

Competition Policy Review Panel
280 Albert Street, 10th Floor
Ottawa, Ontario, K1A 0H5

11 January 2008

Sent via e-mail: Competitionreview@ic.gc.ca

Dear Mr. L. R. Wilson:

CanWest MediaWorks Inc. (“CanWest”) is pleased to submit the following comments for consideration by the Competition Policy Review Panel (the “Panel”). Given the Panel’s stated mandate to limit responses to a maximum of twenty (20) pages (including attachments), we have primarily focused our response on current taxation policy, and the sectoral investment regime related to Canadian Broadcasting.

We sincerely hope that our submission sheds further light on specific issues canvassed in the paper “Sharpening Canada’s Competitive Edge” (the “Consultation Paper”) – and appreciate the opportunity to participate in this important process. The submission addresses the following questions contained in the Consultation Paper:

- 1. Do Canada’s economic policies appropriately reflect our increased integration with the North American and global economy? How might these policies be changed to better reflect this new competitive environment?**
- 2. What changes, if any, are required to Canada’s sectoral investment regimes to minimize or eliminate negative impacts on Canada’s competitiveness?**
- 3. What have been the impacts of these investment regimes on productivity and competitiveness in the specific sectors?**
- 4. Are there alternative mechanisms that would achieve the non-economic policy objectives of the sector while also ensuring maximum competitiveness of firms operating in the sector?**

Should the Panel require additional information concerning this submission, or seek direct consultation, we would be pleased to help.

Sincerely,

CANWEST MEDIAWORKS INC.



Per: Charlotte Bell
Vice-President, Regulatory Affairs

Executive Summary

The historical presence of sector-specific restrictions and controls on foreign investment should not somehow result in a default to a *status quo* position in those sectors. After all, if those sectors are important enough to have distinct foreign investment restrictions and controls, it logically follows that those same sectors should have a fine-tuned and modern approach to accessing foreign capital, ideas, people, and other resources in order to survive and adapt to rapidly changing landscapes in both the domestic and international marketplaces. Moreover, there are several existing mechanisms or protections to ensure the continued domestic control of our Broadcasting system and individual licences.

The capital requirements of domestic Broadcasters are expected to increase significantly over the near- to medium-term due primarily to: mandated transition from analog to digital transmission technologies; rapidly increasing programming costs; the need to re-aggregate viewing audiences and associated revenues via industry consolidation (and here we note that domestic capital markets cannot easily or readily support large-scale financial transactions in the Broadcasting sector, or for that matter, in other industrial sectors); and as a response to new domestic and foreign competitors operating on multiple media platforms. The new Broadcasting landscape clearly requires size, financial capacity, a spirit of innovation and acceptance of change, and breadth of service offerings to compete against foreign multi-media giants that do not have regulatory obligations, as well as against some of Canada's most well-heeled cable, satellite, and telecom companies that have expanded and solidified their interests in several parts of the Broadcasting value chain.

In order to ensure the continued competitiveness of domestic participants in the Broadcasting sector, and maintain or provide the necessary support for expansion into new exhibition platforms and territories, we have proposed a number of recommendations that we hope will be included in the Panel's eventual presentation to Government:

- 1. a broad-based taxation policy where mere choice of industry does not artificially increase the effective corporate tax rate on capital invested of a given company. In this regard, particular attention should be paid to Canada's service sectors (including the Communications industry) as those rates are particularly uncompetitive when compared to foreign jurisdictions.**
- 2. domestic taxation policies that include regular assessments of changes to statutory corporate tax rates in comparable industrialized foreign jurisdictions to ensure that Canadian multinational companies can truly compete against their respective global competitors.**
- 3. a review of extremely high transaction costs associated with domestic acquisition of Broadcasting assets, including the Benefits Regime that is applied unevenly by the Canadian Radio-television and Telecommunications Commission ("CRTC"); and**
- 4. a review of both the *Broadcasting Act* and the *Direction to the CRTC (Ineligibility of Non-Canadians)*. With respect to the latter, we recommend raising the current maximum of non-Canadian voting interest in the parent or holding company from 33 1/3% to 49%.**
- 5. recognition that "micro" regulation and certain CRTC policies, practices, and interpretations run counter to the objectives set out in the Consultation Paper (e.g., setting higher Canadian Programming Expenditure levels for more profitable services; the layering effect of detailed Canadian content rules; mandated use of independent production companies for certain types of programming; and potentially distinct treatment of domestic "professionally produced" Broadcasting content on new media).**

