decisions CRTC 2009-536 and 537, 28 August 2009) are equally inapplicable to the present situation. In both the case of CJNT-TV and the case of CHCH-TV, the Commission agreed with the applicant that the "value of the transaction" was a negative number. After citing the intangible benefits being offered by the purchaser, the Commission highlighted the primary reason why it would not require the applicant to pay tangible benefits. In both decisions, the Commission said,

> 14. The Commission notes that the value of the transaction is negative and therefore no tangible benefits are payable in the circumstances.

96. The Canwest properties do not have negative "values of the transaction" and, therefore, the CHCH-TV, CJNT-TV, and CHEK-TV cases do not serve as precedents with respect to the payment of tangible benefits in this case.

97. Shaw also cited, at paragraph 89 of its Supplementary Brief, the Commission's decisions with respect to two tiny Category 2 (now Category B) specialty channels and two small over the air services when it noted that the Commission "has excluded unprofitable undertakings from the value of the transaction against which benefits are assessed." In the case of World Impact Ministries cited by Shaw, the purchaser was a small charity that was acquiring the Category 2 digital service, The Christian Channel. In its decision[22], the Commission noted that, the purchase price was only $4 million and said,

> The Christian Channel is a Category 2 service that has been losing money at a rate of approximately $1.2 million a year since its launch and that the service may go off air if profitability cannot be achieved.

98. It is farfetched to compare this standalone single-faith religious Category 2 service being purchased by a small charity with the $2 billion purchase under consideration in this case.

99. In the case of CIIT-TV and CHNU-TV, the owner of the purchasing company was also a charity, VisionTV, Canada's Faith Network/Réseau religieux canadien. The assets being

[22] Broadcasting Decision CRTC 2009-247, 4 May 2009.

acquired were two small religious television stations and the Commission-determined "value of the transaction" was just over $6 million. Based on that valuation, the new tangible benefits package would have had a value of $624,791. However, citing its 2007 television policy determinations, the Commission noted the following:

> 11. In the present case, the Commission recognizes that CCI is a small religious broadcaster and notes the poor financial performance of the two television programming undertakings subject to the present transaction. Further, CCI indicated that it would assume all of the remaining outstanding tangible benefits owing by Rogers, including the $1.5 million tangible benefits package related to the purchase of CHNU-TV Fraser Valley and CIIT-TV Winnipeg in 2005, and the $350,000 of benefits related to the addition of a transmitter in Victoria, approved in Broadcasting Decision 2005-207. These payments would be directed to the same recipients as proposed by Rogers and on the timelines previously deemed appropriate by the Commission.
>
> 12. In addition, the Commission considers that relieving CCI from its obligation to provide a tangible benefits package equal to 10% of the value of the transaction is consistent with its exemption from the benefits policy for small market stations, as set out in Broadcasting Public Notice 2007-53.
>
> 13. Accordingly, the Commission considers it appropriate to not require CCI to provide a tangible benefits package in regard to the present transaction.

100. The final case cited by Shaw was that of Serdy Direct's acquisition of effective control of Canal Evasion from Bell Globemedia.[23] In this case, although this small French-language service was technically a "must-carry" in Quebec, the BDUs had chosen to market it on a positive option basis. In the Commission's words,

> This means that, unlike most other analog services, Canal Évasion must sign up its own subscribers directly. As a result, the service is not distributed as widely as other such services.

101. More importantly, the Commission noted that,

> The Commission notes that Canal Évasion has been operating at a loss since it began operating three years ago. The applicant indicated that the events of September 11 2001 and ongoing terrorist activities the world over are having such an impact on the

[23] Broadcasting Decision CRTC 2003-22, 23 January 2003.

> travel industry in general that it does not expect to become profitable for several years.

102. Thus, the service had low penetration, a series of operating losses that were projected to continue into the future, a potential market that was much smaller than for Anglophone services, and a small independent purchaser. The purchase price of $1,236,000 would have resulted in tangible benefits, had they been required, of $123,600. The Commission exempted Serdy Direct from the payment of those benefits, noting that,

> In view of Canal Évasion's financial problems, the unique nature of the service it provides, and the public interest that would be served by the proposed intangible benefits, the Commission considers that an exception to the Television Policy with respect to tangible benefits is justified in this case.

