Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Decision CRTC 2008-69

Ottawa, 27 March 2008

BCE Inc., on its behalf and on behalf of certain of its affiliates, licensees of broadcasting and distribution undertakings
Across Canada

Application 2007-1117-8, received 3 August 2007
Public Hearing in the National Capital Region
25 February 2008

Transfer of effective control of BCE Inc. to a corporation to be incorporated and a consequential change in ownership of CTVglobemedia Inc.

*The Commission **approves**, subject to certain conditions, an application for authority to transfer effective control of BCE Inc. and certain of its affiliates to a corporation to be incorporated. The Commission further **approves** a consequential change in ownership of CTVglobemedia Inc. The conditions of approval are set out in the appendix to this decision.*

Introduction

1. The Commission received an application by BCE Inc. (BCE), on its behalf and on behalf of certain of its affiliates, licensees of broadcasting and distribution undertakings (the applicant), for authority to transfer effective control of the applicant to a corporation to be incorporated (BCE Holdco). BCE Holdco would hold the shares of BCE through its subsidiary 6796508 Canada Inc. (Bidco).

2. BCE and Bidco entered into a definitive agreement, effective 29 June 2007, pursuant to which Bidco agreed to purchase all of BCE's issued and outstanding common and preferred shares (BCE proposal).

3. The BCE proposal was approved by a majority of BCE shareholders at a special shareholder meeting that took place on 21 September 2007 in Montréal.

4. The proposed transaction will be effected by way of a Plan of Arrangement under section 192 of the *Canada Business Corporations Act*. The applicant submitted that the final cost of the transaction would not be determined until closing, but the funds available at the time of the application were $7.8 billion in equity financing and $32 billion in debt financing.

5. Following the completion of the transaction, BCE Holdco will be privately owned, with share capital consisting of Class A voting, non-participating shares (Class A shares), Class B non-voting, participating shares (Class B shares) and Class C non-voting, participating shares (Class C shares). The Class B and Class C shares will be economically equivalent and will together represent the total equity value of BCE Holdco.

6. Morcague Holdings Corp. (Morcague), a Canadian, will hold 66.7% of the Class A shares of BCE Holdco, with the balance of 33.3% held by non-Canadians, namely Providence Equity Partners International VI L.P. and its affiliated investment funds (Providence), Madison Dearborn Capital Partners V L.P. and its affiliated investment funds (MDP), and Merrill Lynch Global Partners, Inc. (Merrill Lynch). The Class A shares will be subject to a voting agreement between Morcague and Teachers' Private Capital, a division of Ontario Teachers' Pension Plan Board (Teachers'), a Canadian.

7. The majority of the Class B shares and all of the Class C shares of BCE Holdco will be held by Canadians, with Teachers' holding the largest equity stake in the company at 51.6%. Non-Canadians will hold approximately 42% of the equity of BCE Holdco, with Providence (17.3%), MDP (9.0%) and Merrill Lynch (6.1%) being the largest non-Canadian shareholders.

8. Bidco and BCE will have Class A and Class B shares issued and outstanding. BCE Holdco will own 100% of the Class B shares and 58.1% of the Class A shares of Bidco, with the balance of 41.9% of the Class A shares held by Morcague. Similarly, Bidco will own 100% of the Class B shares and 58.1% of the Class A shares of BCE, with the balance of 41.9% of the Class A shares held by Morcague. A summary of the proposed equity structure can be found on the Commission's website at http://www.crtc.gc.ca/Broadcast/eng/HEARINGS/2007/ex2007-19.htm

Value of the transaction for calculating tangible benefits

9. The applicant submitted that the overall value of the transaction is $39.8 billion. The applicant has allocated $109.6 million of this amount to the broadcasting undertakings subject to the tangible benefits policy. This includes $108.5 million for the direct-to-home pay-per-view service of Bell ExpressVu, Limited Partnership (DTH-PPV Service) and $1.1 million for the regional video-on-demand service in the province of Quebec of Câblevision du Nord de Québec inc. (Quebec Feature Film Service).

Proposed tangible benefits

10. For the DTH-PPV Service, the applicant proposed that a significant portion of the dollar amount of the benefits package be dedicated to on-screen resources. The applicant proposed to allocate $6,156,000 over a seven-year period to the creation of programming that features and promotes important and under represented Canadian entertainment programming on a pay or free per view basis. This programming would be offered in high definition. Eighty percent of these on-screen tangible benefits would go towards original programming that is both of popular interest and of specific relevance to viewers in Quebec.

11. The applicant also proposed to allocate $4,104,000 of the benefits to the Bell Fund and $700,000 to the Media Awareness Network over a seven-year period.

Change in ownership of CTVglobemedia Inc.

12. The proposed transaction will also affect the ownership of CTVglobemedia Inc. (CTVgm) given that BCE and Teachers' currently hold 15% and 25% respectively of the voting shares of CTVgm. The proposed transaction will result in Teachers' increasing its voting interest in CTVgm to more than 30%, and thus requires regulatory approval.

13. Accordingly, the applicant also requested authority, on behalf of CTVgm, licensee of radio, television and specialty programming undertakings, to allow a consequential change in ownership of CTVgm subject to the approval of the Commission pursuant to section 14(4)*(c)*(i) of the *Television Broadcasting Regulations, 1987*, section 10(4)*(c)*(i) of the *Specialty Services Regulations, 1990* and section 11(4)*(c)*(i) of the *Radio Regulations, 1986*.

The proceeding

14. The Commission received written interventions in connection with this application, and numerous parties made oral presentations at the public hearing. The Commission has carefully reviewed and considered the submissions of all parties. The public record of this proceeding, which includes interventions in support of, in opposition to, and commenting on the application, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

15. The Commission has identified the following issues to be addressed in its determinations:

- Does the agreement between Morcague and Teachers' comply with Ontario pension legislation?
- Would the participation of Providence, MDP and Merrill Lynch result in control of BCE by non-Canadians?
- Is the proposed value of the transaction for tangible benefits purposes acceptable?
- Is the proposed tangible benefits package acceptable?

Does the agreement between Teachers' and Morcague comply with Ontario pension legislation?

16. As mentioned above, under the structure proposed by the applicant, Morcague will hold 66.7% of the Class A shares of BCE Holdco. The voting of Morcague's shares is subject to an agreement between Morcague and Teachers', which grants Teachers' full voting and transfer rights over the shares. Morcague can only vote the shares in the manner instructed by Teachers' and it cannot in any way vote them independent of Teachers' instructions.

17. The applicant explained that this agreement will allow Teachers' to comply with the terms of the Ontario *Pension Benefits Act.* The Ontario *Pension Benefits Act* incorporates, by reference, *inter alia*, Schedule III to the federal *Pension Benefits Standards Regulations, 1985* (Pension Investment Regulations). Section 11(1) of Schedule III of the Pension Investment Regulations reads as follows:

> … the administrator of a plan shall not, *directly or indirectly*, invest the moneys of the plan in the securities of a corporation to which are attached more than 30 percent of the votes that may be cast to elect the directors of the corporation.

18. The Commission determined that the enforceability of the agreement between Morcague and Teachers' and the legality of the arrangements relating to the voting rights controlled by Teachers' is material to a determination of control in fact of BCE because of the importance to such determination of Teachers' role in respect of BCE.

19. In response to concerns from the Commission that the agreement would appear to contravene section 11(1) of Schedule III, since Teachers' will control 66.7% of the voting shares in BCE Holdco through Morcague, the applicant provided a letter from the Financial Services Commission of Ontario (FSCO), which is the provincial body responsible for administering the Ontario *Pension Benefits Act*. In that letter, FSCO concluded that the transaction complies with the requirement of section 11(1) of Schedule III of the Pension Investment Regulations. In summary, the letter states that, given the fact that Morcague acquired the Class A shares with its own money (albeit a purely nominal sum), FSCO is of the view that Teachers' did not 'invest' in the voting shares. The applicant further provided a sworn affidavit from Mr. McCague indicating, among other things, that Morcague did not receive any remuneration from Teachers' for the voting shares that it purchased.

