



13 January 2014

John Traversey
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: *Call for comments on the Commission's approach to tangible benefits and determining the value of the transaction, Broadcasting Notices of Consultation 2013-558 and 2013-558-1 (Ottawa, 21 October 2013 and 4 December 2013)*

1. The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian broadcasting system that serves the public's interests.
2. We are pleased to participate in the process initiated by Broadcasting Notice of Consultation 2013-558, regarding the tangible benefits afforded to Canadians by transfers of ownership and control. Our comments on the issues raised in the Commission's notice are attached.
3. We look forward to the opportunity of reviewing other comments submitted in this proceeding.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

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From surviving, to thriving

Call for comments on the Commission's approach to tangible benefits and determining the value of the transaction, Broadcasting Notices of Consultation 2013-558 and 2013-558-1 (Ottawa, 21 October 2013 and 4 December 2013)

Comments of the Forum for Research and Policy in Communications

13 January 2014

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Executive Summary

Introduction: the smokescreen of tangible benefits

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting.
- 2 The Forum supports a strong Canadian broadcasting system that serves the public interest, and welcomes this review of the CRTC's approach to extracting benefits from applications involving the transfer of ownership or control of broadcasting undertakings.
- 3 We are seriously concerned that the tangible benefits approach has morphed into a convenient smokescreen that masks extremely serious problems in Canada's news sector – in particular, the fact that a very small number of broadcasters effectively controls Canada's broadcast news agenda.
- 4 Streamlining the tangible benefits approach will not address the problem of decreasing diversity – but providing increased data and information about ownership transactions and their impact will enable the public, going forward, to evaluate the impact of the tangible benefits policy.

The tangible benefits policy: historical context

- 5 The CRTC's current tangible benefits policy, based on at least seven different policy statements issued at different times and under different circumstances, has developed after decades of decisions that have allowed increasingly concentrated ownership of broadcasting undertakings.
- 6 The CRTC first suggested that changes in ownership should “contribute significantly” to increasing the level of Canadian programming available on television in 1974, when it approved the transfer of control of the newly licensed Global Communications. By 1977 the Commission was seeking ‘significant and unequivocal benefits’ from more concentrated ownership.
- 7 A review by the CRTC in 1992 found that its cable, television and radio transactions priced at \$2,135 million had ‘injected’ tangible benefits of \$317 million (14.85% of the total price) into the broadcasting system. The CRTC dropped the tangible benefits requirement for BDUs in 1996 because it had adopted an ‘open-entry’ approach to BDUs licensing.

Current approach to tangible benefits: has yielded less than half the level of benefits obtained from 1986 to 1992

- 8 The CRTC’s current approach to tangible benefits is based on at least seven different policy statements, issued at different times and under different circumstances, for different classes of broadcasting undertaking.
- 9 As Broadcasting Notice of Consultation 2013-558 provided little or no empirical information about tangible benefits, we reviewed 147 CRTC decisions involving ownership transactions issued from 2000 to the present (January 13, 2014); the CRTC approved 144 of these transactions. Worth \$25.07 billion, the transactions as approved were supposed to yield \$1.8 billion in tangible benefits (7.2% of the transactions’ regulated value).

Response to CRTC questions

CRTC questions	Position of the FRPC
<p>Q.1 Is it appropriate to require purchasers to direct a percentage of tangible benefits to the CMF and CIPFs as set out in the Commission’s proposal? If not what other approach would be appropriate?</p>	<p>Yes – at least 80% should go to the CMF</p> <p>The CRTC should use its licensing powers to ensure that general-interest programming services (over-the-air radio and TV) provide minimum, but increasing levels of local, regional and national news, analysis and reporting</p>
<p>Q2. Is the proposed allocation of funds between the CMF and CIPFs appropriate? If not, what allocation would be appropriate?</p>	<p>The CMF should receive a higher share of funding</p>
<p>Q3. Would reporting on the implementation of tangible benefits through the Commission’s Communications Monitoring Report be appropriate and adequate?</p>	<p>Yes, but more is needed.</p> <p>The CRTC should develop a webpage that enables the public to review broadcasters’ progress in fulfilling their tangible and intangible benefits commitments.</p> <p>The CRTC should work with public interest groups, licensees, and other non-licensed stakeholders to develop an effective and efficient monitoring framework</p>
<p>Q.4 Is the proportion of tangible benefits that may be allocated to discretionary initiatives appropriate? If not, what proportion would be appropriate, and why?</p>	<p>Yes – though we recommend that the CRTC encourage over-the-air radio and television broadcasters to provide more support to local programming initiatives and local elementary and secondary schools (to buy or replace musical or audio-visual equipment, for example)</p>
<p>Q.5 Do the criteria set out above ensure that the discretionary initiatives proposed by applicants will not be self-serving? If not, what other criteria would be appropriate?</p>	<p>Yes.</p>
<p>Q.6 Is the proposed list of discretionary initiatives sufficient? If not, what additions should be made and why?</p>	<p>No. The CRTC should remind broadcasters that many elementary and secondary schools could benefit from financial support for their media and arts-related programming.</p>

CRTC questions	Position of the FRPC
Q.7 Does the current approach for the allocation of tangible benefits for radio undertakings remain appropriate? If not, what changes should be made?	<p>The current benefits approach allocates 75% of financial benefits to two industry funds, 17% to discretionary initiatives and 8% to the CRFC. Too little information is available to evaluate the effectiveness of the monies allocated to industry funds.</p> <p>Given radio's stature as a local medium, the CRTC should require radio transfer applicants to describe how they will increase weekly levels of original local programming, expenditures on original local programming, and local employment.</p>
Q.8 Should tangible benefits generally be provided as part of the transfer of ownership or control of all radio or television programming undertakings? What are the advantages and disadvantages to such an approach?	<p>Yes.</p> <p>Requiring all broadcasters to direct tangible benefits to the broadcasting system will benefit the public, and will simplify administration of the tangible benefits regime.</p>
Q.9 Under what specific circumstances should the requirement to provide tangible benefits not apply?	<p>The tangible benefits regime should not apply to community and campus broadcasters, as they are generally operated by volunteers with very limited resources.</p> <p>The CRTC should require tangible benefits from ownership transactions involving BDUs, radio and television services.</p>
Q.10 Should the Commission ensure that all expenditures on tangible benefits are made in advance of the closing of the transaction as a means to ensure that initiatives are funded and for ease of administration? If not, why would such an approach not be desirable?	<p>No.</p> <p>Requiring broadcasters to expedite tangible benefits payments will lead to hasty decision-making, administrative complexities and uncertainty in the development of Canada's program production system.</p>
Q.11 When a programming undertaking changes ownership, should the Commission ensure that all outstanding tangible benefits from a previous purchase be expended in advance of the new transaction?	<p>No.</p> <p>This requirement would suggest that the CRTC has tacitly consented to the ownership transaction; would subtly pressure the CRTC to actually approve the transaction; and would introduce new complexities if the CRTC were to deny the transaction.</p>
Q.12 Should the Commission maintain or modify its approach used to calculate the value of the transaction?	<p>We may comment after reviewing other parties' submissions.</p>
Q.13 How could the Commission clarify and codify its practice with respect to the calculation of the value of the transaction?	<p>We may comment after we review other parties' submissions.</p>
Q.14 What allocation method would most effectively provide for a simpler, consistent and predictable allocation of the value of the transaction?	<p>The CRTC should require all ownership applications to commit the same percentage value of their transactions, to tangible benefits. This value should exceed that set by broadcasters in the absence of a tangible benefits regulatory framework in 1992 – 15.4%.</p>

CRTC questions	Position of the FRPC
Q. 15 What other steps might be taken to simplify the current process, which is iterative in nature?	We may comment after reviewing other parties' submissions.
Q.16 What other elements of the method related to calculation of the value of the transaction and its allocation should the Commission consider?	Competitive ownership transfers.

Conclusions: ‘benefits’ are no substitute for diversity and competition

- 10 In our view, the tangible benefits policy obscures the real problem with transfers of ownership: it suggests that the public can be compensated for the reduction in the number of voices in the system with money. Even when – or if – tangible benefits reach the broadcasting system, however, they cannot make up for the absence of information they are entitled to have, and likely would have if Canada’s broadcasting system had more competing owners.
- 11 That said, the Forum supports the Commission’s desire to ‘streamline’ its tangible benefits approach – if the objective is to serve the public’s interest by
 - raising the level of tangible benefits directed to the broadcasting system,
 - permanently strengthening the system’s performance through the creation, production and broadcast of increasing levels of original Canadian content, and higher levels of employment, and by
 - at least increasing the level of original news and information being reported daily to Canadian communities.
- 12 The Forum therefore recommends that the CRTC
 - 1 Evaluate competitive ownership transfer systems
 - 2 Apply tangible benefits to all broadcasting undertakings
 - 3 Report clearly on tangible and intangible benefits in each ownership decision
 - 4 Modernize its single-point-in-time ownership reporting system, and
 - 5 Develop an easy-to-use and up-to-date reporting system for benefits

I Introduction: the smokescreen of tangible benefits

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting.
- 2 As the Forum supports a strong Canadian broadcasting system that serves the public interest, we welcome the CRTC's decision to review its approach to ensuring that the transfers of ownership and control of Canada's broadcasting undertakings benefit the communities they serve, and Canada's broadcasting system as a whole.
- 3 Our central concern with the CRTC's current approach is that the tangible benefits approach has morphed into a convenient smokescreen that masks extremely serious problems in Canada's news sector. The effort spent reviewing, critiquing and revising accounting valuations to extract every possible penny that broadcasters will not otherwise spend on programming made in Canada for Canadians, creates the façade of regulatory concern – but has not addressed the even more serious, and real, problem: that a very small number of broadcasters effectively control Canada's broadcast news agenda.
- 4 Studies such as those used in *The Missing News*¹ demonstrate that ownership structures can lead to gaps and omissions in news coverage which are not explained simply by editorial choice. Research undertaken in *Hidden Agendas* considers the impact of ownership changes on staffing choices, which in turn affect the types of news collected and reported.² The analysis in *Media Concentration and Democracy* explains why tangible benefits are an inadequate response to the harms of media mergers.³
- 5 Related to the concern about tangible benefits becoming a useful smokescreen, is the fact that very little information is available to the public from the Commission about the impact of concentrated media ownership. In particular, the absence of a well-developed monitoring system that tracks and reports levels of broadcast ownership, levels of original news and information, and levels of fulfilled and unfulfilled tangible and intangible benefits' makes it virtually impossible for the public to evaluate the impact of each new ownership transfer proposal.

¹ Robert A. Hackett & Richard Gruneau, *The Missing News: Filters and Blind Spots in Canada's Press* (Canadian Centre for Policy Alternatives, Ottawa: 2000).

² See Lydia Miljan & Barry Cooper, *Hidden Agendas: How Journalists Influence the News* (UBC Press, Toronto: 2003) at 175.

³ C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press, New York: 2007).

6 With these concerns in mind, our comments on Broadcasting Notice of Consultation 2013-558 begin by reviewing the history of the Commission’s tangible benefits policy, and by summarizing the advantages and disadvantages of concentrated media ownership. We then respond to the CRTC’s questions. Our additional comments, conclusions and recommendations follow. In brief, we urge the Commission to re-examine the use of competitive transfers,

II The tangible benefits policy: historical context

7 As a matter of law licences granted to operate broadcasting services cannot be bought or sold.⁴ Broadcast licensees have always been free, however, to apply for changes in the ownership or control of broadcasting undertakings. The first licences issued for radio stations in the early 1920s, for example, permitted the assignment or temporary transfer of radio licences with the written consent of the Minister of the Department of Marine and Fisheries.⁵

A The problem: safeguarding the public interest

8 The tangible benefits policy emerged after decades of decisions approving the transfer in ownership and/or control of the assets whose operations were governed by the *Broadcasting Act* and CRTC licences, as the CRTC began to receive applications in which potential buyers already held interests in broadcasting undertakings.

9 The CRTC considered ownership issues at its very first public hearing in April 1968,⁶ and by June 1968 said that it was “... concerned about excessive concentrations of

⁴ See, e.g., *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 (CanLII) at ¶143: Finally--and this is an extremely important consideration, as we will see later--the appeal before us is not challenging a CRTC decision that deprives or strips the appellant of a right. The appeal has to do with a decision not to renew a privilege that had been granted to the appellant. The obtaining or exercise of a privilege is generally accompanied by conditions with which the licensee undertakes to comply subject to penalties for non-compliance, including possible non-renewal or loss of the privilege. In other words, the appellant not only has no right to a broadcasting licence, it also has no vested interest in the fixed-term privilege that was granted to it: see *Procureur général du Canada v. Compagnie de Publication La Presse, Ltée (La)*, 1966 CanLII 35 (SCC), [1967] S.C.R. 60, where the Court writes [at page 76]: "there was no contractual relationship between the Crown and respondent, and the latter had no vested or property right in the licence which it held."

⁵ Department of Marine and Fisheries, *License to use Radio*, (Ottawa, 18 April 1923), s. 21: “Except with the consent in writing of the Minister, the licensee shall not assign or sublet this license.”