103. Shaw also highlighted the Commission's policy of exempting unprofitable radio stations. That policy does not apply to the assets under consideration in this case either. Even if it did, Shaw's argument in this area would fail. The Commission's policy in this regard was established in 1993.[24] In it, the Commission noted,

> **Accordingly, the Commission will forgo benefits requirements for unprofitable radio undertakings. The Commission will measure profitability according to the average profit before interest and taxes (PBIT) of the undertaking over the three years preceding the filing date of the application. The Commission will not systematically apply this exemption to stations in the first five years of operation. In cases where an applicant is applying to acquire a group of stations, all or some of which fall below this threshold, the Commission will consider profitability on an aggregate basis**. [emphasis in original]

104. Accordingly, it can be seen that Canwest's stations would first be assessed as a group and second would be assessed as to their profitability over the last three years. They would fail that test and the benefits test would apply.

105. In summary, a detailed review of the foregoing situations highlighted by Shaw leads to the conclusion opposite to that which Shaw is inviting the Commission to make. Rather, the review makes clear that Shaw has highlighted a series of disparate hardship cases, not one of which can be considered in any way parallel to the current situation, and has added to the mix two Commission policies (one for radio and one for television, which will be discussed in the next section), neither of which has any applicability to the present

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[24] Public Notice CRTC 1993-68, 26 May 1993.

circumstances. Shaw has then suggested that, on the basis of these precedents and policies, the Commission should apply its benefits policy in a "flexible" manner that would allow Shaw to avoid paying an appropriate amount of benefits in the current case. That suggestion should be firmly rejected by the Commission. The precedents are not comparable and the policies are not applicable.

C) Canwest is not in Financial Distress

106. The premise behind Shaw's request for relief from paying tangible benefits is that Canwest is in financial distress and the mere continuation of Canwest's services and the other intangible benefits should be sufficient to permit the Commission to approve this transaction without the requirement for tangible benefits. However, Canwest is not in financial distress.

107. Shaw noted in its Supplementary Brief that in 2007, the Commission amended its benefits policy to exclude its application to certain unprofitable television stations, saying the following,

> The Commission remains of the view that, in the absence of a competitive process for ownership transactions, the contribution of benefits in the amount of 10% of the value of an ownership transaction is still an appropriate mechanism for ensuring that the public interest is served. However, the Commission is conscious of the economic challenges faced by independent small market broadcasters. Accordingly, the Commission hereby revises its policy to exempt those television stations earning less than $10 million in annual revenues and who are, or could be, eligible to receive support from the Small Market Programming Fund from the application of the benefits test.

108. In its Supplementary Brief, Shaw stated that six Canwest conventional stations are also in "substantially similar circumstances to the unprofitable small market stations that have been exempted from the benefits policy" and cited Canwest's stations in Halifax, Winnipeg, Saskatoon, Regina, Lethbridge and Kelowna. With respect, while Shaw may consider those stations to be in substantially similar circumstances to the exempt stations, the Commission was very clear in making the test for exemption a two-pronged one. First, the station had to be earning less than $10 million in revenues and second, it had to be eligible to receive support from the Small Market Programming Fund. In order to receive such support a station had to be independently-owned and located in a market with fewer than 300,000. Not one of the stations cited by Shaw would qualify and CKND-TV would be excluded on both counts from the Small Market Programming Fund.

109. The fact that not one of the stations cited by Shaw would qualify under the Commission's policy enunciated in the Commission's most recent TV policy[25] undoubtedly accounts for Shaw's use of the phrase "substantially similar circumstances" to those that have been exempted. This is incorrect. The small market stations are independently-owned. This is a critical distinction and one that cannot be ignored. If the Canwest stations were to qualify just because they are in small markets, then why not Rogers' or CTV's small stations? What happens to the independently-owned small market television stations if Canada's largest media corporations are allowed to tap into the Small Market Programming Fund? One cannot simply amend a policy on the fly like this without considering the ramifications. The Commission was careful to use the cross-referencing technique in its TV policy as it knew that the stations it was exempting would NOT be owned by Canada's largest media corporations.