20. There is no judicial guidance for the interpretation of section 11(1) of Schedule III of the Pension Investment Regulations. The Commission is aware of the current practice of large Canadian pension funds in making active investments. Given the Commission's understanding of the purposes of the relevant regulatory provisions at the time of their enactment, the agreement between Morcague and Teachers' described in paragraph 16 could be interpreted as being in violation of section 11(1) of Schedule III of the Pension Investment Regulations. However, interpreting the Ontario *Pension Benefits Act* and ensuring compliance with that Act is not part of the Commission's mandate. Having asked for evidence from the Ontario regulatory authority and having received FSCO's letter, the Commission defers to FSCO's views without in any way expressly or implicitly endorsing them. Accordingly, the Commission acknowledges that Teachers' has presented evidence that the relationship between Teachers' and Morcague is acceptable to FSCO. The Commission, however, will treat Teachers' as the holder in substance of the Class A shares for purposes of assessing this application and this decision is conditional on continued compliance with pension legislation in accordance with paragraph 78.

Would the participation of Providence, MDP and Merrill Lynch result in control of BCE by non-Canadians?

21. The Commission has authority under the *Broadcasting Act* (the Act) to regulate the broadcasting system in Canada to implement policy objectives, including the requirement that the Canadian broadcasting system shall be effectively owned and controlled by Canadians, as set out in subsection 3(1)(*a*) of the Act.

22. The Governor in Council has, by Order in Council P.C. 1997-486, *Direction to the CRTC (Ineligibility of Non-Canadians)*, 8 April 1997 (the Direction), issued a direction to the Commission, pursuant to subsection 26(1) of the Act, respecting the classes of applicants to whom licences may not be issued or to whom amendments or renewals thereof may not be granted. Pursuant to the Direction, no broadcasting licence may be issued, and no amendment or renewals thereof may be granted, to an applicant that is a "non-Canadian." A "non-Canadian" is a person or entity that is not a "Canadian." A "Canadian" includes a "qualified corporation."

23. The Direction defines a "qualified corporation" as follows:

> A "qualified corporation" means a corporation incorporated or continued under the laws of Canada or a province, where:
>
> *(a)* the chief executive officer or, where the corporation has no chief executive officer, the person performing functions that are similar to the functions performed by a chief executive officer, and not less than 80 per cent of the directors are Canadians;

(b) in the case of a corporation having share capital, Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80 per cent of all the issued and outstanding voting shares of the corporation and not less than 80 per cent of the votes; and

(c) in the case of a corporation that is a subsidiary corporation,

(i) the parent corporation is incorporated or continued under the laws of Canada or a province,

(ii) Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 66 2/3 per cent of all of the issued and outstanding voting shares of the parent corporation and not less than 66 2/3 per cent of the votes, and

(iii) the parent corporation or its directors do not exercise control or influence over any programming decisions of the subsidiary corporation where:

(A) Canadians beneficially own and control, directly or indirectly, in the aggregate and otherwise than by way of security only, less than 80 per cent of all of the issued and outstanding voting shares of the parent corporation and less than 80 per cent of the votes,

(B) the chief executive officer of the parent corporation or, where the parent corporation has no chief executive officer, the person performing functions that are similar to the functions performed by a chief executive officer is a non-Canadian, or

(C) less than 80 per cent of the directors of the parent corporation are Canadian.

24. The Direction also provides that, where the Commission determines that an applicant is controlled by a non-Canadian, whether on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control in fact, the applicant is deemed to be a non-Canadian. Therefore, where the Commission determines that a qualifying corporation that would otherwise be a “Canadian” for the purposes of the Direction is in fact controlled by a non-Canadian, the corporation shall be deemed to be a “non-Canadian.”

25. Among other factors, for purposes of determining whether non-Canadians will exercise effective control over an applicant, the Commission is concerned with the degree of influence that non-Canadian investors can exercise over the company through designated representation on the board of directors and committees of the board. The Commission examines the number of designees appointed by non-Canadians relative to the number of designees appointed by Canadians on the board and committees of the applicant. The Commission also seeks to ensure that directors designated by Canadian investors are adequately represented at all board and committee meetings. Therefore, the Commission considers that in order for a director to be considered Canadian, the director must be both Canadian by citizenship or residency in accordance with section 1 of the Direction and a designee of a Canadian investor.

26. The Commission, in applying the Direction, therefore examines whether a non-Canadian can exercise:
    a) *de jure* control (legal control); or
    b) *de facto* control (control in fact).

Legal control

27. The Commission finds on the basis of information provided by the applicant that the chief executive officer and not less than 80% of the directors of each regulated entity, including BCE and any regulated subsidiaries, will be Canadian. It further finds that Canadians will beneficially own and control, directly or indirectly, in the aggregate and otherwise than by security only, not less than 80% of all issued and outstanding voting shares of the regulated entity and not less than 80% of the votes. Accordingly, the Commission is of the view that the requirements in subparagraphs *(a)* and *(b)* of the definition of "qualified corporation" have been met.

28. With respect to subparagraph *(c)* of the definition of "qualified corporation" as applied to Morcague, BCE Holdco and Bidco, the Commission considers that

    - the requirement in subparagraph *(i)* is satisfied;

    - the requirement in subparagraph *(ii)* is satisfied because not less than 66 2/3% of the voting shares of Morcague, BCE Holdco and Bidco will be beneficially owned and controlled by Canadians; and

    - the requirement in subparagraph *(iii)* is satisfied because while non-Canadians will hold in excess of 20% of the voting shares of BCE Holdco and Bidco, the applicant has proposed that an Independent Programming Committee be established in respect of the regulated entities.

29. Accordingly, the following section will focus on the control in fact analysis mandated by section 3 of the Direction, which applies to the control of a regulated entity by a non-Canadian "on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control."

Control in fact

30. As established in Broadcasting Decision 2007-429, in which the Commission approved the transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to CanWest MediaWorks Inc. (the CanWest Decision),[1] the Commission considers that the appropriate test for assessing control in fact was set out in Decision No. 297-A-1993 (the Canadian Airlines decision) of the National Transportation Agency (the NTA), now the Canadian Transportation Agency. In that decision, the NTA found that control in fact generally can be viewed as the ongoing power or ability, whether exercised or not, to determine the strategic decision-making activities of an enterprise. It can also be viewed as the ability to manage and run the day-to-day operations of an enterprise.

31. In examining whether the non-Canadian investors will exercise control in fact in the present application, the Commission has considered all of the documentation submitted by the applicant and in particular the Principal Investor Agreement and the Advisory Services Agreement. In this regard, of the principal investors, the largest non-Canadian investor (Providence) specializes in investments in media, entertainment, communications and information companies and, by comparison, the largest Canadian investor (Teachers') is not an active operator and does not have any particular expertise in such sectors. In analyzing the documentation submitted by the applicant, the Commission considered the influence that may be associated with the relative levels of specialization and expertise of Providence and Teachers'.

32. Based on an analysis of the proposed transaction, the Commission considers that the following matters raise concerns relating to control in fact:

- composition and mandate of the Board of Directors of BCE Holdco (Board) and the boards of its subsidiaries;
- quorum provisions for the Board;
- composition of the Executive Committee;
- transactions requiring investor approval;
- composition of the Independent Programming Committee; and
- advisory services.