⁶ The CRTC was established on 1 April 1968 and its first, 3-day hearing began on 23 April 1968. In *Announcement*, Decision CRTC 68-37 (Ottawa, 30 May 1968) at 1-2 the CRTC granted an application by CHAB Ltd., the licensee of CHAB and CHAB-TV Moose Jaw and of CHRE-TV Regina, to transfer 520 common shares of its capital stock. CHAB Ltd. was owned by Moffat Broadcasting Limited, however, which also held an interest in CJAY-TV Winnipeg, a CTV affiliate. The CRTC continued the policy of its predecessor, the Board of Broadcast

ownership in communication media.”⁷ This concern led the CRTC to deny an application that would have permitted both more concentrated and cross-media ownership.⁸

- 10 By August 1968, however, the CRTC had allowed one television broadcaster to buy another because of promises that participation in the companies from the communities they served would safeguard the communities’ interests. The Commission explained that “equitable balance of ownership is a form of guarantee for safeguarding community interests and sustaining the presentation of vital news and informational services”.⁹ It set out “four points of consideration for decisions about broadcast ownership – three of which involved community participation.¹⁰ Acknowledging “the need for adequate economic resources in the natural development and expansion of broadcasting”,¹¹ the CRTC said that its approval was

... directly related to a normal need for expansion and improvement of general broadcasting service as well as assurance of the continued capacity of local participation as a safeguard for community interests.¹²

- 11 The CRTC occasionally denied ownership applications, seeking more local involvement,¹³ and broadcasters began to emphasize local service in such applications:

Governors, which prohibited any affiliate of the CTV Network from controlling more than one affiliate and therefore required Moffat to sell CHAB-TV and CHRE-TV within the following year (or risk “automatic revocation” of CHAB Ltd’s television licences).

⁷ *Announcement*, Decision CRTC 68-38 (Ottawa, 13 June 1968).

⁸ *Ibid.* British Columbia Television Broadcasting System Ltd. (BCTV), licensee of CTV affiliate CHAN-TV Vancouver, had applied to transfer voting and non-voting shares to Famous Players Canadian Corporation Limited, which also had shares in CTV affiliate CKCO-TV Kitchener, and to Selkirk Holdings Limited, which had direct or indirect interests in other radio and television stations in Canada. While realizing “that the development of communication in Canada may sometimes require the participation of large entities”, the CRTC denied the application.

⁹ *Public Announcement*, Decision CRTC 68-39 (Ottawa, 27 August 1968) at 1.

¹⁰ *Ibid.* at 1-2. The four points were:

1. The balance between shareholders from the community and shareholders from outside the community to be served by the station.
2. The balance on the Board of Directors of the company between members of the community to be served by the station and other members of the Board.
3. The capacity of the company – as demonstrated by the structure of ownership and by the composition of the Board of Directors – to understand the characteristics of the community to be served and to meet the various needs of that community.
4. Extent of ownership of other commercial undertakings which might influence the performance of broadcasting stations.

¹¹ *Ibid.* at 2.

¹² *Ibid.*

... Besides the reasons already given for the present decisions, the Commission has taken into account the applicant's insistence on local involvement on exchange of information and programs, on the opportunity for increased programming and production capacity in the CTV network and generally on improving and increasing program production. Should this ownership pattern not result in the achievement of such objectives, the Commission will reconsider the situation resulting from this decision.¹⁴

The CRTC viewed local ownership as important to BDUs, as it was to radio and television services,¹⁵ but recognized "that there are difficult problems involved in the financing of Canadian business enterprises."¹⁶ Nevertheless, the spirit and text setting out the objectives of the *Broadcasting Act* made it clear that "broadcasting is not to be considered simply as a business and those who hold or control broadcasting licences are not to be considered simply as investors in the ordinary commercial sense;"¹⁷

B The solution: maintained or improved program service, including local news

- 12 While the CRTC in its early years often approved ownership applications without providing reasons,¹⁸ it also approved ownership changes specifically because the change would maintain existing services¹⁹ or improve them²⁰ by extending service²¹ or investing in programming.

¹³ *Public Announcement*, Decision CRTC 69-394 (Ottawa, 11 December 1969) at 1, regarding the acquisition of CKGM and CKGM-FM Montréal by Chum: "... it would be in the public interest that this station be operated by a licensee with more direct involvement in the social, cultural and economic life of Montréal."

¹⁴ *Public Announcement*, Decision CRTC 70-152 (Ottawa, 6 July 1970) at 2-3. See also *Public Announcement*, Decision CRTC 425 (Ottawa, 23 December 1971) at 2 (approving CFCF Limited's acquisition of CFCF Limited, licensee of CFCF and CFCX Montréal from Canadian Marconi Company).

¹⁵ In 1971 the CRTC denied an application to transfer ownership in three BC cable systems as it was "... of the opinion that ownership of these Okanagan Valley cable television systems should be under the control of interests closely associated with the region." *Public Announcement*, Broadcasting Decision CRTC 71-460 (Ottawa, 31 December 1971) at 12.

¹⁶ *Public Announcement*, Decision CRTC 70-284 (Ottawa, 3 November 1970), approving Starlaw Investment's acquisition of the shares in Cable T.V. Ltd., serving Montréal and Laval, from several non-Canadian-controlled companies.

¹⁷ *Public Announcement*, Decision CRTC 72-221 (Ottawa, 20 July 1972) at 2 (approving the application of Multiple Access to acquire the stations licensed to Canadian Marconi Company – CFCF-TV, CFQR-FM, CFCF and CFCX Montréal).

¹⁸ See e.g. *Public Announcement*, Broadcasting Decisions CRTC 71-113 (Ottawa, 10 June 1970) at 1: "The Commission is satisfied that the new licensee will maintain the service being given to the listeners by the station."

¹⁹ *Public Announcement*, Decision CRTC 69-182 (Ottawa, 3 July 1969) at 16: approval would "maintain the service being given to listeners by the station."

- 13 The Commission first mentioned the impact of ownership on broadcast news in 1971. It approved the purchase of CKNX and CKNX-TV Wingham by the London Free Press, to strengthen local news and information in the area:

CKNX Radio and CKNX-TV provide essential broadcasting services to Wingham and to many other towns and rural communities in their licensed areas of Western Ontario. **The recent approval of the extension of alternative television service from the CTV network station CKCO-TV Kitchener and the increased competition for advertising revenues which it creates, makes it desirable to seek added resources to maintain and to improve the services of CKNX and CKNX-TV to many communities dependent on them for local news and information services as well as advertising opportunities.** The approval of this application, coupled with the undertakings given by the purchaser of the stations at the Public Hearing, appear to the Commission to assure a continuation of comprehensive programming services which are unique to the communities concerned.²²

[bold font added]

- 14 At about this time the Senate of Canada constituted a Special Senate Committee on Mass Media to report on ownership and control of mass public communications in Canada.²³ Among many biting criticisms of private broadcasting in Canada the Committee took aim at news and information; while no broadcaster testified that broadcast news is unimportant, the Committee was “left feeling that many

In March 1969 the CRTC approved the CTV Network’s acquisition of 75% of CJCH Limited “because it appears to be the most practical solution in the interest of the station’s performance and the network at this moment.” It added, though, that it “will be interested in the methods used by the licensee to ensure community participation and safeguard community interests”, and required that 4 of CJCH’s 9-member Board of Directors be residents of Halifax: *Public Announcement*, Decision CRTC 69-92 (Ottawa, 21 March 1969) at 7-8.

²⁰ *Public Announcement*, Decision CRTC 70-313 (Ottawa, 18 December 1970) at 1: approved CHTK Radio Ltd.’s transfer of all issued shares to Skeena Broadcasters because the CRTC was “of the opinion that the service provided by broadcasting undertaking CHTK will be maintained or improved under the proposed ownership and control of the licensee company.” See also Decisions CRTC 71-98 to 71-101 (Ottawa, 9 March 1971).

²¹ *Public Announcement*, Decision CRTC 72-323 (Ottawa, 5 December 1972) at 2 (approving Moffat Communications Limited’s acquisition of Woodmount Investments Limited). Moffat committed to extend CTV service north in Manitoba to The Pas, Flin Flon, Snow Lake and Thompson, and “to increase the amount and quality of local programming.”

²² *Public Announcement*, Decision CRTC 71-104 (Ottawa, 11 March 1971) at 1-2 (approving the acquisition by London Free Press Holdings Limited of the licensee of CKNX and CKNX-TV Wingham).

²³ Special Senate Committee on Mass Media, *The Uncertain Mirror: Report*, Vol. 1 (Queen’s Printer, 1970), “Terms of Reference”.

broadcasters wish they did not have to be concerned with it.”²⁴ The research it commissioned, meanwhile, found that

Television is the most believed and most important medium for international news and for Canadian news of national importance. Newspapers are identified as the most believable and important for local news. The written word is believed especially when it is local. Radio is not far behind newspapers in satisfied local news needs. Local media are more trusted for news than national media.²⁵

- 15 In decisions following the 1970 Mass Media report the CRTC approved changes in ownership because of commitments to news and information. In 1971, for example, the new owner undertook “to develop a more extensive news and public affairs program service through co-operation between CKLM in Montréal and CHRC in Quebec City.”²⁶
- 16 By 1972 the CRTC considered that a broadcast undertaking’s “news personnel ... has a particular responsibility in fostering better community understanding.”²⁷ It said that “[t]he production of local live programming and news services in radio and TV must be maintained or improved where possible”²⁸ in ownership transactions, and denied applications when it thought that local service would not be strengthened.²⁹

²⁴ *Ibid.*, at 213.

²⁵ Special Senate Committee on Mass Media, *Good, Bad, or Simply Inevitable?: Report*, Vol. 3, at 6.

²⁶ *Public Announcement*, Decision CRTC 71-91 (Ottawa, 15 February 1971) at 2, approving the transfer of ownership of Radio Laval Inc. to Baribeau & Fils Inc.

²⁷ *Public Announcement*, Decision CRTC 72-83 (Ottawa, 28 March 1972) at 2, approving CJC Limited’s acquisition of ownership and control of Moncton Broadcasting, licensee of CKCW and CKCW-TV Moncton, CKCD-TV Campbellton and CKAM-TV Upsalquitch Lake.

²⁸ *Public Announcement*, Decision CRTC 72-163 (Ottawa, 9 June 1972) at 1.

²⁹ *Public Announcement*, Decision CRTC 74-58 (Ottawa, 26 March 1974) at 2:

The Commission has stressed that it expects the dominant CTV stations not only to provide a local service but to contribute to regional and national services as well. CJOH-TV has the complex responsibility within the CTV network of reflecting to the rest of Canada the National Capital area, with its distinctive bilingual and bicultural character, as well as the other communities of the Eastern Ontario triangle, with their varying historical, social and cultural traditions.

...

The Commission is unwilling to permit the newly amalgamated company, IWC Communications (“IWC), to be diverted from accomplishing its stated purpose to strengthen and improve local service in the diverse communities served by the broadcasting undertakings now owned or controlled by it, particularly having regard to the significantly different problems and circumstances it would encounter in providing the scope and quality of service the Commission expects from station CJOH-TV.

...

This application was based on an agreement between Western and IWC dated October 5, 1973. The Commission does not question that the agreement was entered into in good faith with the intention of carrying out the divestiture order of November 24, 1972. On the other hand, however, as the parties are aware, the Commission must, in virtue of its mandate under the Broadcasting Act, consider all applications includes those for the transfer of control of broadcasting undertakings, in the light of the declaration in the Act that broadcasting

In 1974 the CRTC addressed the resources needed for news programming, noting that Telmed Ltée had

... formally committed itself ... to improve the programming of CKCV, to increase its staff and to broadcast programs that take into account local requirements.

The Commission will require the licensee to implement these commitments. In particular the Commission will require the licensee to maintain a sufficient number of reporters to ensure an adequate local and regional information service and to contribute effectively to the Telemedia radio broadcasting network.”³⁰

17 In 1978 the CRTC notified prospective ownership applicants that they should expect to address these four concerns:

- (i) that the existing level of service provided by the licensee will at least be maintained,
- (ii) that the financial arrangements involved in the sale are not such that there will result to the licensee undertaking or the applicant a financial burden which might impair the ability or willingness of the licensee to provide a quality service or to meet its obligations under the Broadcasting Act or which might in the case of cable make inevitable an application for a rate increase, and
- (iii) that the proposed transaction is in the public interest. This latter becomes of extra importance in the case of a transaction which by its very magnitude is likely to have a major impact on the broadcasting system. The major factor in this assessment will be the financial and other capacity of the applicant and, where applicable, its associated and parent companies, to contribute to the improvement of the Canadian broadcasting system generally, and the extent and nature of its or their commitment to do so.³¹

18 The CRTC also mentioned its interest in local control over broadcasting undertakings, explaining that

If a proposed transfer involves the replacement of local ownership and control with non-local ownership and control, the applicants must satisfy the Commission that there are no prospective satisfactory local purchasers or that the proposed transaction is otherwise particularly in the public interest.³²

1 ***The introduction of ‘significant benefits’***

undertakings make use of radio frequencies that are public property. It is the obligation of the Commission to ensure that such frequencies are controlled and operated in the best interests of the Canadian public whose property they are.