110. It is worth recalling the words of Shaw's Senior VP and CFO, Mr. Wilson, who noted the following on May 3, 2010 during the conference call with financial analysts cited above:

> We believe when we look at the outlook for the business that had we waited for at least a year or perhaps more under the previous agreements we had that we would have paid more for this asset as we believe that we are still in the bottom of the economic cycle here. We may have just rounded the corner but there is tremendous leverage and upside…
>
> Going forward we believe there is significant leverage in the Company's bottom line as the majority of revenue growth should flow through the EBITDA performance improving in the future.

111. Mr. Wilson also noted what a small percentage of Canwest's assets are represented by the conventional television stations and the specialty services owned by Canwest prior to the Alliance Atlantis acquisition. He said,

> In terms the valuation, we are paying in aggregate approximately CAD2 billion for 100% of Canwest's broadcasting assets. In terms of the split, we are evaluating the Canadian television subsidiary which includes the conventional business and TVtropolis along with several other smaller specialty stations and approximately CAD250 million to CAD300 million. So **I think it's important for people to understand that that portion of the business represents less than 15% of the purchase price here. The majority of the value is for the highly profitable and sought after portfolio of specialty channels and CW Media Group**

[25] Ibid.

> **subsidiary which generate margins in excess of 40%...** [emphasis ours]

112. Shaw's own press release on February 12, 2010 made the following comments:

> **Significant Restructuring Completed** and the sale/closure of E! stations and the operating efficiencies achieved leave the Company well positioned to benefit from an improving economy and advertising market
>
> **2nd Largest Private Conventional Television Network in Canada** with Global reaching 98% of Canadian households
>
> **Attractive Programming Line-up** including 24, House, Heroes, Glee, Survivor, NCIS, Family Guy, The Office, The Simpsons among others and premiere sporting events
>
> **Strong Presence in Western Canada** with the #1 News broadcast in Western Canada
>
> **Leading Portfolio of Profitable Specialty Television Assets** which dominate rankings and include History, HGTV, Action, National Geographic, Mystery, Showcase Diva and MovieTime
>
> **Strong Synergies Captured** between Specialty Television Assets and Conventional Network

113. Given the foregoing, it would be an unacceptable development indeed if Shaw were able to secure an exception or "flexibility" regarding tangible benefits in these circumstances. Moreover, a good portion of the "less than 15%" that was not the "highly profitable and sought after portfolio of specialty channels" would be represented by profitable television stations and TVtropolis among other things. This is not a group of assets that is deserving of an exception or flexibility.

114. Indeed, Canwest's profitability was identified by the Commission in its deficiency letter of 14 May 2010. It noted that,

> The Commission's data indicates that overall Canwest stations have a positive pre-tax margin and even when disaggregated into CTLP Conventional, CTLP Specialty and CW Media, each of these groups of services show a positive pre-tax profit. In light of this, please explain why the tangible benefits policy should not apply to this case.

115. Shaw's answer to the Commission in its deficiency response bears little resemblance to the reports of the future presented by the Shaw management team in its May 3, 2010 call with analysts described above. In the letter to the Commission, Shaw indicates that,

"Canwest will also continue to face financial difficulties following implementation of the Plan of Arrangement and the emergence of the restructured company, in view of the significant economic challenges governing the conventional television sector."

116. If one were trying to select as between what Shaw told the analysts on May 3, 2010 and the response to the CRTC, one should closely review Canwest's "Management Discussion and Analysis" for the 9 months ended May 31, 2010 and 2009. It was published on July 14, 2010 and key excerpts are attached as Schedule 3[26]. While the Commission asked Shaw about the past profitability of Canwest (in the context of Shaw's request not to pay tangible benefits), the latest figures show an even more promising picture. Just as Shaw's senior management predicted, Canwest is doing fine. For the nine months ended May 31, 2010, (ignoring the sale/shut-down of the E! Network) conventional airtime revenue was up 3% "as a result of strong demand". Subscriber revenues for Canwest's specialty services increased 7% for the 9 months ended May 31, 2010 compared to a year earlier. Profit jumped even more, by 107% to $99 million compared to $48 million for the same period in 2009. The increase resulted primarily from the elimination of losses from the E! Network.