33. In addition to the above matters, the Commission was concerned that certain vetoes that exist in favour of non-Canadian investors relate to strategic business matters and not solely to rights between the investors. The Commission would have preferred that such strategic business vetoes be exercisable by the applicable shareholders' designees on the Board rather than by the investors directly. The applicant asserted, as a rationale against such preference, that the designees are subject to fiduciary duties. This, of course, is the reason for the Commission's preference and not a rationale against it. However, because of other amendments to the arrangements between the parties either agreed by the applicant and/or required as a condition of this decision, the Commission has not further pursued its preference for strategic business vetoes.

[1] On 10 January 2008, CanWest MediaWorks Inc. changed its name to Canwest Media Inc.

Composition and mandate of the Board of Directors

a) Overview of the proposed composition of the Board

34. The Principal Investor Agreement filed with the application provides that the Board will consist of five members designated by Teachers', three members designated by Providence, one member designated by MDP, one member designated by Merrill Lynch, the Chief Executive Officer of BCE (CEO) and up to two Independent Directors. The Independent Directors will be selected by a committee of the Board comprising one member designated by Teachers', one member designated by Providence and the CEO. The CEO will be appointed by the Board.

35. Under the Principal Investor Agreement, Teachers' designees and Independent Directors will be Canadian, unless Teachers' and Providence otherwise approve. The CEO will be Canadian. To the extent required by law, a majority of the members of the Board will be Canadian.

b) Number of directors designated or approved by Teachers'

36. At the Public Hearing, the Commission expressed concern that, under the Principal Investor Agreement, the principal Canadian shareholder, Teachers', will have the same number of Board seats as non-Canadian shareholders, even though Teachers' will hold a majority of the voting and equity shares of BCE Holdco. Further, although the Principal Investor Agreement allows for the appointment of Independent Directors, the Commission was concerned that the Board could be subject to greater non-Canadian influence if Independent Directors were not appointed.

37. In order to address the Commission's concerns about Canadian shareholder representation on the Board, the applicant proposed to amend the Principal Investor Agreement to provide that the Board will always have two Independent Directors and to grant Teachers' a veto right over the appointment of one of the Independent Directors. The applicant also emphasized that the proposed Board structure would ensure that a majority of the Board is always Canadian, since at least eight of thirteen members would be Canadian.

38. The Commission considers that the applicant's proposal would not adequately remedy the Commission's concerns regarding Canadian investor representation on the Board. As noted, Canadian control involves not only having a majority of Canadians on the Board, but ensuring that Canadian investors can exercise effective control through director representation. Under the applicant's proposal, the Independent Director who would be appointed subject to a Teachers' veto would not represent the interests of Teachers' since that director would not be selected by Teachers' and would be independent of Teachers'. The applicant's proposal would not remedy the concern about Canadian investor representation because the principal Canadian investor, Teachers', would still only be represented by five of thirteen directors, which in the Commission's view would be insufficient to offset the substantial influence of non-Canadian investors on the Board derived from both the number of designees of non-Canadian investors and their relative levels of expertise. The Commission is also of the view that five of thirteen directors would not reflect Teachers' equity position in BCE Holdco.

39. The Commission considers that Teachers' should be granted the right to designate another director of the Board to ensure that non-Canadians do not control BCE Holdco and its subsidiaries. The Commission therefore directs BCE to amend the Principal Investor Agreement so that the Board will be fixed at thirteen directors and include, within the total membership, six designees of Teachers', one Independent Director and the CEO.

c) Appointment of the CEO

40. Under the terms of the Principal Investor Agreement, the CEO will be appointed by an even number of directors since the Board will consist of 12 directors, not including the CEO. The Commission was concerned that this could lead to a deadlock in the selection of the CEO.

41. In response, the applicant proposed to amend the Principal Investor Agreement so that the Chair of the Board would have a tie-breaking vote over the appointment of the CEO.

42. The Commission is satisfied with the amendment that the applicant has proposed. Similarly, for the reason set out above, the Commission directs the applicant to amend the Principal Investor Agreement so that the chair of the Board will have a tie-breaking vote over the dismissal of the CEO as well.

d) Chair of the Board

43. The Principal Investor Agreement provides that the Chair of the Board will be appointed jointly by Teachers' and Providence. The agreement does not provide any limitation on who will be eligible to hold this position.

44. At the Public Hearing, the Commission expressed concern about the possibility that the Chair could be a designee of a non-Canadian shareholder or be a non-Canadian director.

45. In response, the applicant proposed to amend the Principal Investor Agreement to provide that the Chair will be a member of the Board but will not be a designee of a non-Canadian shareholder and will be a Canadian. The applicant further confirmed that the Chair of the Board will not also serve as the CEO.

46. The Commission finds that the applicant's proposal is an acceptable response to its concerns. In addition, in order to ensure that the process for selecting the CEO cannot be frustrated by a deadlock of the Board, the Commission considers that the Principal Investor Agreement should be amended to provide that a Chair must at all times be appointed to the Board.

e) Canadian Directors

47. Under the terms of the Principal Investor Agreement, Board members designated by Teachers' and Independent Directors can be non-Canadians if approved by Teachers' and Providence. The Commission is of the view that, in order to ensure that a majority of the Board consists of Canadians, the directors designated by Teachers', as well as the Independent Directors, should always be Canadian.

48. In response, the applicant proposed to amend the Principal Investor Agreement to remove the following language "unless otherwise approved by the Requisite Investors" from Sections 2.4.1(i) and (vi). The effect of this change will be that the directors designated by Teachers' and the Independent Director must always be Canadian.

49. The Commission is satisfied with the amendment that the applicant has proposed.

f) Definition of "Independent"

50. At the Public Hearing, the Commission noted that the Principal Investor Agreement does not include a definition of "independent" as it applies to a director. The Commission is of the view that such a definition is necessary to ensure that the Independent Director is not beholden to any investor.

51. In response, the applicant proposed to amend the Principal Investor Agreement to include a definition of "independent" consistent with the definition used by CTVgm. This definition is as follows:

> "Independent", when used in respect of a director, shall mean a director who has been determined by the Board not to have any direct or indirect relationship with the Company, any Principal Investor or any of their respective affiliates or subsidiaries that would reasonably be expected to interfere with the exercise of his or her independent judgement as a director of the Company and, for greater certainty, a director shall not be considered to have such a relationship with any such Person by reason only of that director holding an equity interest of up to 5% in such Person.

52. The Commission is of the view that the proposed definition of "independent" is appropriate.

g) Loss of Board members if Teachers' sells its shares

53. The Principal Investor Agreement provides that Teachers' could lose the right to designate one, two or all of its members of the Board if it reduced its equity stake below certain levels. The agreement further provides that if Teachers' loses the right to designate Board members, the size of the Board will be reduced and resulting vacancies would not be filled. At the Public Hearing, the Commission questioned the applicant about how it would ensure that Canadian investors would be adequately represented on the Board in the event Teachers' loses the right to designate Board members.

54. In response, the applicant proposed to amend the Principal Investor Agreement to provide that where the number of Teachers' Board designees is reduced, the resulting vacancies will be filled by an Independent Director subject to Teachers' approval.

55. The Commission is of the view that the applicant's proposed remedy does not go far enough to satisfy the Commission's concern. Under its proposal, directors designated by Canadian shareholders would not outnumber those designated by non-Canadian shareholders if Teachers' loses the right to designate one or more Board members. The applicant's proposal also fails to address how Canadian investors would be represented on the Board if Teachers' reduced its investment to less than $225 million, at which point Teachers' would lose the right to nominate any directors.