³⁰ *Public Announcement*, Decision CRTC 74-425 (Ottawa, 21 November 1974) at 1.

³¹ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, Public Announcement (Ottawa, 25 July 1978), at 45-46.

³² *Ibid.* at 46.

- 19 The CRTC first suggested that changes in ownership could “contribute significantly” to increasing the level of Canadian programming available on television in 1974, when it approved an application to transfer control of the newly licensed Global Communications.³³ Later that year it referred to the benefit that changes in broadcast ownership could deliver, when it approved the ownership application of a BDU undertaking as being “beneficial to the public to be served.”³⁴
- 20 In 1977 the CRTC introduced the idea that changes in ownership or control should serve the public interest by delivering significant and unequivocal benefits. It denied a major ownership application involving radio, television and cable services because no benefits were proposed to strengthen over-the-air television in Canada – any benefits would instead flow to the cable sector to help cable licensees “meet the heavy capital requirements of changing cable technology and public demand for new services.”³⁵ The Commission explained that all applicants for ownership changes had to demonstrate “significant and unequivocal benefits” that would advance the public interest.³⁶
- 21 The CRTC reiterated the importance of significant and unequivocal benefits in ownership applications in 1985,³⁷ and again in 1986 when it denied Power’s

³³ *Public Announcement*, Broadcasting Decision CRTC 74-83 (Ottawa, 11 April 1974).

³⁴ *Public Announcement*, Decision CRTC 74-312 (Ottawa, 21 August 1974):

While the application proposes an extensive revision of the ownership and financing proposals contained in the original application for a licence which was approved in Decision 73-520, the Commission is satisfied that it does not result from an inability to unwillingness to serve the area licensed to and accepted by Kemptville Cablevision Ltd. The Commission expects that the transfer of ownership to The Utilities Management Group Ltd. ... will be beneficial to the public to be served.

³⁵ *Applications involving the transfer of effective control of Premier Cablevision Limited, and Western Broadcasting Company Ltd.*, Decision CRTC 77-456 (Ottawa, 28 July 1977) at 5-6.

³⁶ *Ibid.*, at 4.

³⁷ Decision CRTC 85-666: “the onus is on the purchaser to demonstrate that approval of the transactions will yield significant benefits to the communities to be served and to the Canadian broadcasting system, and that it is in the public interest.”

See also *Transfer of Control of Standard Broadcasting Corporation Limited to Slaight Broadcasting Inc.*, Decision CRTC 85-1146 (Ottawa, 14 November 1985):

... to achieve the various objectives of the Broadcasting Act, ownership matters are dealt with by the Commission on a case-by-case basis. Given the extent to which ownership transactions differ in terms of their magnitude and complexity, the Commission examines each case on its individual merits to ensure that the benefits are commensurate with the size and nature of the transaction, and that they reflect the responsibilities to be assumed by the purchaser.

In considering an ownership transaction of this magnitude, the Commission carefully assesses not only those benefits that can be quantified in monetary terms, but also those which are not easily measurable in terms of their dollar value, in order to determine the overall significance of these benefits and to ensure that approval is in the public interest.

application to buy the Télé-Métropole group of stations.³⁸ Its decision emphasized that applications had to establish that the advantages of more concentrated ownership “clearly outweigh the disadvantages, and that the transaction is in the public interest.”

2 Clarifications of the benefits test

22 Several massive ownership transactions in the late 1980s led the Commission to clarify the elements it considered when reviewing ownership applications.³⁹ Public Notice CRTC 1989-109 explained that ownership applicants had to demonstrate how approval of their applications would not just serve the public interest, but would measurably improve Canada’s broadcasting system.⁴⁰

23 In 1992 the CRTC announced that it had reviewed its application of the benefits test for radio, television and cable.⁴¹ It concluded that the tangible benefits approach

³⁸ *APPLICATIONS FOR AUTHORITY TO TRANSFER EFFECTIVE CONTROL OF TÉLÉ-MÉTROPOLE INC. TO POWER CORPORATION OF CANADA*, Decision CRTC 86-367 (Ottawa, 18 April 1986).

³⁹ *ELEMENTS ASSESSED BY THE COMMISSION IN CONSIDERING APPLICATIONS FOR THE TRANSFER OF OWNERSHIP OR CONTROL OF BROADCASTING UNDERTAKINGS*, Public Notice CRTC 1989-109 (Ottawa, 28 September 1989).

While the CRTC recently stated, in *The Score – Change in effective control and licence renewal and amendment*, Broadcasting Decision CRTC 2013-207 (Ottawa, 30 April 2013) at ¶16, that its purpose in issuing Public Notice CRTC 1989-109 “... was to allow the market to govern the transfer of broadcasting licences as part of ownership transactions, while still recognizing that broadcasting licences are public property and that any transaction must be in the public interest”, Public Notice CRTC 1989-109 does not in fact even mention the term, “market”, and is entirely silent about market governance of the transfer of markets.

⁴⁰ *ELEMENTS ASSESSED BY THE COMMISSION IN CONSIDERING APPLICATIONS FOR THE TRANSFER OF OWNERSHIP OR CONTROL OF BROADCASTING UNDERTAKINGS*, Public Notice CRTC 1989-109 (Ottawa, 28 September 1989).

The applicant must also demonstrate that the proposed transaction is in the public interest. As well as considering such matters as concentration of ownership, cross-media ownership and local participation in ownership, the Commission, in its deliberations as to how the public interest would best be served, must be satisfied that the strength of the applicant's human and financial resources are sufficient to give it the capability to improve the undertaking in question and to make a contribution to the enhancement of the Canadian broadcasting system.

In addition to demonstrating that it has sufficient resources, an applicant is expected to propose 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. The Commission must be satisfied that the proposed benefits package is commensurate with the size and nature of the transaction and takes into account the responsibilities to be assumed, the characteristics and viability of the broadcasting undertakings in question and the scale of programming, management, financial and technical resources available to the prospective purchaser.

⁴¹ *Assessment of the Impact of the Benefits Test Applied at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1992-42 (Ottawa, 15 June 1992) (“Application of the

was reasonable because \$317 million had been “injected into the broadcasting system ... as a result of application of the benefits test”, compared with a total price for the services involved of \$2,135 million – ie, 14.85%. The Commission then asked whether the test should be applied to undertakings with financial problems or to undertakings above a specific threshold, whether intangible benefits should ever have precedence over tangible benefits, whether it should more clearly define acceptable benefits and whether it should place greater importance on system-wide rather than local benefits.

- 24 In 1993 the CRTC decided to make decisions case by case with respect to intangible benefits, local benefits, and local ownership preference – and to exempt unprofitable radio undertakings and cable systems with fewer than 2,000 subscribers from the benefits test.⁴²
- 25 The CRTC subsequently eliminated tangible benefits from all ownership applications involving BDUs three years later.⁴³ Public Notice CRTC 1996-69 explained that the CRTC no longer required a benefits test because it had eliminated restrictions on entry in the BDU sector, and was encouraging the entry of “new competitors using a variety of distribution technologies”.

C The current tangible benefits policy and the concerns it raises

- 26 The CRTC’s current approach to tangible benefits is based on at least seven different policy statements, issued at different times and under different circumstances, for different classes of broadcasting undertaking.

1 All broadcasting services

- 27 The CRTC has said that applications that increase consolidated media ownership “should include improvements to the quality of the programming offered, including news and information programming”.⁴⁴

Benefits Test”). It reviewed transactions involving radio from 1985, and those involving cable and television from 1986.

⁴² *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1993-68 (Ottawa, 26 May 1993).

⁴³ *CALL FOR COMMENTS ON A PROPOSED APPROACH FOR THE REGULATION OF BROADCASTING DISTRIBUTION UNDERTAKINGS*, Public Notice CRTC 1996-69 (Ottawa, 17 May 1996).

⁴⁴ *Diversity of Voices*, Broadcasting Public Notice CRTC 2008-4 (Ottawa, 15 January 2008) at ¶136: 36. With respect to quality of voices, the Commission considers that any benefits related to increased consolidation in the Canadian broadcasting system should include improvements to the quality of the programming offered, including news and information programming offered at both the local and national level.

28 The CRTC also recently clarified in Broadcasting Decision CRTC 2013-310 that “an appropriate tangible benefits package is only part of the applicant’s obligation to demonstrate that the transaction is in the public interest”⁴⁵ and that it also considers the factors set out in the *Broadcasting Act*, “including the nature of programming and service to the communities involved, as well as regional, social, cultural, economic and financial considerations.”

2 BDUs

29 All BDUs are exempt from the tangible benefits policy due to Public Notice CRTC 1996-69.

3 Radio programming services

30 Profitable radio programming services are generally required to include tangible benefits worth 6% of the value of their ownership transaction, due to the 2006 *Commercial Radio Policy*⁴⁶ and the 2010 *Campus and community radio policy*.⁴⁷ The CRTC has occasionally required tangible benefits in the case of unprofitable radio stations that were the subject of ownership transactions in their first operating term.⁴⁸

4 Television programming services

The assessment of quality is, however, essentially a subjective exercise and one that a regulator should approach with caution. The Commission has the ability to measure certain key indicators of quality. These include financial commitments to produce and acquire programming, the number of hours of different categories of programming that are broadcast, and the audience that programming attracts. However, the Commission considers that any assessment of such indicators is best done at licence renewals.

⁴⁵ At ¶121.

⁴⁶ Public Notice CRTC 2006-158 (Ottawa, 15 December 2006).

⁴⁷ Broadcasting Regulatory Policy CRTC 2010-499 (Ottawa, 22 July 2010) at ¶109.

⁴⁸ *CKKK-FM Peterborough - Acquisition of assets*, Broadcasting Decision CRTC 2009-383 (Ottawa, 26 June 2009):

19. McNabb requested an exemption from the tangible benefits requirements because of the station's financial losses and the fact that it is currently not on air. McNabb contended that the proposed transaction is needed to ensure the station's continued operation. The applicant nevertheless confirmed that it would pursue the transaction if the Commission imposed tangible benefits.

20. The Commission considers that tangible benefits are costs of doing business and the cost of using the public airwaves for commercial gain. It is normal for a station to encounter some financial difficulties in the first few years following its launch. The Commission has considered the applicant's arguments but does not find the rationale satisfactory to support an exemption from the Commission's tangible benefits requirements. Accordingly, the Commission determines that McNabb must pay clear and unequivocal benefits representing a minimum direct financial contribution of \$11,400, i.e. 6% of the value of the transaction, which is \$190,000.

31 Over-the-air, pay and specialty television programming services are generally required to include and fulfill tangible benefits worth 10% of the value of their ownership transaction, due to the 1999 television policy⁴⁹ and Public Notice CRTC 1993-68,⁵⁰ but incrementality is not necessarily mandatory due to Public Notice CRTC 1993-68.⁵¹

D Evaluating the tangible benefits policy

32 While Broadcasting Notice of Consultation 2013-558 provides the Commission and Canadians with a welcome opportunity to review the Commission’s approach to tangible benefits, it has provided no information about the policy’s impact. That information was required to enable the public to comment on the CRTC’s Notice of Consultation, but also to enable it to evaluate any new tangible benefits policy that the CRTC introduces going forward. We note that understanding the impact of the current tangible benefits approach could be especially significant if Parliament decides to introduce staggered levels of foreign ownership, as it has already done in the telecommunications sector.

33 When it previously reviewed its approach to tangible benefits the CRTC published some of the results of its own evaluation. These results are summarized below:

Medium	Number of transactions	Number of undertakings	Total cost of transactions	Accepted benefits	Benefits as % of total cost	Period
Cable TV	48	278	\$842.6	\$97.93	11.6%	1986-92

⁴⁹ *Building on Success – a policy framework for Canadian television*, Public Notice CRTC 1999-97 (Ottawa, 11 June 1999).

⁵⁰ *Ibid.*, at ¶23.

⁵¹ *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2011-163, at ¶¶44-45:

Commission’s analysis and determinations

44. The Commission acknowledges that in recent years the overall viability of conventional television stations has been in question. Recent Commission decisions, including the creation of the LPIF, have been intended to sustain and improve the programming of local conventional stations and ensure Canadians’ access to local OTA programming.

45. The Commission notes that programming funded by tangible benefits is intended to be incremental (i.e. over and above current programming levels). However, the tangible benefits policy set out in Public Notice 1993-68 allows that in certain cases current expenditures can be deemed incremental if their continuation is in doubt because of ongoing financial difficulties. In this case, BCE submitted that without additional funding the current levels of programming on the A-Channels would be unsustainable. The Commission therefore approves BCE’s tangible benefits initiative to sustain local programming in A-Channel markets. Notwithstanding the above, the Commission requires that the A-Channel programming resulting from the benefits spending be incremental to any programming produced to meet LPIF requirements. In addition, the Commission requires BCE to fulfill the commitment made at the hearing to keep the A-Channels in operation for at least three broadcast years starting 1 September 2011.