117. The results from CW Media's television operations, which hold the former Alliance Atlantis properties, were also quite positive. Revenues were up 12% to $331 million, including advertising revenue growth of 16% due to strong demand as a result of larger audiences. Subscriber revenue grew by 5% due to growth in subscriber base. Operating profit was $39 million or 31% higher than in the same period in fiscal 2009.

118. In other words, whether one measures financial capacity by looking at the target or the acquirer, in this case it does not matter. Both are financially healthy with excellent prospects. This is not a "financial distress" case. Canwest's broadcast business has been and continues to be viable and profitable.

119. In fact, it is interesting to compare the results as disclosed by management for the nine months ended May 31, 2010 with the much bleaker financial projections offered to the Commission a week later in Shaw's letter of July 21, 2010. The chart below tells the story.

	CTLP including both specialty and conventional stations	**CW Media (the former Alliance Atlantis specialty services)**	**Total**
Canwest Management results for the 9 months ending May 31, 2010 and published 14 July 2010	Revenues: $467 million Operating Profit: $99 million	Revenues: $331 million Operating Profit: $169 million	Revenues: $798 million Operating Profit: $268 million

[26] The entire report is available on SEDAR at www.sedar.ca.

Annual results projected by Shaw in its letter to CRTC dated 21 July 2010	Revenues: $548 million Operating Profit: $48 million	Revenues: $341 million Operating Profit: $140 million	Revenues: $889 million Operating Profit: $188 million

120. The projections provided to the Commission by Shaw were annual results for the broadcast year ended August 31, 2010. If the nine month actual numbers disclosed by Canwest management are scaled up to a full 12 months, the results are as shown in the chart below and compared to the projections provided to the Commission.

121. As shown in the charts above and below, Shaw projects annual operating profits for the combined enterprise of only $188 million for the 2010 broadcast year. But Canwest management's numbers show that this figure has already been exceeded in the first nine months of the broadcast year, when there were operating profits of $268 million. By the end of the year operating profits could easily be in the $350 million range.

122. The operating profit of the combined entity is almost double what Shaw indicated to the Commission. Clearly, an entity with more than a billion dollars in revenue, $350 million in profit, and an operating margin of 33.55% ought not to qualify for any "exceptions" or "exemptions" from the payment of tangible benefits.

	CTLP including both specialty and conventional stations	CW Media (the former Alliance Atlantis specialty services)	Total
Annualized results based on 4/3rds of Canwest Management results for the 9 months ending May 31, 2010 and published 14 July 2010	Revenues: $623 million Operating Profit: $132 million	Revenues: $441 million Operating Profit: $225 million	Revenues: $1,064 million Operating Profit: $357 million
Annual results projected by Shaw in its letter to CRTC dated 21 July 2010	Revenues: $548 million Operating Profit: $48 million	Revenues: $341 million Operating Profit: $140 million	Revenues: $889 million Operating Profit: $188 million

D) Shaw is not in Financial Distress

123. In describing why it had made its TV policy exemption decision in 2007, the Commission stated that it was "in order to address the issue of adapting the benefits policy to take into account the financial capabilities of **applicants**." If one were to consider the financial situation of Shaw as the acquiring company, it would stand in stark contrast to the purchasers in each of the situations that was being advanced as a precedent by Shaw.

124. Indeed, it would be ironic if Shaw were able to use its enormous financial muscle to argue that its ability to save the stations in question from going dark was an intangible benefit while at the same time attempting to shelter under a TV policy designed to take into account the financial capabilities of much smaller applicants by exempting them from the payment of tangible benefits on transfers.

125. In conclusion, far from qualifying for an exception to the benefits policy resulting in the payment of reduced or even no tangible benefits, the Application falls squarely within the four corners of the Commission's policy, which requires the contribution of such benefits in the amount of 10% of the value of the transaction as determined by the Commission.

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