56. The Commission considers that, in order to ensure that Canadians are sufficiently represented on the Board, and given the fact that Teachers' can only sell its shares to other Canadians pursuant to the various shareholder agreements filed with the Commission, Canadian investors should have the right to designate six members at all times. The Commission therefore directs the applicant to amend the Principal Investor Agreement to include a requirement that any vacancy of the Board caused by Teachers' losing the right to designate a member be filled by the designee of the Canadian investor who acquires the largest number of shares from Teachers'. As with the directors designated by Teachers', any such designee of another Canadian investor must also be a Canadian.

57. At the hearing, the applicant further assured the Commission that Teachers' would have two members on the Executive Committee and one member on the Nominating Committee for Independent Directors at all times, provided that Teachers' investment in BCE Holdco does not go below $225 million. The Commission accepts Teachers' submission, but would like additional assurance that Canadian investors would be adequately represented on these committees in the event that Teachers' lost the right to designate nominees to the Board. As such, the Commission directs that the Principal Investor Agreement be amended to provide that any vacancy of a committee seat held by a Teachers' designee be filled by a Canadian director designated by the Canadian investor who acquires the largest number of shares from Teachers'.

h) Bidco and BCE boards and committees

58. The Principal Investor Agreement provides that Bidco and BCE will use "best efforts" to cause the board of directors of Bidco and BCE to maintain the same committees as BCE Holdco, with the same member composition and mandate. In order to ensure consistency with Bidco and BCE, the applicant proposed at the Public Hearing to delete the term "best efforts" from Sections 2.6 and 2.7 of the Principal Investor Agreement.

59. The Commission considers that the amendment proposed by the applicant is appropriate. However, the Commission requires that the obligations of BCE Holdco under Sections 2.6 and 2.7 of the Principal Investor Agreement be extended to require BCE Holdco to maintain the same quorum requirements for committees of the boards of Bidco and BCE as apply to BCE Holdco.

Quorum provisions for the Board

60. Pursuant to the Principal Investor Agreement, a quorum for meetings of the Board of Directors will consist of a majority of the Board provided that at least one director designated by each of Teachers' and Providence is present and provided that a majority of the members of the Board present are Canadian.

61. While the Commission found the quorum provisions for Board meetings in the Principal Investor Agreement to be generally acceptable, it sought, at the Public Hearing, to clarify the provision that states that members designated by Providence, MDP and Merrill Lynch will not be included for purposes of determining whether a majority of members constituting the quorum are Canadian. This provision is designed to ensure that quorum will not be met when directors designated by non-Canadians outnumber other directors at a meeting.

62. In response, the applicant proposed to revise the applicable portion of Section 2.4.3 of the Principal Investor Agreement to read as follows:

> For the avoidance of doubt, all members of the Board designated by the PEP Investors or by the MDP Investors or by the ML Investors shall be deemed not to be Canadian for purposes of determining whether quorum is present at a meeting of the Board.

63. The Commission accepts the revision to the Principal Investor Agreement set out above.

Composition of the Executive Committee

64. The Principal Investor Agreement provides for the creation of an Executive Committee that would consist of the CEO and one director designated by each of Teachers', Providence and MDP. Merrill Lynch has the right to designate one observer to the Executive Committee. As set out in the Principal Investor Agreement, the role of the Executive Committee is to call Board meetings, suggest certain matters for consideration by the Board and liaise with senior executive management of BCE Holdco and its subsidiaries. The Executive Committee will not be delegated any powers of the Board.

65. Although the Executive Committee may not have absolute power to determine the agenda of Board meetings, the Commission expressed concern at the Public Hearing that the Executive Committee may, as a practical matter, have a significant or even determining influence over the agenda. The Executive Committee could also exert significant influence over day-to-day operations in its role of liaising with senior executive management. As originally proposed, designees of non-Canadian investors Providence and MDP would outnumber designees of the Canadian investor Teachers' on this committee. The Commission was therefore concerned that the Executive Committee could provide a vehicle for non-Canadians to exercise control over BCE Holdco and its subsidiaries.

66. In response to these concerns, the applicant proposed to add another Teachers' designee to the Executive Committee.

67. The Commission finds that the applicant has satisfied its concerns about the composition of the Executive Committee.

Transactions requiring investor approval

68. The Principal Investor Agreement provides Teachers' and Providence with veto rights over certain matters. Of particular concern to the Commission were the investor veto rights over transactions relating to indebtedness, assets and investments exceeding $100 million. The Commission established in the CanWest Decision that an appropriate minimum threshold amount for transactions out of the ordinary course of business is at least 5% of the value of the broadcasting undertakings. The $100 million threshold proposed by BCE fell short of this 5% level. The Commission was also concerned that no definition was provided for "ordinary course of business."

69. In response to the Commission's concerns, the applicant proposed to increase the threshold amount to $110 million and to incorporate the following definition for "ordinary course of business":

> "ordinary course of business", activities shall be deemed to be in the ordinary course of business of a Person if they are routine or occur frequently in the course of that Person's business, historically have not generally been subject to approval by such Person's board of directors (or equivalent governing body), are undertaken in good faith and are consistent with that Person's usual custom and past practice, including with respect to the quantity, value, quality and frequency thereof, and do not expose that Person to a business risk that is materially different from other similar actions that have previously been undertaken by that Person.

70. The Commission notes that the $110 million threshold proposed by the applicant more closely approximates the 5% value of the broadcasting undertakings to be acquired. As such, the proposed amount is closer to the threshold established in the CanWest Decision. The Commission therefore accepts the revised threshold amount proposed by the applicant in respect of the applicant's broadcasting undertakings. The Commission is also of the view that the applicant has provided an acceptable definition of "ordinary course of business."

Composition of the Independent Programming Committee

71. Given that non-Canadians would hold over 20% of the voting shares of BCE Holdco, the applicant proposed to establish an Independent Programming Committee to comply with the Direction, and submitted a draft By-law to establish it. In response to Commission concerns that persons associated with non-Canadian investors could hold positions on the committee, the applicant proposed, at the Public Hearing, to amend the By-law to state that no member of the Independent Programming Committee will be a director, officer or employee of any non-Canadian shareholder.

72. The Commission finds that the applicant has satisfied the Commission's concerns with respect to the composition of the Independent Programming Committee.

Advisory services

73. BCE Holdco and its subsidiaries will enter into an Advisory Services Agreement with Providence, MDP and Merrill Lynch, whereby those non-Canadian investors will provide advisory services relating to the financing of the transaction, financial issues relating to the businesses, and other areas that might include financial and business planning and analysis, human resources and executive recruitment services.

74. At the Public Hearing, the Commission expressed concern that the Advisory Services Agreement would offer the non-Canadian investors an avenue to provide important strategic direction to the companies, an avenue that would not be available to Teachers'. The Commission was also concerned that the Advisory Services Agreement could provide non-Canadians with a means to influence programming decisions of the broadcasting entities, since advice relating to programming was not explicitly excluded from the agreement.

75. In response, the applicant proposed to amend the Advisory Services Agreement to state that the services provided will not relate to programming. It further proposed to amend the agreement to provide that Teachers' will be entitled to review and provide input and advice in respect of the services provided. It further proposed to remove the words "are requested to be" from Section 1 of the proposed revision of the Advisory Services Agreement (which words were used to qualify Teachers' input and advice on services to be provided under the Advisory Services Agreement and may have implied that Teachers' input and advice may only relate to a sub-set of such services).

76. The Commission finds that the applicant has adequately addressed its concerns regarding the Advisory Services Agreement.