Radio	79	191	\$409.8	\$58.3	14.0%	1985-92
TV	14	125	\$822.6	\$162.4	18.4%	1986-92
Total	*	594	\$2,075.0	\$318.6	15.4%	
Public Notice CRTC 1992-42						
* not included, as some transactions may involve two or more of the media						

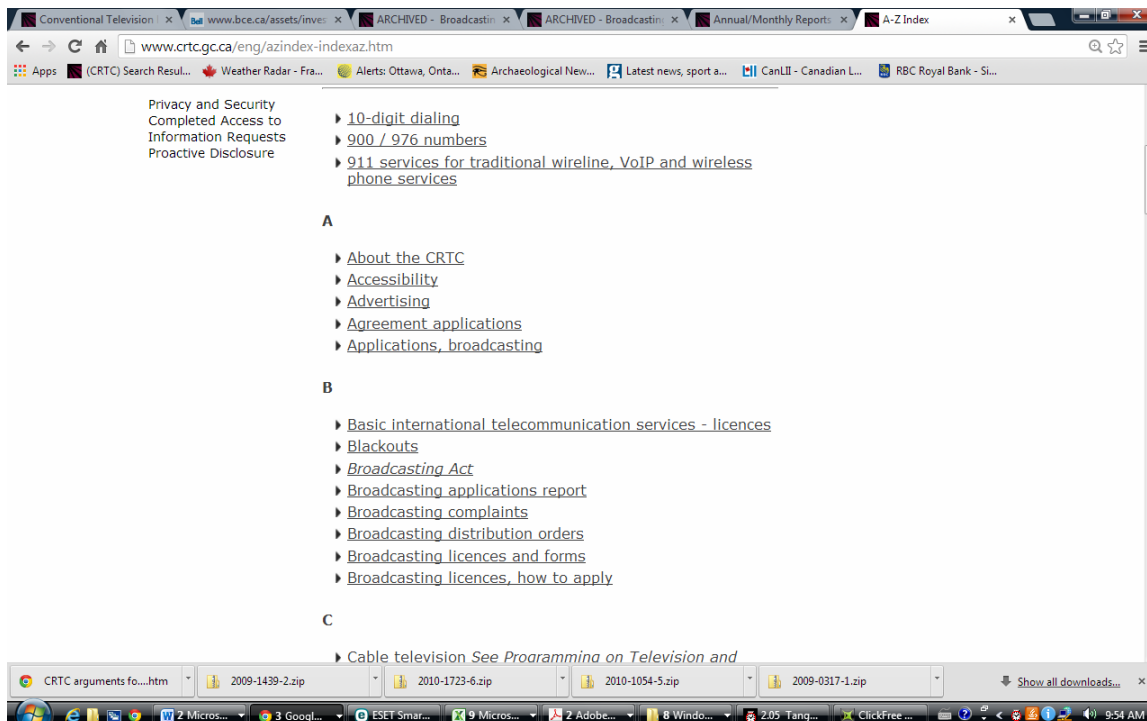
- 34 Evaluating the impact of the Commission’s current tangible benefits policy is difficult, primarily because the CRTC does not publish information about tangible benefits requirements or outcomes in a single location on its website. Locating tangible benefits requirements is not as simple as searching for CRTC decisions online that mention “tangible benefits”, because the CRTC publishes some ownership decisions through ‘information bulletins’ that do not describe tangible benefits offered or accepted in such applications. At times letter decisions approving an ownership change were not available on the CRTC’s website.⁵²
- 35 We acknowledge that broadcasters’ reports about their fulfillment of commitments such as those made for tangible benefits are posted online:

⁵² *Notice of applications received*, Broadcasting Notice of Consultation 2012-295, (Ottawa, 17 May 2012) Item 1, refers to a letter that could not be located through the CRTC’s website search engine:

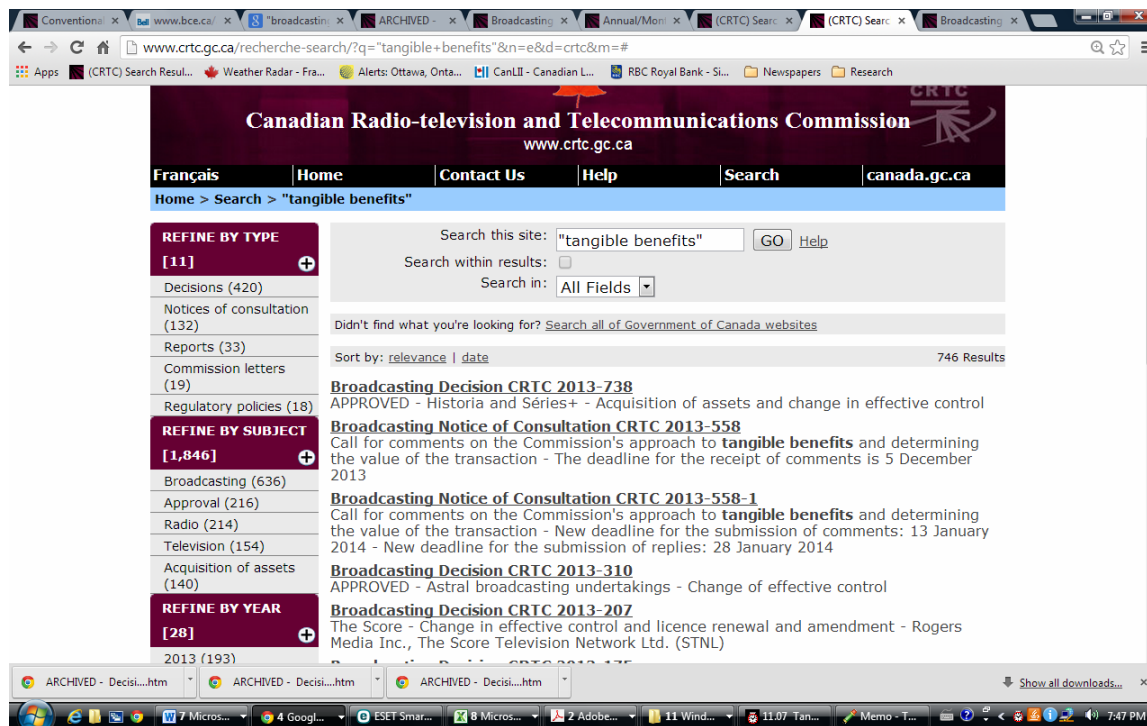
...
 The applicant proposed a tangible benefits package of \$3.833 million, which represents 10% of the value of the 75% interest it holds in TRN and TMLN [i.e., (75% x \$51.113 million) x 10%]. The applicant also proposed to pay the outstanding benefits resulting from the transaction regarding Gol TV approved by the Commission in a letter decision dated 24 April 2009, in the amount of \$559,689.



36 Unfortunately, it is difficult to find either these “annual reports filed by broadcasters” or the issue of “benefits” in general from the CRTC’s current A-Z index:



- 37 Simply searching for the term, “tangible benefits” generates a confusing melange of 1,846 documents:

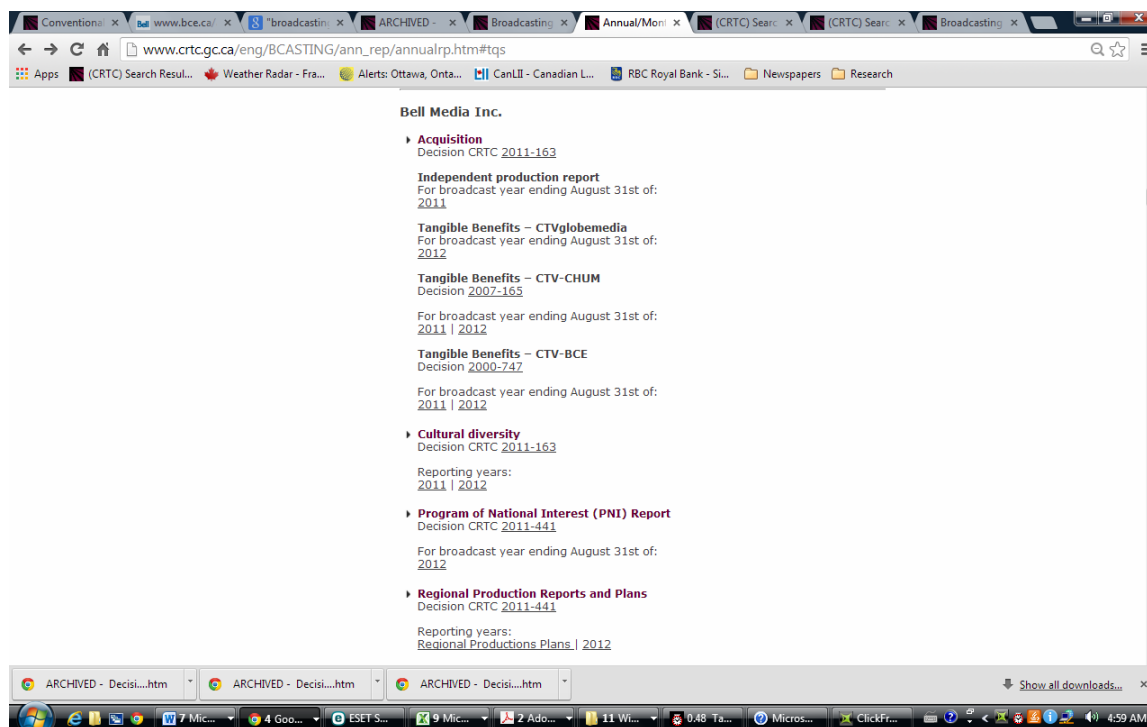


- 38 That said, the Forum reviewed 147 decisions involving transfers of broadcast ownership, from January 1, 2000, to the present; the CRTC approved the applications in 144 of these decisions. We tracked prices paid, CRTC valuations and levels of tangible and intangible benefits, to the extent that this information was available.⁵³
- 39 We encountered several problems in attempting to collect information about tangible benefits. For example, the CRTC provides little or no information about BDU ownership transaction costs in decisions that approve ownership transfers of these undertakings: the absence of this information makes it impossible for the public to evaluate the impact of the CRTC’s decision to exempt BDUs from the benefits policy.
- 40 Ownership decisions announced through *Information Bulletins* do not provide information about their costs or the benefits they are expected to deliver to the

⁵³ *Local Management Agreements*, Public Notice CRTC 1999-176 (Ottawa, 1 November 1999).

broadcasting system. It was only occasionally possible to obtain costs information by reviewing the documents filed with such applications.

- 41 When CRTC decisions deferred the calculation of tangible benefits in specific transactions it was difficult and at times impossible to locate the final tally of benefit commitments. For example, in *Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310 (Ottawa, 27 June 2013) the CRTC directed BCE to file a revised proposal for the tangible benefits it proposed for radio, by 29 July 2013 and to submit annual reports about its tangible benefits expenditures. We could not locate the revised proposal on the CRTC’s website (searching for “2013-310 radio”), or through the CRTC website list of reports submitted by BCE regarding various tangible benefits:



- 42 Considering these difficulties, the CRTC should have published information about ownership transactions and tangible benefits, as it did in its 1992 review. That said, our results found that tangible benefits amounted to less than 8% of the cost of transactions involving 622 or more⁵⁴ undertakings:

⁵⁴ The numbers of BDU undertakings involved in transactions are not consistently identified in CRTC decisions.

Approved ownership transactions and tangible benefits: 2000-2014				
Medium	Number of undertakings	Total cost of transactions (\$M)	Accepted benefits (\$M)	Benefits as % of total cost
BDU	Unknown	\$2,507	\$0	0.0%
Radio	469	\$1,668	\$221	
Television				
OTA	118	\$731	\$536	
Pay & sp	193	\$4,210	\$248	
Subtotal, television	311	\$4,940	\$783	
Total	622	\$25,070	\$1,801	7.2%

1 BDU exemption from tangible benefits - \$291 million opportunity cost

43 The CRTC’s 1992 review of the benefits test found that it approved 48 BDU transactions between 1986 and 1992.⁵⁵ Buyers paid \$842.6 million for 278 cable systems, with tangible benefits worth 11.6% of this cost, or \$97.9 million.

44 Having exempted BDUs from the application of its tangible benefits policy, the CRTC now rarely discusses either the price of BDU ownership transactions, or the manner in which they may benefit the broadcasting system or the communities the BDUs were licensed to serve.

45 We identified nine BDU ownership transactions that the CRTC approved, from 2000 to 2014. If pricing information was not included in the CRTC’s decisions we reviewed news articles discussing the transactions and used their pricing estimates if these were provided. The price paid to change ownership of four of the nine BDU ownership transactions identified from 2000 to 2014 totalled \$2.5 billion. If the CRTC had not adopted its current tangible benefits policy, four BDU transactions alone would have yielded \$290.8 million in tangible benefits.

2 Radio – loss of local benefits

46 The CRTC’s 1992 review of the benefits test found that it approved 79 radio transactions between 1986 and 1992.⁵⁶ Buyers paid \$409.8 million for 191 radio stations, with tangible benefits worth 14% of this cost, or \$58.3 million.