Conclusion

77. In light of the above, the Commission requires the applicant, as a **condition of approval**, to file, within 30 days of the date of this decision, an executed amended Principal Investor Agreement that:

- fixes the membership of the Board of Directors at thirteen and includes, within the total membership, six designees of Teachers', one Independent Director and the CEO, all of whom must be Canadians;

- provides that the Chair of the Board will have a tie-breaking vote over the appointment and dismissal of the CEO;

- provides that a Chair will be appointed to the Board at all times, that the Chair will be a member of the Board but will not be a designee of a non-Canadian shareholder, will be a Canadian, and not also serve as the CEO;

- removes the following language "unless otherwise approved by the Requisite Investors" from Sections 2.4.1(i) and (vi);

- includes the following definition of "independent";

  "Independent", when used in respect of a director, shall mean a director who has been determined by the Board not to have any direct or indirect relationship with the Company, any Principal Investor or any of their respective affiliates or subsidiaries that would reasonably be expected to interfere with the exercise of his or her independent judgement as a director of the Company and, for greater certainty, a director shall not be considered to have such a relationship with any such Person by reason only of that director holding an equity interest of up to 5% in such Person.;

- includes a requirement that any vacancy on the Board or on a committee of the Board caused by Teachers' losing the right to designate a member be filled by the designee of the Canadian investor who acquires the largest number of shares from Teachers', and that any such designee must be a Canadian;

- deletes the term "best efforts" from Sections 2.6 and 2.7 relating to the composition of Bidco and BCE committees and extends the obligations of BCE Holdco under Sections 2.6 and 2.7 to require BCE Holdco to maintain the same quorum requirements for the committees of the boards of Bidco and BCE as apply to BCE Holdco;

- revises the relevant portion of Section 2.4.3 on quorum to include the following statement:

  > For the avoidance of doubt, all members of the Board designated by the PEP Investors or by the MDP Investors or by the ML Investors shall be deemed not to be Canadian for purposes of determining whether quorum is present at a meeting of the Board;

- adds a second Teachers' designee to the Executive Committee;

- increases the threshold for transactions requiring investor approval to $110 million, and incorporates the following definition of "ordinary course of business";

> "ordinary course of business", activities shall be deemed to be in the ordinary course of business of a Person if they are routine or occur frequently in the course of that Person's business, historically have not generally been subject to approval by such Person's board of directors (or equivalent governing body), are undertaken in good faith and are consistent with that Person's usual custom and past practice, including with respect to the quantity, value, quality and frequency thereof, and do not expose that Person to a business risk that is materially different from other similar actions that have previously been undertaken by that Person.

78. The conditional approval set out in this decision is given in light of the position expressed by FSCO in its letter described in paragraph 19. If that position is successfully challenged in a court of competent jurisdiction, the conditional approval set out in this decision is automatically withdrawn and the applicant shall bring a new application to the Commission within 30 days after such decision is rendered and (i) is affirmed on appeal, or (ii) no appeal has been taken and the time for appeal has elapsed.

79. The Commission requires the applicant, as a **condition of approval**, to file, within 30 days of the date of this decision, an executed amended By-law establishing the Independent Programming Committee that provides that no member of this committee will be a director, officer or employee of any non-Canadian shareholder of BCE Holdco, Bidco, BCE or any of its subsidiaries.

80. The Commission requires the applicant, as a **condition of approval**, to file, within 30 days of the date of this decision, an executed amended Advisory Services Agreement that provides that the services rendered under that agreement will not relate to programming, that Teachers' will be entitled to review and provide input with respect to the services provided, and that removes the words "are requested to be" from Section 1.

81. The Commission requires the applicant, as a **condition of approval**, to file within 30 days of the effective date of any amendment, the Principal Investor Agreement, the Shareholders Agreement and all other related or incidental agreements or other documents applicable to the applicant, as amended.

Is the proposed value of the transaction for tangible benefits purposes acceptable?

82. Because the Commission does not solicit competing applications for authority to transfer the ownership or control of radio, television and other programming undertakings, the onus is on the applicant to demonstrate that the benefits proposed in the application are commensurate with the size and nature of the transaction. The Commission generally expects applicants to make commitments to clear and unequivocal benefits representing a financial contribution of 10% of the value of the transaction, as accepted by the Commission for television undertakings in Public Notice 1999-97 (the 1999 Television Policy) and maintained in Broadcasting Public Notice 2007-53. No benefits package is required for the transfer of effective control of distribution undertakings, such as Bell ExpressVu.

83. The applicant submitted that the overall value of the transaction is $39.8 billion. The applicant has allocated $109.6 million of this amount to the broadcasting undertakings for the purpose of calculating the associated tangible benefits. This includes $108.5 million for the DTH-PPV Service and $1.1 million for the Quebec Feature Film Service.

84. The Commission considers that the application raises the following issues related to the calculation of value of the transaction for tangible benefits purposes:

- exclusion, by the applicant, of the value of the Internet Protocol Television pay-per-view/video-on-demand (IPTV) service;
- addition, by the applicant, of a size premium to the cost of equity;
- addition, by the applicant, of a specific risk premium for each broadcasting undertaking;
- exclusion, by the applicant, of the acquisition premiums related to the broadcasting assets; and
- exclusion, by the applicant, of the value of the assumed operating leases.

Value of IPTV

85. The applicant excluded IPTV from the calculation of the value of the transaction for the purpose of the tangible benefits package. In support of this position, the applicant noted that the IPTV service has not yet launched and therefore has no established customer base, incremental assets or employees. As well, since the service has not launched, it has no goodwill or brand recognition. The applicant further argued that PPV and video-on-demand (VOD) licences are readily granted by the Commission, and that such services enjoy no protection based on the genre of programming that they offer.

86. The Commission expressed concern that no value had been assigned to the IPTV service, given that the applicant had indicated its intention to launch the service in the Fall of 2007 and that it had invested in technology specifically for IPTV. As well, KPMG assigned a value of $15 million to IPTV in a valuation report that it provided.

87. In reply, the applicant indicated that IPTV had only "soft launched," that is, launched in a trial form. Given that the service is not in full commercial operation, the applicant was of the view that IPTV should not be subject to the same full-scale benefits that would apply to fully launched services. The applicant submitted that the schedule for the full commercial introduction of IPTV has still not been determined and that roll-out plans have been scaled back significantly. It also argued that the financial projections and value filed in the KPMG report are no longer accurate. The applicant indicated, however, that it planned to eventually launch IPTV in order to solidify the company's position in the residential market.

88. The Commission notes that the price negotiated for the broadcasting assets took into account the IPTV project as it was at the date of the transaction, and no adjustments were made for a decrease in value due to IPTV. The Commission further notes that the service has soft launched and still is part of BCE's business, notwithstanding that there are uncertainties with respect to its future. As well, a value was assigned to the service by KPMG.

89. In light of the above, the Commission finds that a value of $15 million for the IPTV Service, as determined by KPMG, should be included in the value of the transaction for the purpose of determining the tangible benefits package. This value is reflected in the table set out in the conclusion to this section.

Size premium

90. In determining the cost of equity, the applicant applied a 1.8% size premium for each of the broadcasting undertakings subject to benefits.

91. The Commission questioned the applicant as to why a size premium would be appropriate, given that these services are part of a large organization and are operated in conjunction with other business lines such as telephony services.

92. In reply, the applicant submitted that a size premium should be considered and reflected regardless of the size of the business. It was of the view that the size premium should not be based on the size of the overall company but rather be reflective of the size of the autonomous unit. It argued that the services are part of an autonomous unit with its own infrastructure and can be separated from BCE. As such, the exclusion of a size premium for the sole reason that the services are part of BCE would not be appropriate.

93. While acknowledging that the services are managed autonomously, the Commission is of the view that they are an integral part of the applicant's combined business plans for residential services. It also notes that the applicant plans to sell these services grouped with telephony services and that they would therefore benefit from the size of the telephony services that BCE provides. They would also benefit from the management expertise of the larger organization. The Commission therefore considers that it is appropriate to exclude the size premium for the DTH-PPV Service, the Quebec Feature Film Service and IPTV from the cost of equity for the broadcasting services.