⁵⁵ *Assessment of the Impact of the Benefits Test Applied at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1992-42 (Ottawa, 15 June 1992) (“The Cable Television Sector”).

47 We identified 73 decisions from 2000 to 2014, in which the CRTC approved applications to change the ownership of 469 radio stations. As mentioned above, calculating the total price paid and tangible benefits offered for these stations overall was difficult because the CRTC does not consistently report the prices paid for unprofitable undertakings, and often revises the ‘value’ of different elements of ownership transactions without providing a detailed summary of the revised valuation and benefits for each type of undertaking.

48 The total paid for radio stations in 39 of these decisions was \$1,668 million, with benefits of \$221 million (ie, 13.2% of transactions costs); reviewed individually, however, decisions generally reflected tangible benefits as being worth 6% of prices mentioned for radio stations. Five decisions approving ownership changes for radio in which benefits were not required due to the stations’ lack of profitability in the preceding three years, involved costs paid ranging from \$0.3⁵⁷ to \$5.5 million⁵⁸.

49 Our review of tangible benefits decisions found that the adoption of an approach that mandates the allocation of specific percentages of the prices paid by ownership applications has led to the loss of discussion about non-monetary benefits from radio ownership transactions. Take the example of radio, for which local programming has been described as key.⁵⁹

50 Of the 73 decisions involving radio ownership applications, just 6 mentioned local programming, specified incremental increases in weekly local news, or referred to the hiring of additional local staff.

3 **Television – from thriving to barely surviving**

51 The CRTC’s 1992 review of the benefits test found that it approved 14 TV transactions between 1986 and 1992.⁶⁰ Buyers paid \$882.6 million for 125 television stations, with tangible benefits worth 18.4% of this cost, or \$162.4 million.

52 We identified 22 transactions involving the ownership of 118 television stations, and 48 decisions involving the ownership of pay or specialty television services.

⁵⁶ Public Notice CRTC 1992-42 (“The Cable Television Sector”).

⁵⁷ Broadcasting Decision CRTC 2008-128.

⁵⁸ Broadcasting Decision CRTC 2011-661.

⁵⁹ CRTC, *Public Hearing Transcript*, (Montréal, 10 September 2012) at ¶302: “... certainly from a radio perspective, local is obviously the key metric that’s involved in running radio stations. Any radio station that’s not intensely local is not going to be successful in its market.” (Chris Gordon, President, Local Radio and Television, Bell Media)

⁶⁰ Public Notice CRTC 1992-42 (“The Cable Television Sector”).

Unfortunately, decisions sometimes combine the prices of conventional and pay and specialty television services, making it difficult to determine which benefits apply to which services. From 2000 to 2014 television and pay and specialty ownership transactions approved by the CRTC involved the exchange of \$4,940 million and \$783 million in tangible benefits (18.6%).

III Benefits of ownership

53 Broadcasters that own more than one broadcasting station (MSOs) enjoy several advantages that single-station owners do not. Stations can share programming, technical, administrative and sales costs.⁶¹

54 Owning more than one station in a single location also allows owners to maximize advertising income – as they can develop rate cards to reflect the sale of time on individual or all of their stations,⁶² or tailor each station’s programming to serve different audience segments. (In competitive markets, by contrast, stations may choose to maximize their profits by appealing to the largest audience segment.)⁶³

55 In brief, reducing costs for individual stations while the stations’ revenues remain the same or grow, raises each station’s profit margin and benefits MSOs.

56 Cross-media ownership can also benefit broadcasters, as Bell explained in 2013:⁶⁴

Additionally, in conjunction with local TV assets, we [Bell radio services] will pursue opportunities that can leverage our promotional capabilities, provide an expanded

⁶¹ For example, when Astral applied for Bell to be allowed to buy Astral, it explained that it did not want “to divest itself of CJAD, CJFM-FM or CHOM-FM to comply with the Common Ownership Policy because those three stations share technical, administrative and sales resources, and pool the costs of certain English-language programming, such as traffic and weather.”
 Broadcasting Decision CRTC 2013-310, at ¶107.

⁶² *Public Announcement*, Decision CRTC 71-104 (Ottawa, 11 March 1971) at 2:
 ... The Commission agrees that the means required for maintenance and improvement of the services from CKNX-TV will be more readily secured by establishing an attractive combined rate with CFPL-TV for national selective advertising. ...

⁶³ Broadcasting Decision CRTC 2004-114 at ¶16.

⁶⁴ BCE, *Annual Report 2012* at 27:
 Bell Media derives the majority of its revenues from the sale of advertising airtime on its TV, radio and digital media properties to both local and national advertisers across a wide range of industry sectors. Considerable revenue also is generated from fees payable by the broadcast distributors for carrying pay, PPV and specialty services, which are subject to negotiations between the broadcast distributors and Bell Media’s programming services.

platform for content sharing, and offer synergistic co-location opportunities where practical.⁶⁵

- 57 Multiple-station and multiple-platform ownership heightens the disadvantages of concentrated media ownership for the public, however. Apart from concerns that programming diversity will decrease as concentration increases as the number of potential buyers of independent productions decreases,⁶⁶ that debt may impair service,⁶⁷ the Forum is especially concerned that large broadcasters will use their control over media as a pulpit, so to speak, to influence the discussion of local, regional and national matters of concern.⁶⁸
- 58 As for the public, traditional claims about the benefits they will obtain from the approval of ownership applications include
- the establishment of financial stability,⁶⁹
 - maximized distribution of programming services⁷⁰
 - the delivery of “new, attractive content” to audiences⁷¹
 - Increased diversity of ownership⁷² and
 - Increased opportunities for Canadian creators, artists and producers “to showcase their talent”⁷³

⁶⁵ BCE, *Annual Report 2012* at 29.

⁶⁶ Broadcasting Decision CRTC 2013-738 at ¶150.

⁶⁷ In *Public Announcement*, Decision CRTC 74-189 (Ottawa, 5 July 1974) at 1 (approving CHUM Limited’s purchase of CFRW and CFRW-FM Winnipeg), the Commission said that it wd “insist that financial obligations undertaken by purchasers not impinge on their obligations to maintain innovative and varied programming in accordance with the objectives of the Broadcasting Act.”

See also *Public Announcement*, Decision CRTC 74-425 (Ottawa, 21 November 1974).

⁶⁸ In at 2, the Commission denied Campeau Corporation’s purchase of Bushnell Communications, in part due to

... the concerns expressed by the interveners regarding the possible conflicts of interest that might arise between the objectives of a company engaged in the development and management of real estate and the responsibilities imposed on broadcasters by the Broadcasting Act. The Commission agrees that such public issues as government housing policies, regional planning, the re-zoning of lands and the relationship of landlords to tenants contain a potential for conflict between the objectives of a developer and manager of real estate and the responsibilities of broadcasters to provide balanced opportunity for the expression of differing views on matters of public concern. ...

⁶⁹ Broadcasting Decision CRTC 2013-738 at ¶120.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*, at ¶125.

⁷³ *Ibid.*, at ¶126.

59 The CRTC has not published any empirical research about this issue, however, suggesting that it is less concerned by ‘ownership chill’ than with (for example) understanding other issues, such as the mechanics of baseball arbitration.⁷⁴

IV Response to CRTC questions

A Third-party funding

Q.1 Is it appropriate to require purchasers to direct a percentage of tangible benefits to the CMF and CIPFs as set out in the Commission’s proposal? If not, what other approach would be appropriate?

60 The CMF supports four of the 26 subcategories of programming monitored by the CRTC – specifically, children’s programming, documentaries, dramas, and performing and variety arts programming.

CRTC programming subcategories (Schedule I of the <i>Television Broadcasting Regulations</i> , 1987)	CMF support
(1) News	
(2) (a) Analysis and Interpretation	
(2) (b) Long-form documentary	CMF support
(3) Reporting and Actualities	
(4) Religion	
(5) (a) Formal education and pre-school	
(5) (b) Informal education/Recreation and leisure	
(6) (a) Professional sports	
(b) Amateur sports	
(7) (a) Ongoing Dramatic Series	CMF support
(7) (b) Ongoing comedy series (sitcoms)	
(7) (c) Specials, mini-series or made-for-TV feature films	
(7) (d) Theatrical feature films aired on TV	
(7) (e) Animated television programs and films	
(7) (f) Programs of comedy sketches, improvisation, unscripted works, stand-up comedy	
(7) (g) Other drama	
(8) (a) Music and dance other than music video programs or clips	CMF support
(8) (b) Music video clips	
(8) (c) Music video programs	
(9) Variety	CMF support
(10) Game shows	

⁷⁴ Samuel J. Reich, *Structuring Baseball's "Final Offer" Arbitration process for use in proceedings before the CRTC: A report* (2009).

(11) (a) General entertainment and human interest	
(11) (b) Reality television	
(12) Interstitials	
(13) Public service announcements	
(14) Infomercials, promotional and corporate videos	
Total categories and subcategories: 26	CMF supported: 9

- 61 We agree that purchasers should be permitted to direct a portion of their tangible benefits to the production funds that support Canadian programming, and we generally support the Commission’s proposal for allocating the portion of tangible benefits flowing to on-screen program production: with at least 80% of such funds going to the CMF, with a maximum of 20% going to CIPFs.
- 62 We also support the proposal that purchasers be permitted to allocate up to 20% of all tangible benefits from their transactions to initiatives of their choice, with certain qualifications. Such initiatives should either fall within the range of eligible initiatives already approved by the Commission, or if not already approved, with the CRTC’s consent before allocations are made. Again, we strongly recommend that the CRTC develop a reporting framework in consultation with the public and other interested parties, to ensure that over time the results and impact of this aspect of the CRTC’s tangible benefits policy can be and are monitored consistently from one fund to the next.
- 63 We would not support the extension of tangible benefits funding to program categories beyond those now in place – to news, analysis and reporting, for instance. The CRTC should instead use its licensing regime to ensure that OTA television and radio stations, as general-interest programming services, provide minimum levels of local, regional and national news, analysis and reporting.⁷⁵

Q2. Is the proposed allocation of funds between the CMF and CIPFs appropriate? If not, what allocation would be appropriate?

- 64 While the 80%-20% allocation of funds between the CMF and CIPFs appears appropriate, we would support an increase in the amount of funding directed towards the CMF.

⁷⁵ To avoid the well-known problem of floors and ceilings (in which minimum levels tend to become glass ceilings beyond which no progress is made) we suggest rewarding licensees that significantly exceed such levels with full-term renewals (with the remainder receiving shorter-than-possible terms).

65 We do not support raising the proportion of funding directed towards CIPFs because it is unclear that a variety of smaller funding organizations will better generate the coherent mass of high-quality programming needed to meet the public's interest in such programming than the CMF.

66 CIPFs may also focus on a limited segment of program genres that suit the purposes of broadcasters, rather than the broadcasting system: while nothing prevents broadcasters from funding programming that meets their requirements, the history of Canada's broadcasting system has clearly demonstrated the reluctance of broadcasters to fund national programming of national importance without regulatory intervention.

Q3. Would reporting on the implementation of tangible benefits through the Commission's Communications Monitoring Report be appropriate and adequate?

67 Reporting on the implementation of tangible benefits through the Commission's *Communications Monitoring Report* would be appropriate, but inadequate. The CRTC should also establish a separate section on its website to enable funds to give the public easier and more direct access to this information. It should enable funds to submit and update information more often than every 12 months, and would therefore provide a more accurate description of the status of tangible benefits directed towards national-level programming.

68 Frequent and regular updates about developments in Canada's broadcasting system that affect the public are as important, we submit, as timely and regular updates about the financial status of individual sectors of the broadcasting system. We note, for example, that in the CRTC's 2012 summary of financial and other statistics for private radio, it describes its reasons for providing market-based reports as follows:

In Broadcasting Public Notice CRTC 2006-159, the Commission indicated that it would release aggregate data on small, medium and large markets on an annual basis in order to provide the broadcasting industry with current and meaningful data on the health of individual radio markets. This report presents statistical and financial summaries on the private commercial radio industry by market for the broadcast year ended August 31, 2012 with comparative information for the four previous years.

69 We strongly recommend that the CRTC develop a reporting framework in consultation with the public and other interested parties, to ensure that over time the results and impact of this aspect of the CRTC's tangible benefits policy can be and are monitored consistently from one fund to the next. Each fund should specifically provide a succinct report on the original hours of program production that their funding has produced (not funded) in each broadcast year. The public will benefit from reports that provide current and meaningful data about the impact of tangible benefits, and the funds supported by these benefits, on Canada's broadcasting system.

B Discretionary initiatives

Q.4 Is the proportion of tangible benefits that may be allocated to discretionary initiatives appropriate? If not, what proportion would be appropriate, and why?

- 70 The Forum supports the current proportion of tangible benefits allocated to discretionary initiatives, with several qualifications.
- 71 We suggest that the CRTC use its decisions, policy statements and informational bulletins to encourage over-the-air and radio broadcasters to allocate discretionary tangible benefits towards local initiatives that will support local program production and/or local schools' arts-based initiatives (ie, purchase of musical or audio-visual equipment).
- 72 The CRTC should also develop a webpage to facilitate access by local groups, such as schools, to information (including up-to-date contact data for broadcasters that have chosen to support discretionary initiatives) about accessing tangible benefits resources.
- 73 While broadcasters should be free to allocate a percentage of the funding they allocate to discretionary initiatives, funding to support public participation should also be a non-discretionary component of tangible benefits transactions. (In other words, broadcasters should always be permitted to strengthen support to public participation, but that support should not be discretionary.)

Q.5 Do the criteria set out above ensure that the discretionary initiatives proposed by applicants will not be self-serving? If not, what other criteria would be appropriate?

- 74 While welcoming the CRTC's efforts to restrict the degree to which discretionary initiatives are 'self-serving', it would be unreasonable to expect the CRTC's criteria to "ensure" the complete elimination of self-service.
- 75 In addition to the approach outlined by Broadcasting Notice of Consultation 2013-558, the Commission should retain its current, flexible approach of evaluating tangible benefit discretionary initiatives case by case, and should encourage broadcasters to seek guidance from the Commission as required. At all times, however, broadcasters should demonstrate how the initiatives they are proposing serve to implement Parliament's objectives for Canada's broadcasting system, as set out in section 3 of the *Broadcasting Act*.

Q.6 Is the proposed list of discretionary initiatives sufficient? If not, what additions should be made and why?

- 76 The CRTC has included discretionary initiatives directed towards "post-secondary programs" focussed on communications or journalism. Many elementary and secondary schools have reduced or eliminated performing-arts related programming

such as music or theatrical studies due to lack of funds. We suggest that OTA and radio broadcasters be encouraged to support local schools, for example by funding the purchase and maintenance of musical and audio-visual equipment.

C Radio

Q.7 Does the current approach for the allocation of tangible benefits for radio undertakings remain appropriate? If not, what changes should be made?

77 Stats

78 The current tangible benefits for radio requires broadcasters to allocate at least 75% of the value of such benefits to two industry funds, and 8% to community radio. Broadcasters may allocate the remaining 17% to eligible discretionary initiatives, or to the industry funds:

3% to the Radio Starmaker Fund or Fonds Radiostar;	3.0%	50%
1.5% to FACTOR or MUSICACTION;	1.5%	25%
1 % at the discretion of the purchaser, to any eligible CCD initiative; and	1.0%	17%
0.5% to the Community Radio Fund of Canada (CRFC).	0.5%	8%
Total benefits	0.06	100%

79 The benefits that radio ownership transactions have delivered to Canada’s broadcasting system are difficult to evaluate. As the CRTC’s annual financial summaries for radio, for example, provide no information on the level of Canadian or non-Canadian programming expenditures of Canada’s private radio broadcasters the public cannot determine whether more concentrated radio ownership is in general benefiting Canada’s broadcasting system.

80 More seriously, given radio’s reputation as a local medium, it is troubling that when it reviewed ownership decisions involving radio from 2000 to 2014, the Forum very few mentioned purchasers’ commitments to strengthen local programming service. The Forum is concerned that the current approach to allocating tangible benefits in radio transactions ignores the importance of strengthening service to local communities. The CRTC should therefore revise its tangible benefits approach to radio transactions to require explicit references to the manner in which radio transfers will increase levels of original local programming, expenditures on original local programming and employment – all of which can clearly and directly benefit local communities.

81 We are also somewhat concerned that the CRTC’s approach to local management agreements may conflict with its tangible benefits policy. The CRTC’s current policy for these agreements was issued in 2005, and includes a reminder that these

agreements “cannot constitute a change in the effective control of an undertaking.”⁷⁶

- 82 In 2008, however, Newcap argued it should not pay benefits for acquiring CKUL Halifax, because it controlled the licensee corporation through a Management Agreement.⁷⁷ Newcap argued that because the CRTC mentioned the Agreement, which transferred \$600,000 a year from Sun Radio to Newcap⁷⁸ in Decision CRTC 2001-764, the CRTC had tacitly consented to a prior change in control. As the CRTC issued its approval of Newcap’s 2008 purchase of CKUL in an Information Bulletin, we do not know whether the transaction constituted a change of control or whether it yielded tangible benefits for the Halifax community.
- 83 The Forum therefore recommends that the CRTC again clarify in its tangible benefits policy that local management agreements do not transfer control, and do not obviate the requirement to make tangible benefits commitments in subsequent ownership transactions.

D Exemptions from the requirement to provide tangible benefits

Q.8 Should tangible benefits generally be provided as part of the transfer of ownership or control of all radio or television programming undertakings? What are the advantages and disadvantages to such an approach?

- 84 Tangible benefits should be provided as part of the transfer of ownership or control of all broadcasting undertakings. A uniform approach to tangible benefits would remove the exemptions currently enjoyed by BDUs, by unprofitable and by insufficiently profitable undertakings.
- 85 The primary advantage of such an approach would be the strengthening of Canada’s broadcasting system; a secondary advantage would be the simplification of the CRTC’s approach to tangible benefits (by eliminating exemptions). Adopting a consistent approach to ownership transfers in broadcasting would bring these applications in line with the CRTC’s requirements for new broadcasting services: in such cases the

⁷⁶ The Commission’s policy on local management agreements (LMAs) - *Determinations concerning the appropriateness of various existing and proposed LMAs, including local sales agreements, between licensees of radio stations serving the same market*, Broadcasting Public Notice CRTC 2005-10 (Ottawa, 31 January 2005), at ¶16.

⁷⁷ Newcap Broadcasting, *Application to transfer the control and ownership of shares currently held by CTV Limited – response to CRTC deficiency questions of 8 April 2008*, Application 2008-0472-5 (Dartmouth, 11 April 2008) at 4.

⁷⁸ *Management Agreement*, (with respect to CIEZ Halifax) 1 January 2002, at s. 5.1.

CRTC requires applicants to demonstrate the benefits their service would bring to the communities they plan to serve and Canada's broadcasting system.⁷⁹

86 The Forum acknowledges that in a very small number of cases, purchasers may lack the financial resources to undertake tangible benefits – the CRTC could and should more carefully examine the 'intangible' benefits offered by continued broadcast service,. For example, the continued local employment of numbers of people to operate broadcasting services represents a clear benefit to the communities they serve, as would any increase in the hours of original programming that stations would produce. When such evidence is available to the Commission, it need not also require traditional tangible benefits. That said, as 'unprofitable' undertakings gain profitability, the CRTC's approach to tangible benefits should enable it to require improved programming service at the time of licence renewal – whether through the traditional initiatives supported by the tangible benefits policy, or through initiatives directed to local communities (such as increased levels of original local programming or employment).

87 The CRTC should also clarify whether tangible benefits apply in cases not involving transfers of ownership. For example, in 2012 the Commission approved Bell Media's application to add new digital transmitters to its CKVR-DT Barrie licence.⁸⁰ The CRTC approved the application, commenting favourably on Bell's commitments

... to maintain a level of 9 hours and 55 minutes of local programming for the Barrie market each broadcast week, which is higher than its current requirement of 7 hours of local programming; to keep the station in operation for the duration of its licence term; and not to solicit local advertising in the markets served by the new transmitters. ...⁸¹

88 The Forum supports all initiatives that increase original local and Canadian programming for Canadians, and the CRTC should consider whether tangible benefits should apply to a wider range of licensing decisions than ownership transactions alone.

⁷⁹ Beginning in 1968 the CRTC denied applications for new services when these did not enrich the broadcasting system. In *Public Announcement*, Decision CRTC 68-103 (Ottawa, 24 December 1968) at 1, for example, the CRTC denied an application for a new radio station in New Brunswick, because it was "not satisfied that the proposed radio station would enrich or contribute significantly to existing program service in its coverage area."

⁸⁰ *CKVR-DT Barrie – New digital transmitters to serve the areas of Burlington, Fonthill, Fort Erie, Hamilton, Niagara Falls, St. Catharines, Oakville and Welland*, Broadcasting Decision CRTC 2012-51 (Ottawa, 26 January 2012)

⁸¹ *Ibid.*, at ¶21.

Q.9 Under what specific circumstances should the requirement to provide tangible benefits not apply?

- 89 The Forum considers that the requirement to provide tangible benefits should not apply to community and campus broadcasters, as these generally consist of volunteers with few resources whose time is best spent on the production and distribution of programming.
- 90 The CRTC should otherwise require tangible benefits from all other transactions involving the transfer of ownership or control of broadcasting undertakings. In other words, transactions involving BDUs, unprofitable radio stations or less-profitable-than-desired television stations should incur tangible benefits.
- 91 The CRTC eliminated tangible benefits from all ownership applications involving BDUs in 1996 because it had dropped “all or most of the existing licensing restrictions on market entry” in the BDU sector and was encouraging the entry of “new competitors using a variety of distribution technologies”.⁸²
- 92 The Commission’s 1996 exemption decision for BDUs has several problematic features. First, no clear evidence and no reasons were given as to why reduced regulatory requirements for obtaining broadcasting licences outweighed the necessity to strengthen Canada’s broadcasting system.
- 93 Second, it is unclear whether open entry actually exists for the BDU sector. As the number of BDU applications received by the CRTC under its new open-entry BDU licensing approach is not actually known the degree of ‘open entry’ cannot be measured.⁸³ The CRTC moreover denied four applications for new distribution undertakings to serve locations in Ontario in 1997, instead of granting them as contemplated by an easier open-market approach;⁸⁴ it also denied an application to launch a new BDU to serve Yarmouth in 1998 because the applicant had asked for the wrong class of BDU licence and the CRTC had serious concerns about the viability of its business plan.⁸⁵ Such decisions indicate that the open-entry approach may be partially closed.

⁸² *CALL FOR COMMENTS ON A PROPOSED APPROACH FOR THE REGULATION OF BROADCASTING DISTRIBUTION UNDERTAKINGS*, Public Notice CRTC 1996-69 (Ottawa, 17 May 1996).

⁸³ The CRTC can, for example, return applications to applicants without gazetting the applications – meaning that no public record of the application exists.

⁸⁴ *Application by Teleglobe Inc. and others OBCI, to be known as LOOK TV Inc. for a licence for a new MDS radiocommunication distribution undertaking – Approved*, Broadcasting Decision CRTC 97-370 (Ottawa, 6 August 1997) at ¶1.

⁸⁵ *Interventions and reasons for decision*, Broadcasting Decision CRTC 98-489 (Ottawa, 30 October 1998).

- 94 Third, the tangible benefits exemption effectively creates two-tier regulation of Canadian broadcasters. The licensees of one class of broadcasting service (programming) are required to implement Parliament’s objectives for the broadcasting system,⁸⁶ while licensees of another broadcasting service (distribution) are not. The CRTC has not explained why BDUs differ from programming undertakings so significantly that they are exempted from a key component of broadcast regulation – which is the strengthening of Canada’s broadcasting system through financial and other investments.
- 95 Finally, exempting BDUs from the tangible benefits requirement introduces an artificial distinction between programming and distribution services that is not recognized by the *Broadcasting Act*. While Parliament introduced special responsibilities for distribution undertakings in 1991,⁸⁷ it did not establish that distribution undertakings are exempt from the remaining section 3 requirements that focus predominantly on the creation, production and broadcast of programming. It is not clear why programming services must bear the entire weight of strengthening a broadcasting system that includes both programming and distribution undertakings.
- 96 The BDU exemption from tangible benefits is unfair to the Canadian public, which deserves a growing and strengthened broadcasting system serving their needs and interests. Removing the exemption will support the production of new Canadian audio-visual programming, will increase employment opportunities for Canadians, will provide Canadian radio and television stations with more program choice, and will provide Canadians with more programming choices.

E Schedule for the payment of tangible benefits

Q.10 Should the Commission ensure that all expenditures on tangible benefits are made in advance of the closing of the transaction as a means to ensure that initiatives are funded and for ease of administration? If not, why would such an approach not be desirable?

- 97 The Forum does not agree that the CRTC should ensure that all expenditures on tangible benefits are made in advance of the closing of the transaction as a means of ensuring that initiatives are funded and to ease administration.
- 98 As we understand it, the CRTC’s current approach to tangible benefits requires purchasers to fulfill tangible benefits scheduled to be paid, after the transaction’s close. The CRTC can require applicants to adhere to such commitments through

⁸⁶ Under s. 9(1)(b)(i) of the *Broadcasting Act*.
⁸⁷ S. 3(1)(t).

condition of licence, and broadcasters that subsequently want to change the benefits selected by their predecessor are free to apply to amend the terms of their licences. Provided tangible benefits commitments are clearly set out in the CRTC's ownership decision, non-licensee participants in the broadcasting system such as independent producers, guilds, associations and unions benefit from the certainty provided by this approach.

- 99 In our view, requiring such expenditures to be paid before the close of the transaction may benefit designated funds that simply receive expected payments early, but will otherwise be difficult to administer and will create uncertainty in Canadian program production. Administrative difficulties will arise because broadcasters and potential recipients will have to rush to locate eligible initiatives to fund, while program productions expecting to receive stable tangible benefits funding from one year to the next may either be abandoned or required to advance program production plans (which may not be possible if those involved in the productions have undertaken contractual commitments elsewhere).