Specific risk premiums related to each broadcasting undertaking

94. In determining the cost of equity, the applicant added a specific risk premium of 5% for the DTH-PPV Service, 6% for the Quebec Feature Film Service and 9.9% for the IPTV Service. These premiums represent the perceived additional level of risk of these services compared to the general risk of broadcasting undertakings provided for by the beta of this industry. In support of this position, KPMG argued that the operations valued are subject to additional risks stemming from the fact that they are start-up or growing operations with significant, unproven cash flow growth, and are subject to significant additional risks. As such, there are risks associated with the cash flows of the operations that have not been captured by the beta alone.

95. The Commission has examined the circumstances of the applicant's arguments and is satisfied that, in this particular case, the specific risk premiums can be justified.

Acquisition premiums related to the broadcasting assets

96. The applicant did not add the 40% acquisition premium to the value determined by KPMG. In support of this position, the applicant argued that the premium paid to acquire control is not directly attributable to the broadcasting assets but is attributable to the revised composition of BCE's shareholders. The applicant was of the view that the value of the shares in the stock market reflects the value of holding a minority interest in a public company.

97. The applicant further noted that KPMG valued the assets at their intrinsic value and did not apply a discount for a non-controlling stake but rather valued the entire business from a sole owner's perspective. As such, the applicant was of the view that the control premium has been taken into consideration.

98. The applicant further argued that trading prices for public companies reflect the companies' intrinsic value, unless they are perceived to be subject to a take-over that is expected to result in significant synergies. It was of the view that the Principal Investors are not capable of generating synergies. The applicant also stated that the planned operational restructuring and longer-term strategy for BCE services are improvements aimed at its telecommunications and broadcasting distribution services and not at the DTH-PPV Service, the Quebec Feature Film Service or IPTV.

99. The Commission expressed concern that the intrinsic value does not reflect acquisition premiums. It noted that BCE had announced that the price represented a 40% premium over the undisturbed average trading price of BCE common shares in the first quarter of 2007, prior to the time when the possibility of a privatization transaction surfaced publicly.

100. In reply, the applicant noted that BCE's broadcasting businesses are integral to its competitive position within Canada. It argued that its competition comes primarily from cable and it needs its broadcasting services in order to compete effectively for residential customers.

101. The applicant indicated that its projections would be the same with or without the proposed change in ownership. It also submitted that the multiple of 10 times for these services was higher than the seven times multiple for the overall transaction and further clarified that KPMG "did not intend to conclude that simply because the implied multiple for the assets valued by KPMG was higher than the multiple for the overall transaction that the control premium was necessarily included." The applicant submitted that the transaction multiple already includes the entire transaction premium of 40%.

102. It is the Commission's practice to allocate the value for an entire transaction, including acquisition premium, between assets based on their value, without making a distinction between regulated and non-regulated assets or the value or absence of synergies. This approach was followed by the Commission when it approved the transfer of effective control of CHUM Limited to CTVgm in Broadcasting Decision 2007-165. In this case, the Commission took note of the stock market and calculated that the premium was in the range of 40%, which was confirmed by the news release issued by BCE.

103. The Commission is of the view that, while shares of public companies represent marketable minority interests, they often trade at or near their control value. Takeover premiums do not generally reflect elements of control but, rather, synergies, economies of scale and/or strategic benefits perceived by the purchaser. The acquisition premium may also be the result of the rationalization of operations planned by the purchaser. As well, the Commission does not consider that the intrinsic value based on projections in absence of a takeover includes the acquisition premium. KPMG determined the intrinsic value of the assets without any synergies or rationalization of operations and indicated that the projections would have been the same without the acquisition. Therefore, the Commission concludes that the acquisition premium is not included in the value provided by KPMG. Accordingly, the Commission finds that it is appropriate to increase by 40% the intrinsic value of the assets as determined by the Commission to reflect the acquisition premium. The allocation of the acquisition premium is reflected in the table set out in the conclusion to this section.

Assumed operating lease commitments

104. The applicant did not include assumed operating lease commitments as part of the value of the transaction for the purpose of determining the benefits package.

105. At the hearing, the Commission requested that the applicant provide the value of these commitments, and the applicant filed a document following the hearing that indicated that their value amounted to $7.3 million.

106. The Commission's practice is to include the value of operating lease commitments as part of the value of the transaction since it regards such leases as an alternative to financing assets. The Commission therefore will include the $7.3 million value of assumed operating lease commitments in the value of the transaction. Assumed operating lease commitments are reflected in the table set out in the conclusion to this section.

Conclusion

107. Based on all of the above, the Commission revises the value of the transaction for the purpose of the benefits package from $109.6 million to $219.1 million. The following table sets out the value of the transaction as proposed by the applicant and determined by the Commission as a result of its adjustments.

Value of the transaction

($ million)	**DTH-PPV**	**Quebec Feature Film**	**IPTV**	Total
Value as proposed by the applicant	108.5	1.1	0.0	109.6
Cumulative value with Commission adjustments for:				
Inclusion of IPTV - value as per KPMG	108.5	1.1	15.0	124.6
Exclusion of size premium	131.2	1.3	18.8	151.3
Allocation of the 40% acquisition premium	183.7	1.8	26.3	211.8
Assumed operating lease commitments				7.3
Revised value of the transaction				219.1

Is the proposed tangible benefits package acceptable?

108. The applicant proposed a tangible benefits package of $10,960,000 to be discharged over the next seven years. The benefits package would be allocated as follows:

Programming benefits

- $6,156,000 allocated to create incremental independently produced programming for the DTH-PPV Service;
- $4,104,000 directed to the Bell Broadcast and New Media Fund (Bell Fund); and

Social benefits

- $700,000 allocated to the Media Awareness Network

109. Approximately 94% ($10,260,000) of the benefits would be allocated to programming benefits and 6% ($700,000) to social benefits. The applicant indicated that this spending would be incremental to existing requirements.

110. The Commission considers that the model used to administer and apportion the tangible benefits between programming benefits and social benefits is appropriate and consistent with past practice.

111. The Commission is of the view that the tangible benefits package proposed by the applicant raises the following issues:

- plans for disbursement of the allocation to independent program production;
- plans for disbursement of the allocation to the Bell Fund;
- plans for disbursement of the allocation to the Media Awareness Network;
- tangible benefits required as a result of an increase in the value of the transaction;
- means to ensure that tangible benefits payments are incremental to current expenditures; and
- administration fees.

Plans for disbursement of the allocation to independent program production

112. The applicant proposed that a significant portion of the dollar amount of the benefits package be dedicated to on-screen initiatives. For the DTH-PPV Service, the applicant proposed to allocate $6,156,000 over a seven-year period to the creation of high definition programming that speaks to niche interests and that does not receive funding from traditional sources. Eighty percent of these on-screen tangible benefits would go toward original programming that is both of popular interest and of specific relevance to viewers in Quebec.

113. The $6,156,000 would be allocated to five broad funding envelopes for on-screen initiatives as follows:

- Envelope 1: 10% for the coverage of live theatrical productions;
- Envelope 2: 25% for the creation and administration of a Quebec Independent Production Fund to produce original programming for viewers in Quebec;
- Envelope 3: 50% to assist in funding the production of one original French-language comedy or drama series produced by the independent production sector in Quebec;
- Envelope 4: 5% for the coverage of existing festivals featuring Francophone artists from Quebec, as well as to create a series of concerts using French Canadian artists and to cover the Montréal World Film Festival (MFF); and
- Envelope 5: 10% for additional projects, with the exact concepts to be developed as consumer demand and viewing habits change.

114. The applicant indicated that 100% of the proposed programming benefits would be allocated to independent producers and third party production houses.