Q.11 When a programming undertaking changes ownership, should the Commission ensure that all outstanding tangible benefits from a previous purchase be expended in advance of the new transaction?

- 100 The CRTC does not generally report on broadcasters' progress in meeting their tangible benefit requirements until their licences are renewed or they become the subject of an ownership application. For example, Canadians only learned in 2013 that the benefits promised from the transfer of ownership of CJMB-FM Peterborough in Broadcasting Decision CRTC 2009-383 were not paid.⁸⁸ In reviewing 147 CRTC ownership decisions from 2000 to 2014 we noted 10 cases in which the CRTC mentioned tangible benefits that were overdue at the time of a second ownership transactions. On average 39.6 months passed between the date of these ownership transactions and a report from the CRTC about broadcasters' delayed fulfillment of their tangible benefits commitments. The overdue amounts totalled \$29.3 million.
- 101 Bearing mind that tangible benefits were developed as a counterweight to the many disadvantages of concentrated communications ownership, delays in fulfilling tangible benefits commitments leave Canadians with all the problems of concentrated ownership, but fewer of the benefits concentration was supposed to deliver.

⁸⁸ *CJMB-FM Peterborough – Acquisition of assets*, Broadcasting Decision CRTC 2013-671 (Ottawa, 11 December 2013) at ¶18.

- 102 Requiring all outstanding benefits to be paid in advance of the new transaction may have several unintended and negative consequences, however.
- 103 First, in cases where undertakings are being transferred because of the current owners' financial weakness, responsibility for the benefits payments may be transferred to the parties seeking CRTC approval of the changes in ownership: this transfer may give the appearance that a transfer of control has occurred without prior CRTC approval, contrary to the current regulatory regime.
- 104 Second, permitting proposed purchasers to fulfill unfulfilled benefits in advance of a CRTC decision approving the transaction may introduce new, subtle pressures for the CRTC to approve the transaction, consequently reducing other parties' ability to participate in the ultimate ownership proceeding on a level footing with the applicant.
- 105 Finally, it is unclear how the Commission would address situations in which a potential purchaser had expended outstanding tangible benefits – but the CRTC ultimately denies the ownership transfer.
- 106 For these reasons the Forum does not support the Commission's proposal, proposing instead that going forward the CRTC continue to include a clear statement of the tangible benefits proposed by ownership applicants, and provide frequent and regular updates of broadcasters' progress in meeting their commitments which are linked to the decisions approving ownership transactions and specified benefits. The absence of such reports now limits the public's ability to evaluate the impact of ownership transactions. For example, when TQS was purchased in 2008, it required V Interactions to broadcast original news segments:⁸⁹ the CRTC did not report until 2012, however, that TQS did not provide any coverage of local sports, arts or shows⁹⁰ and that its local service to five communities consisted of a total of 98 minutes per week of local news segments.⁹¹

F Value of the transaction

⁸⁹ *Change in the effective control of TQS inc. and licence renewals of the television programming undertakings CFJP-TV Montréal, CFJP-DT Montréal, CFAP-TV Québec, CFKM-TV Trois-Rivières, CFKS-TV Sherbrooke, CFRS-TV Saguenay and of the TQS network*, Broadcasting Decision CRTC 2008-129 (Ottawa, 26 June 2008) at ¶¶41 – 49.

⁹⁰ *V Interactions inc. – Review of certain conditions of licence*, Broadcasting Decision CRTC 2012-243 (Ottawa, 26 April 2012) at ¶25.

⁹¹ *Ibid.*, "Impact of the commitments".

Q.12 Should the Commission maintain or modify its approach used to calculate the value of the transaction?

107 The Forum is reserving comment on this question until it reviews the submissions of other parties.

Q.13 How could the Commission clarify and codify its practice with respect to the calculation of the value of the transaction?

108 The Forum shares other parties' concerns about the complexity of the current valuation issue, particularly with respect to accounting issues. We are reserving comment on this question until we have reviewed other parties' comments.

Q.14 What allocation method would most effectively provide for a simpler, consistent and predictable allocation of the value of the transaction?

109 The Forum agrees that the CRTC's current approach to allocating the value of ownership transactions is complex. We are also concerned that lengthy and detailed discussions about the intricacies of allocating value are a distraction that reduces the importance of more fundamental and important questions about the impact of more concentrated ownership on communities and Canada's broadcasting system.

110 The current approach has also left the growth and development of Canada's broadcasting system in a rut that threatens to turn into a dead-end. The rut exists because radio and television broadcasters need not exceed the current 6% and 10% tangible benefits requirements, regardless of the size or scale of each transaction; the dead-end is imminent because the number of broadcasting transactions is dwindling (because fewer independent broadcasters remain, having already been acquired), and because the CRTC has excluded BDUs from tangible benefits requirements since 1996.

111 The Forum recommends that the CRTC require all ownership transactions to strengthen broadcasters' service to local communities and support for Canada's broadcasting system, to the same minimum degree. In other words, the CRTC should replace its current 10%, 6% and 0% approach to TV, radio and BDU benefits, with a single value that applied to all broadcasting undertakings, regardless of their medium, profitability or other factors.⁹² This value should exceed the average value identified in 1992 – ie, 15.4%. While a level of this size would be higher than the current tangible benefits levels, it has the virtue of more closely approximating the

⁹² With the understanding that as the CRTC is not bound by its own precedents, it may from time to time tailor an approach that meets the needs of an individual licensee, as provided for by s. 9(1)(a)(b)(i) of the *Broadcasting Act*.

value placed on acquiring broadcasting undertakings – since the tangible benefits results reported in 1992 were set by ownership applicants, not the CRTC.

112 The Forum also believes the CRTC should consider introducing a premium tangible benefits payment for large transactions – those that involve all the radio and television undertakings in a single city, for example, different media or a number of cities. Currently large and small broadcasters alike pay the same level of benefits – and in some case, very large broadcasters are not contributing to the growth of Canada’s broadcasting system, but merely its continued existence. For example, when BCE – Canada’s largest communications company – applied to buy CTV in 2011, it did not propose to strengthen, but only maintain, local television stations, and then only for a limited period.⁹³

113 This premium should reflect the importance to large broadcasters of increasing their scale within the broadcasting system.

Q. 15 What other steps might be taken to simplify the current process, which is iterative in nature?

114 The Forum is reserving comment on this question until it reviews the submissions of other parties.

Q.16 What other elements of the method related to calculation of the value of the transaction and its allocation should the Commission consider?

115 The Forum’s preference would be for the Commission to adopt a competitive transfer system in which the market could establish the value of holding broadcasting licences in Canada, and provide a mechanism for increasing broadcasters’ willingness to strengthen the broadcasting system.

⁹³ *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2011-163 (Ottawa, 7 March 2011):

Sustaining local programming in A-Channel markets

41. At the hearing, BCE repeatedly stated that the future of the A-Channel stations was uncertain and that these stations needed assistance to maintain their current programming levels. Consequently, in its tangible benefits package of 7 February 2011, BCE proposed to dedicate \$35 million to the A-Channel stations, including \$30 million for local programming and \$5 million for upgrading the master controls for the stations. BCE’s proposal included a promise to keep the A-Channels open for three years, regardless of their financial performance. These benefits would sustain rather than increase the current level of local programming provided by the individual A-Channel stations. BCE submitted that the A-Channels currently provide programming beyond their regulatory obligations and stated that without benefits funding the continued operation of the A-Channels was in doubt.

116 The CRTC dismissed the idea of competitive transfers in 1978, however.⁹⁴ It feared formidable obstacles that might “well constitute an unwarranted interference in the market”.⁹⁵ It is unclear whether these obstacles remain.

V Additional comments

117 In addition to the matters raised in Broadcasting Notice of Consultation 2013-558, the Forum urges the Commission to consider the following issues.

A Strengthen transparency and disclosure

118 The 1976 Federal Court of Appeal decision in *Re CRTC and London Cable*⁹⁶ established that the public is entitled to know and understand the facts offered to support broadcasting applications, and that public hearings of bodies such as the CRTC must provide all parties with a fair opportunity to correct or contradict any relevant evidence. The Court criticized the CRTC’s approach to its public hearings, emphasizing that to be meaningful, the public hearings mandated under the *Broadcasting Act* had to provide “the public with a reasonable opportunity to know the subject-matter of the hearing, and what it involved from the point of view of the public” in time to decide whether to participate in the hearings.

119 The CRTC subsequently introduced the idea of a publicly accessible system of information for broadcasting in 1978. It noted that consideration of broadcasters’ financial position was “an essential element” in assessing “the degree to which they have discharged their duty” to the communities they serve and the broadcasting system, and whether to renew their licences.⁹⁷

⁹⁴ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters, Public Announcement*, (Ottawa, 25 July 1978).

⁹⁵ *Ibid.*, at 44-45:

... The Commission finds, however, that while there is much merit in theory in such a process, there are also such formidable obstacles to its implementation as to render it impracticable. One such obstacle is illustrated by taking the case of the sale of the control bloc only of shares of a holding company which controls a number of licensee and non-licensee companies.

To require surrender of the licences in such a case might be most unjust to those shareholders, (who may even constitute a majority) not in the control bloc. Indeed, the control bloc may well not be large enough to carry the often necessary vote of shareholders to approve surrender of the licences. To demand in such a case competing bids for the control bloc of shares may well constitute an unwarranted interference in the market and extension of Commission jurisdiction and would in any event be of no value to those who wished and were financially able to apply for only one of the licences controlled by the holding company.

⁹⁶ (1976), 67 D.L.R. (3d) 267 (F.C.A.).

⁹⁷ *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters, Public Announcement* (Ottawa, 25 July 1978), at 18.

- 120 A ‘public file’ would include the audited financial statements and three-year financial projections of each broadcast undertaking and all relevant information submitted about applications.⁹⁸ The CRTC presumably intended that access to the public file would reduce complexity in public hearings, because it also proposed to disallow cross-examination “[t]o the extent that the facts are not in dispute”.⁹⁹
- 121 The information made available by the public file is necessary and important for public participation – but the CRTC could and should make additional information available. For example, with electronic stations’ program logs at its disposal, the CRTC could and should include a statistical synopsis to enable the public to compare a station’s current broadcast performance with the improved performance that an ownership transfer would presumably yield.
- 122 Unfortunately, certain approaches of the Commission now conceal more than they disclose. Apart from being issued months after the fact¹⁰⁰ administrative decisions approving ownership transfers generally fail to provide any discussion of price or the tangible and/or intangible benefits that such transfers may deliver. In our view the Commission’s ‘information bulletin’ approach to announcing ownership transactions has the unintended effect of reducing the granting of an important privilege,¹⁰¹ to the level of the inconsequential purchase and sale of candy bars.
- 123 At times the Commission’s decisions also conceal highly relevant information. For example, in evaluating Bell’s application to add two transmitters and its proposal to increase local television programming, the majority decision approving the application did not discuss the station’s recent history. That discussion was left to a minority of Commissioners, who dissented from the decision:

Bell/CTV has “promised” in this decision to increase its local Barrie programming from 7 hours to 9 hours and 55 minutes a week and to keep CKVR-DT in operation until the completion of its licence term in 2017. Given the drastic declines—close to

⁹⁸ *Ibid.*, at 17. ‘Relevant’ information was defined as the information that the Commission or the applicant considered “necessary or desirable in order adequately to assess an application.”

⁹⁹ *Ibid.*, at 25.

¹⁰⁰ Leading to procedural questions about the deadlines for appeals.

¹⁰¹ *Change of effective control - The Chinese News Network and The Chinese Television Network*, Broadcasting Decision CRTC 2008-137 (3 July 2008, Ottawa,) at ¶18:

The Commission notes that a broadcasting licence is a privilege that is granted as the result of an extensive public process that often involves competitive applications. The decision to award a licence to a specific person is based on the merits of the application. The decision takes into consideration the benefits that will accrue both to the Canadian broadcasting system and to those who will be served by the proposed broadcasting undertaking. Consequently, the sale of an unlaunched or of a newly licensed broadcasting undertaking also brings into question the original licensing process.

one-third of local staff laid off and the cancellation of a reportedly well-received local breakfast program little more than two years ago—, it is remarkable that anyone would see this as a major commitment. The latter promise to keep the station in operation is even more difficult to make sense of as it implies an “obligation to serve” normally associated with monopolistic structures in the telecommunications sphere and appears to indicate that the Commission shares the apparent Bell/CTV view that it is the only organization with the ability to operate CKVR-DT and is therefore a quasi-public entity.

Nevertheless we concede there is some modest benefit to Barrie residents in terms of local programming. There is, however, absolutely no evidence of any benefit accruing to the residents of the Golden Horseshoe with this approval.¹⁰²

- 124 The CRTC’s approach to reporting such information is inconsistent, however. In 2010 the Commission described an ownership applicant’s proposal for adding local news programming to the schedules of the stations it sought to acquire – and the Commission explained that the proposal reversed the previous elimination of local programming:

With the support of CHMP-FM and Cogeco Nouvelles as news providers, Cogeco proposed to reintroduce local news and public affairs programming in the schedule of the regional stations in Trois-Rivières, Sherbrooke and Gatineau. This programming would reflect the concerns and issues of these markets and would air in the early morning and at noon.¹⁰³

- 125 The public cannot easily challenge broadcasters’ ownership applications when relevant information such as this is not mentioned by the Commission itself. The Forum urges the Commission to convene interested parties – ie, broadcasters, as well as non-licensed stakeholders such as guilds, associations, unions and public interest organizations – to discuss this issue and develop recommendations.

B Erosion of intangible benefits

- 126 The CRTC’s current tangible benefits policy permits broadcasters to substitute ‘intangible benefits’ for tangible benefits when they provide evidence of financial incapacity. Intangible benefits can, in fact, be very tangible. In 2004, for example, Haliburton

¹⁰² *CKVR-DT Barrie – New digital transmitters to serve the areas of Burlington, Fonthill, Fort Erie, Hamilton, Niagara Falls, St. Catharines, Oakville and Welland, Broadcasting Decision CRTC 2012-51 (Ottawa, 26 January 2012)*

¹⁰³ *Corus Entertainment Inc., on behalf of its wholly owned subsidiaries 591991 B.C. Ltd. and Metromedia CMR Broadcasting Inc., Broadcasting Decision CRTC 2010-962 (Ottawa, 17 December 2010) at ¶19.*

... identified various additional, intangible benefits that it stated would result from approval of the proposed transaction. These included an improved radio service in the Northern Georgian Bay area through the introduction of a live radio voice in Elliot Lake. Further, the applicant emphasized its commitment to enhance the resources and technologies available to CKNR-FM and each of Haliburton's other radio stations in the region.¹⁰⁴

Similarly, in 2011 the purchaser of Sirius and XM proposed to

provide a substantial amount of Aboriginal programming on at least one service before the expiration of the current licence term;

implement no increase to the undiscounted monthly rate for their basic subscription packages prior to 31 December 2011, and any increase in this rate would not apply to existing customers as of that date until 31 August 2012;

make available the same “best of” package of audio programming as is currently offered by Sirius XM in the U.S. to enable subscribers of either XM Canada or Sirius Canada to receive popular programming from the service to which they do not subscribe, subject to the negotiation of successful amendments to their agreements with Sirius XM and any necessary revisions to subscriber management systems;

make reasonable efforts to offer subscribers of either service the ability to subscribe to the content on the existing online media player of either company. The service would be offered at the incremental cost that is incurred to provide the service; [and]

make reasonable efforts to import interoperable radios capable of receiving both the XM and Sirius services, and offer those for sale as soon as practicable.¹⁰⁵

127 The provision of live on-air staff is easily quantified, as are the resources and technologies made available to different stations by ownership transfers, or the provision of time or channel capacity for indigenous broadcasters or programming. In our view, all broadcasters seeking the privilege of operating additional broadcasting undertakings should explain the non-financial benefits that their ownership would deliver to the communities they serve – whether this entails the replacement of voice tracking with live on-air announcers, or the provision of air time to new performing artists. ‘Diversity’, another type of intangible benefit, can also be measured.¹⁰⁶

¹⁰⁴ *CKNR-FM Elliot Lake - Acquisition of Assets*, Broadcasting Decision CRTC 2004-114 (Ottawa, 12 March 2004) at ¶16.

¹⁰⁵ *Canadian Satellite Radio Inc. and Sirius Canada Inc. – Change in effective control*, Broadcasting Decision CRTC 2011-240 (Ottawa, 11 April 2011) at ¶16.

¹⁰⁶ *CIMO-FM Magog and its transmitter CIMO-FM-1 Sherbrooke – Licence renewal and amendment*, Broadcasting Decision CRTC 2010-331 (Ottawa, 31 May 2010):

...

128 As noted previously, locating the annual reports on tangible benefits submitted by broadcasters can be a challenging exercise. The Forum urges the Commission to review and revise its website to provide easier access to important information such as tangible benefits reports.

129 We also suggest that the Commission assist the public by summarizing the results of broadcasters' tangible benefits reports, as these are often long and complex. The Commission might, for example, consider linking decisions that approve ownership transactions to summary reports that provide regular updates on progress in meeting the benefits commitments. The easy availability of such information will enable the public to determine, in years to come, the degree to which the disadvantages of concentrated media ownership have been balanced by tangible benefits and intangible benefits alike.

C Duration of benefits

130 The Forum is very concerned that while ownership transactions can deliver permanent benefits to broadcasters, benefits targeted for the broadcasting system are viewed as temporary. Our sense is that large broadcast ownership applicants now often threaten to close local stations, or fail to strengthen existing local programming services. This approach to the rights and responsibilities of broadcast licensees is at best puzzling, and at worst insulting to the public whose spectrum broadcasters are temporarily licensed to exploit.

131 Fortunately, the CRTC sometimes denies proposals whose benefits are ephemeral, rather than substantial. In 2013, for example, it denied a short-lived initiative that would benefit the applicant, rather than the communities served:

3. In connection with the above-mentioned applications and in response to concerns voiced by the Commission and interveners, Astral committed to strengthen the complementarity of formats among the three networks it would own and to develop programming that would further differentiate the stations of the Radio Énergie (now NRJ) network from those of the Radio Rock Détente network. Regarding monitoring mechanisms, Astral proposed to file an annual report on the diversity of musical selections and Canadian Francophone artists aired during the previous year on each of its predominantly music-based network services, Radio Énergie and Radio Rock Détente. The applicant stated that this would serve as an uncomplicated mechanism that would enable the Commission and the public to follow its progress in this regard. The condition of licence reads as follows:

For the FM stations, submission by the licensee, in each broadcast year starting in 2003 and until expiry of the implementation period for the benefits related to this transaction, of a report, in a form acceptable to the Commission, on the diversity of musical selections broadcast by the two predominantly music-based FM networks, Radio Énergie and Radio Rock Détente.

....

The Commission has reviewed Rogers' proposal for tangible benefits. The Commission accepts the benefits relating to Digital Media Production Scholarships and Amateur Sports Production. However, the Commission is concerned with the proposed Sportsnet Winter Games initiative. Specifically, the Commission is concerned that the proposed expenditure would not meet the requirement of the benefits policy that benefits be directed to the communities served and to the broadcasting system as a whole given that a high proportion of the benefit funds would be devoted to non-programming expenses, that the programming resulting from the initiative would be short-lived and that it would exclusively benefit and be useable by Rogers. Furthermore, the Commission is not convinced that the proposed expenditure would be incremental to the ongoing responsibilities of the existing licensee, as required by the benefits policy, given that sports events tend to be very popular and that consequently such an initiative might be undertaken or realized in the absence of the transaction.

Accordingly, the Commission is of the view that the proposal does not provide sufficient benefits to the Canadian broadcasting system or the community served by The Score as a national English-language service. The Commission therefore directs Rogers to submit an alternate proposal for approval by the Commission by 30 May 2013.¹⁰⁷

- 132 The Commission should encourage more broadcasters to make unequivocal commitments that will strengthen the broadcasting system going forward. A rare example comes from 2010, when Shaw applied to purchase Canwest's television stations, it committed to reinstitute morning news programs in six markets, adding 60 hours of original program production each week, and creating 110 additional jobs.¹⁰⁸ Shaw affirmed that it would maintain this level of additional programming "once the tangible benefits have ended."¹⁰⁹
- 133 The CRTC should use the opportunity of this tangible benefits review to address poorly-veiled or explicit threats of station closures, perhaps using the language it used two years ago when it approved the application to transfer several sports specialty programming services. Specifically, the Commission reminded the applicants that approval of ownership transactions must not "impede the ... willingness of the licensee" to meet its regulatory obligations.¹¹⁰

¹⁰⁷ *The Score – Change in effective control and licence renewal and amendment*, Broadcasting Decision CRTC 2012-207 (Ottawa, 30 April 2013) at ¶20.

¹⁰⁸ *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2010-782 (Ottawa, 22 October 2010), at ¶46.

¹⁰⁹ *Ibid.*, at ¶48.

¹¹⁰ *Leafs TV, Gol TV, NBA TV Canada, Mainstream Sports and Live Music Channel – Change in effective control*, Broadcasting Decision CRTC 2012-443 (Ottawa, 16 August 2012) at ¶15:

134 The CRTC should also require all applicants for ownership transactions to state whether the ‘clear, significant and unequivocal’ benefits they are offering in exchange for the virtually unlimited use of a broadcasting licence will end – and if so, when. Without this information the public cannot determine whether the transient tangible benefits being offered will actually strengthen Canada’s broadcasting system.

VI **Conclusions and recommendations: Canadians’ broadcasting system should thrive, not merely survive**

135 The Forum has appreciated this opportunity to respond to the Commission’s questions and to provide its views about the tangible benefits approach to ownership transactions.

A **Conclusions: ‘benefits’ are no substitute for diversity and competition**

136 The Forum has fundamental problem with the tangible benefits policy of the Commission.

137 In our view, this policy obscures the real problem with transfers of ownership, by making it seem as if there is a balanced trade-off: increased concentration of ownership (and commensurate diminution of the diversity of voices) in the system, versus some measure of monetary compensation. Money – even when it reaches its intended target – cannot compensate the public for the absence of information they are entitled to have, and would probably have if Canada’s broadcasting system had more competing owners.

138 The tangible benefits policy of the Commission, in our view, is merely a smoke-screen to obscure the harm that continues to be done to less tangible – but no less important – elements of our society.

139 A related concern is that so little information is available with respect to both quantifiable and unquantifiable aspects of these transactions. The CRTC, Parliament

When deciding whether to approve a proposed ownership transaction, the Commission must be persuaded that the applicants have established that an approval is in the public interest. **The Commission must also be assured that approval will not impede the ability or willingness of the licensee to meet its obligations under the Broadcasting Act (the Act), the Direction to the CRTC (Ineligibility of Non-Canadians) (the Direction), and any relevant regulatory policies and regulations.** Further, in Broadcasting Public Notice 2007-53, the Commission reiterated its 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 remains an appropriate mechanism for ensuring that the public interest is served.
[bold font added]

and the public should be extremely concerned that billions of dollars of ownership transactions have failed to generate measurable improvements in Canadian and local programming expenditures.

140 That said, the Forum supports the Commission's desire to 'streamline' its tangible benefits approach – if the objective is to serve the public's interest by raising the level of tangible benefits directed to the broadcasting system, by permanently strengthening the system's performance through the creation, production and broadcast of increasing levels of original Canadian content, and higher levels of employment, and by at least increasing the level of original news and information being reported daily to Canadian communities.

141 Ensuring that tangible benefits strengthen Canada's broadcasting system will require not just the removal of unfounded exemptions and an increase in the overall level of benefits to be required from ownership transactions, but more, and easier-to-find monitoring of the results of the CRTC's tangible benefits approach. Difficult-to-find or entirely absent empirical evidence about tangible benefits makes it impossible for Parliament and Canadians to evaluate the degree to which Canada's broadcasting policy is being achieved, or whether the public interest is being served.

B Recommendations: enable quantitative assessment of ownership transactions

1 Evaluate competitive ownership transfer systems

142 The CRTC has never undertaken a public review of its decision to prohibit competitive ownership transfers. Before consigning the next decade of progress in Canada's broadcasting system to the whimsy of the marketplace, the CRTC should collect and publish information about the potential advantages and disadvantages of competitive transfers – particularly with respect to stations that existing owners threaten to close.

2 Apply to all broadcasting undertakings

143 The CRTC should revisit its 1996 decision to exempt BDUs from tangible benefits requirements and in the absence of compelling evidence of unreasonable disadvantages to shareholders, should apply the tangible benefits approach to BDU transactions.

144 The CRTC should also apply the tangible benefits approach to all broadcasting services, including unprofitable or not-as-profitable-as-hoped undertakings.

3 Report clearly on tangible and intangible benefits in all ownership decisions

145 Regardless of their size, the tangible and intangible benefit commitments emerging from each ownership transaction should be summarized at the end of each licensing decision (or information bulletin) in a systematic fashion that permits comparison between undertakings. Details about the numbers of undertakings involved (by type), their price and the benefits proffered should be included.

4 *Modernize the CRTC's ownership reporting system.*

146 The CRTC's current PDF single-point-in-time approach to reporting ownership is inadequate, outdated and difficult to use.

147 The CRTC should develop a publicly-accessible ownership database to track ownership trends over time, to assist the public in evaluating ownership transactions going forward.

5 *Develop an easy-to-use and up-to-date system for benefits*

148 The CRTC should provide easy-to-use synopses of benefits reports and link these to ownership decisions, to assist the public in evaluating the impact of ownership transactions.

149 The CRTC should also develop a webpage to report frequently and regularly on levels of original and original, local content being broadcast by individual programming services. This webpage should include information about broadcasters that have not fulfilled tangible benefits commitments.

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