115. In its intervention, the Directors Guild of Canada (DGC) proposed that $7.2 million[2] of the tangible benefits package be directed to support Canadian drama. The DGC submitted that such an approach would be consistent with the benefits packages established when Rogers Media Inc. acquired the Citytv stations and CanWest MediaWorks Inc. acquired control of the broadcasting companies of Alliance Atlantis Broadcasting Inc.[3]

116. The DGC also submitted that the applicant's proposed benefits package contains numerous initiatives that lack specific information concerning the nature of the programming that will be produced, therefore making it difficult to determine how such initiatives qualify as eligible benefits under the Commission's policies.

117. The Canadian Film and Television Production Association (CFTPA) argued that the programming benefits should be expended in equal amounts each year over seven years, consistent with the condition of approval imposed in the Rogers-Citytv and CanWest-Alliance Atlantis acquisitions referred to above.

118. In its reply, the applicant stated that the proposed benefits package is designed to support a variety of programming genres for distribution via PPV and VOD that would appeal to Canadians, including original drama. The applicant stated that the percentage of benefits directed to drama in the CanWest and Rogers' transactions were not imposed by the CRTC but rather were proposed by CanWest and Rogers because they made sense in those particular cases.

119. With respect to the CFTPA's intervention, the applicant submitted that it would be preferable to have some flexibility with respect to expenditures in the event that a greater proportion of the funds were spent on a particular production project in a given year. The applicant argued that producing new, original drama can be expensive, and that a project could suffer if it were obligated to expend its benefits funding in fixed annual amounts.

120. The Commission is satisfied with the applicant's replies to the concerns raised by the DGC and the CFTPA and considers that it is appropriate to assess tangible benefits packages on a case-by-case basis.

121. At the hearing, the Commission questioned the applicant on the portion of Envelope 4 to be allocated to the MFF. The applicant indicated that, although the details had not been worked out, its intention is to provide basic coverage of the MFF that it is line with that currently provided to the Toronto International Film Festival. According to the applicant, funding from its benefits package would enable it to achieve this goal and to serve an audience that is not currently served.

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[2] Based on the premise that the IPTV Service is valued at $15 million.
[3] See Broadcasting Decisions 2007-360 and 2007-429.

122. The Commission notes that most of the Montréal-based over-the-air broadcasters provide basic coverage of the MFF. The Commission considers that the applicant has failed to provide sufficient evidence to qualify this expenditure as an unequivocal benefit to the broadcasting system given that coverage would largely duplicate coverage that is already provided by other broadcasters. Accordingly, the proposal for the allocation of funds for the coverage of MFF is disqualified as a tangible benefit.

123. The Commission wishes to ensure that the value of the tangible benefits in Envelope 4 will be maintained. In this regard, the Commission notes that, within the applicant's proposed Envelope 4, money that the applicant earmarked for coverage of the MFF could be reallocated to the coverage of existing festivals featuring Francophone artists from Quebec or to create a series of concerts using French Canadian performers. The Commission finds that that such an approach would be an unequivocal benefit to the broadcasting system.

124. Accordingly, the Commission directs the applicant to reallocate the money that would have been used for the MFF to the coverage of existing festivals featuring Francophone artists from Quebec or the creation a series of concerts featuring French Canadian performers.

125. At the hearing, the Commission also questioned the applicant regarding Envelope 5, which would be spent on additional projects to be determined at a later date. The applicant indicated that such projects could include:

- the digital re-mastering of important French-Canadian archival films on the basis that there is a large bank of archival media that will not reach a digital audience unless funding is provided for this purpose;
- the dubbing of movies in Quebec French rather Parisian French; and
- the expansion of the coverage of the MFF depending on the success and popularity of the basic festival coverage.

126. With respect to the digital re-mastering of important French Canadian archival films, the Commission notes that Quebecor Media Inc. has initiated a similar project called "projet Éléphant: *mémoire du cinéma québécois*" to gradually convert all of Quebec's feature films to digital form. As of October 2007, the project involved the conversion of approximately 800 feature films made in Quebec.

127. As well, although similar initiatives have been considered to qualify as appropriate tangible benefits in the past, technology and the communication environment has evolved to the point where what was once considered new and cutting edge is now the normal course of doing business. Accordingly, the Commission finds that the applicant failed to provide sufficient evidence to enable the Commission to qualify this expenditure as an unequivocal benefit.

128. Having disqualified coverage of the MFF as a benefit within Envelope 4, the Commission also dismisses expansion of such coverage as a benefit in Envelope 5.

129. Accordingly, the Commission directs the applicant to submit a report setting out other initiatives that it would fund via Envelope 5.

Plans for disbursement of the allocation to the Bell Fund

130. The applicant proposed to direct $4,104,000 to the Bell Fund. This money would be provided in equal instalments each year, and no administrative fees would be charged.

131. At the hearing, the Bell Fund indicated that it would include, in its annual report, a breakdown setting out how the money allocated to the Bell Fund had been spent.

Plans for disbursement of the allocation to the Media Awareness Network

132. The applicant proposed to allocate $700,000 to the Media Awareness Network over a seven-year period. These funds would be provided in seven equal instalments of $100,000 each year, and no administrative fees would be charged.

133. The applicant indicated that these funds would be used to support various projects/initiatives such as anti-racism and diversity programs, Young Canadians in a Wired World Research, the Web Awareness Internet Literacy Program and web-based media education resources. As well, based on consultations with the benefactors, determinations would be made concerning how these funds could be used to support the development of new programs and resources of benefit Canadian youth.

134. The Commission deems that the disbursement of money allocated to the Media Awareness Network as described by the applicant is acceptable.

Tangible benefits required as a result of an increase in the value of the transaction

135. As set out earlier in this decision, the Commission has increased the value of the transaction for the purpose of determining tangible benefits from $109.6 million to $219.1 million. This means that the tangible benefits package required for this transaction is increased from $10.96 million to $21.91 million.

136. Both the CFTPA and the DGC argued that a minimum of $1.5 million in additional tangible benefits should be payable in relation to the acquisition of the IPTV Service.

137. At the hearing, the applicant indicated that, if the benefits requirement were increased, it would consider either pro-rating the increase among the benefits already proposed, or to propose amendments to its benefits package.

138. Accordingly, the Commission requires the applicant, as a **condition of approval**, to file with the Commission within 30 days of this decision, its plans with respect to the implementation of a tangible benefits package with a value of $21.91 million.

139. As set out above, the Commission has approved the original tangible benefits package submitted by the applicant with certain modifications. It now carries a value of $10.34 million.

140. Of the additional $11.57 million remaining for benefits, $10.5 million must be invested in an interest generating fund managed by Teachers' or another party designated by Teachers'. The revenues from the interest generating fund shall be transferred each August 1st to the Canada New Media Fund administered by Telefilm Canada in accordance with the terms of Telefilm Canada's New Media Fund. The next August 1st following the date on which the Canadian Television Fund (CTF) has established its own new media fund (and every August 1st thereafter) all revenues from the interest generating fund shall be transferred to the CTF new media fund to be disbursed in accordance with the terms of the CTF new media fund. The applicant must inform the Commission if the fund that it establishes will be managed by Teachers' or by another party designated by Teachers' and acceptable to the Commission.

141. The remaining $1.07 million of the tangible benefits package may be allocated to initiatives approved in this decision, or the applicant may propose new tangible benefit initiatives for the Commission's approval.

Means to ensure that tangible benefits payments are incremental to current expenditures

142. The applicant stated that it would ensure the benefits are incremental, i.e., above and beyond the base level of expenditures, by acquiring Canadian programming of a genre or brand that has not been made available on television in Canada and/or that would have not been produced without the money it provides.

143. In its intervention, the DGC indicated that the applicant did not address the issue of incrementality with regard to its programming expenditures. To that end, the DGC proposed that the benchmark for determining incrementality for the PPV and VOD services should be the average annual expenditures on Canadian programming by these services for the years 2005, 2006 and 2007. It argued that such an approach would also be consistent with the Commission's approach in approving the transfer of effective control of Craig Media Inc. to CHUM Limited.[4]

144. In its reply to the intervention, and when questioned at the hearing, the applicant agreed that an appropriate benchmark against which incrementality could be measured would be the annual average expenditures of the PPV and VOD services for the last three years (i.e. 2005 to 2007).

145. The Commission is satisfied that the applicant has taken adequate steps to ensure that tangible benefits expenditures are incremental to the Canadian broadcasting system. Accordingly, the Commission requires the applicant, as a **condition of approval**, to file with the Commission, within 30 days of the date of this decision, the annual average expenditures of its PPV and VOD services for the years 2005 to 2007.

[4] See Broadcasting Decision 2004-502

Administration fees

146. The Commission considers that it is inappropriate for any administrative fees to be charged when approval has been given to a licensee to self-administer benefits spending. Accordingly, the Commission reminds the applicant that it may not charge administrative fees.

147. The Commission notes that certified third party independent production funds are permitted to charge up to 5% in administrative fees. However, the Commission notes that the Bell Fund indicated at the Hearing that there would be very minimal fees, in any, charged against the tangible benefit payments it receives. The Commission directs the applicant to indicate in its annual report any administration fees that have been charged by the Bell Fund and the Media Awareness Network.

Conclusion

148. The Commission **approves** the application by BCE Inc. (BCE), on its behalf and on behalf of certain of its affiliates, licensees of broadcasting and distribution undertakings (the applicant), for authority to transfer effective control of the applicant to a corporation to be incorporated (BCE Holdco). BCE Holdco will hold the shares of BCE through its subsidiary 6796508 Canada Inc. (Bidco). This approval is subject to the **conditions** set out in the appendix to this decision.

149. The Commission further **approves** the applicant's request for authority, on behalf of CTVglobemedia Inc. (CTVgm), owner of licensees of radio, television and specialty programming undertakings, to allow a consequential change in ownership of CTVgm.

Secretary General

Related documents

- *Transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to CanWest MediaWorks Inc.*, Broadcasting Decision CRTC 2007-429, 20 December 2007

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

- *Transfer of effective control of CHUM Limited to CTVglobemedia Inc.*, Broadcasting Decision CRTC 2007-165, 6 June 2007

- *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, 17 May 2007

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

- *Transfer of effective control of CTV Inc. to BCE Inc.*, Decision CRTC 2000-747, 7 December 2000

- *Building on success – A policy framework for Canadian television*, Public Notice CRTC 1999-97, 11 June 1999

- *Contribution to Canadian Programming by Broadcasting Distribution Undertakings*, Public Notice CRTC 1997-98, 22 July 1997

- *Direction to the CRTC (Ineligibility of Non-Canadians)*, P.C. 1997-486, 8 April 1997

- *Elements assessed by the Commission in considering applications for the transfer of ownership or control of broadcasting undertakings*, Public Notice CRTC 1989-109, 28 September 1989

This decision is to be appended to each licence. It is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: http://www.crtc.gc.ca.

Appendix to Broadcasting Decision CRTC 2008-69

Conditions of approval

In light of the above, the Commission requires the applicant to file, within 30 days of the date of this decision:

1. an executed amended Principal Investor Agreement that:

    - fixes the membership of the Board of Directors at thirteen and includes, within the total membership, six designees of Teachers', one Independent Director and the CEO, all of whom must be Canadians;

    - provides that the Chair of the Board will have a tie-breaking vote over the appointment and dismissal of the CEO;

    - provides that a Chair will be appointed to the Board at all times, that the Chair will be a member of the Board but will not be a designee of a non-Canadian shareholder, will be a Canadian, and not also serve as the CEO;

    - removes the following language "unless otherwise approved by the Requisite Investors" from Sections 2.4.1(i) and (vi);

    - includes the following definition of "independent"

        "Independent", when used in respect of a director, shall mean a director who has been determined by the Board not to have any direct or indirect relationship with the Company, any Principal Investor or any of their respective affiliates or subsidiaries that would reasonably be expected to interfere with the exercise of his or her independent judgement as a director of the Company and, for greater certainty, a director shall not be considered to have such a relationship with any such Person by reason only of that director holding an equity interest of up to 5% in such Person.;

    - includes a requirement that any vacancy on the Board or on a committee of the Board caused by Teachers' losing the right to designate a member be filled by the designee of the Canadian investor who acquires the largest number of shares from Teachers', and that any such designee must be a Canadian;

- deletes the term "best efforts" from Sections 2.6 and 2.7 relating to the composition of Bidco and BCE committees and extends the obligations of BCE Holdco under Sections 2.6 and 2.7 to require BCE Holdco to maintain the same quorum requirements for the committees of the boards of Bidco and BCE as apply to BCE Holdco;

- revises the relevant portion of Section 2.4.3 on quorum to include the following statement:

  > For the avoidance of doubt, all members of the Board designated by the PEP Investors or by the MDP Investors or by the ML Investors shall be deemed not to be Canadian for purposes of determining whether quorum is present at a meeting of the Board;

- adds a second Teachers' designee to the Executive Committee;

- increases the threshold for transactions requiring investor approval to $110 million, and incorporates the following definition of "ordinary course of business":

  > "ordinary course of business", activities shall be deemed to be in the ordinary course of business of a Person if they are routine or occur frequently in the course of that Person's business, historically have not generally been subject to approval by such Person's board of directors (or equivalent governing body), are undertaken in good faith and are consistent with that Person's usual custom and past practice, including with respect to the quantity, value, quality and frequency thereof, and do not expose that Person to a business risk that is materially different from other similar actions that have previously been undertaken by that Person.

2. an executed amended By-law establishing the Independent Programming Committee that provides that no member of this committee will be a director, officer or employee of any non-Canadian shareholder of BCE Holdco, Bidco, BCE or any of its subsidiaries.

3. an executed amended Advisory Services Agreement that provides that the services rendered under that agreement will not relate to programming, that Teachers' will be entitled to review and provide input with respect to the services provided, and that removes the words "are requested to be" from Section 1.

4. its plans with respect to the implementation of a tangible benefits package with a value of $21.91 million.

As set out in this decision, the Commission has approved the original tangible benefits package submitted by the applicant with certain modifications. It now carries a value of $10.34 million.

Of the additional $11.57 million remaining for benefits, $10.5 million must be invested in an interest generating fund managed by Teachers' or another party designated by Teachers'. The revenues from the interest generating fund shall be transferred each August 1st to the Canada New Media Fund administered by Telefilm Canada in accordance with the terms of Telefilm Canada's New Media Fund. The next August 1st following the date on which the Canadian Television Fund (CTF) has established its own new media fund (and every August 1st thereafter) all revenues from the interest generating fund shall be transferred to the CTF new media fund to be disbursed in accordance with the terms of the CTF new media fund. The applicant must inform the Commission if the fund that it establishes will be managed by Teachers' or by another party designated by Teachers' and acceptable to the Commission.

The remaining $1.07 million of the tangible benefits package may be allocated to initiatives approved in this decision, or the applicant may propose new tangible benefit initiatives for the Commission's approval.

5. the annual average expenditures of its PPV and VOD services for the years 2005 to 2007.

6. The Commission further requires the applicant to file within 30 days of the effective date of any amendment, the Principal Investor Agreement, the Shareholders Agreement and all other related or incidental agreements or other documents applicable to the applicant, as amended.