Background on CanWest

1. CanWest is the largest publisher of paid English-language daily newspapers in Canada,¹ and owns, operates, and/or hold significant interests in conventional and specialty television stations/networks, out-of-home advertising, websites, and radio stations in Canada, Australia, Turkey, Indonesia, Singapore, the United Kingdom, and the United States.
2. CanWest's domestic Broadcasting operations are particularly relevant to this submission. At this writing, our Broadcasting assets include:
 - nineteen (19) local/regional English-language conventional over-the-air television stations via our Global Television and E! branded station groups;
 - one ethnic over-the-air television station in Montreal;
 - eight (8) specialty television networks across various licence classifications; and
 - certain assets previously held by Alliance Atlantic Communications Inc. ("AAC") that did not require prior transfer of control approval from the CRTC.
3. In January 2007, CanWest announced a proposed acquisition of the regulated Broadcasting assets of AAC. On 20 December 2007, the CRTC approved, subject to certain conditions, the proposed transfer of effective control of the affected AAC assets to CanWest through its subsidiary CW Media Inc.² We have subsequently filed the required documents satisfying the CRTC's conditions of approval, and are presently awaiting the CRTC's confirmation to this effect. At that time, with controlling interests in an additional thirteen (13) specialty television networks, CanWest will have significantly increased its stake and participation in Canada's specialty television sector.

Some comments on taxation policy

4. Before we turn our attention to issues more specific to the Canadian Broadcasting sector, we would like to comment briefly on Canada's corporate income tax policies. Note: Our primary goal in the short space allowed is not to detail potential changes to taxation policies, but rather to direct the Panel to specific resources for additional perspective.
5. In September 2007, C.D. Howe Institute released a Commentary (No. 254) by Professor Jack Mintz, Professor of Business Economics at Rotman School of Management at the University of Toronto, entitled *2007 Tax Competitiveness Report: A Call for Comprehensive Tax Reform*. The Commentary presented an 80 country ranking of effective tax rates on capital for marginal investment projects (taking into account corporate income taxes, sales taxes on capital purchases, and other capital-related taxes) – and concluded that Canada had moved from the 6th highest effective tax rate in 2006 (36.6%) to the 11th highest in 2007 (30.9%). Those headline numbers, however, do not tell the whole story:

¹ Based on readership metrics.

² Broadcasting Decision CRTC 2007-429.

However, much of the reduction has been in manufacturing's effective tax rates which, at 23.1 percent, are 28th highest in the world sample of 80 countries. Disappointingly, Canada's service sectors, including construction, transportation, communications, public utilities, trade, business and household services, remain the 6th highest taxed in the world, at 36.4 percent, or at least 4 percentage points above the global-weighted average.

Such high taxes on the service sectors are not going to make Canada's economy competitive. Many businesses are traded internationally, and their costs influence the competitiveness of other industries. Such high taxes on investment discourage capital investment as well as the adoption of new technologies and ultimately effect [sic] the income paid to workers. For this reason, Canadian governments should pay attention to broad-based reforms rather than focus on targeted tax relief limited to a few economic activities.³

6. Professor Mintz also commented on the correlation between taxation policies, domestic competitiveness, and foreign direct investment (FDI):

Canada's position has improved relative to a number of other countries but the country still has one of most uncompetitive business tax regimes in the world. While other determinants of capital investment, such as the size of the economy, infrastructure, the quality of the labour force, regulatory practice and a strong rule of law also substantially affect investment, taxation plays a significant role. We found in other work that a one-percentage-point increase in foreign direct investment inflows to GDP raises the economic growth rate by 0.2 percentage points (Mintz and Tarasov 2007). Thus, high effective tax rates on capital result in less foreign direct investment and therefore less economic growth. . . .

However, as detailed above, Canada's corporate income tax rate remains a significant impediment to Canada's competitiveness. Not only does the corporate income tax contribute to a high effective tax rate on capital, but evidence is accumulating that governments are shooting themselves in the foot by levying a corporate income tax rate in excess of a revenue-maximizing corporate rate. A substantial cut to the corporate rate would potentially increase government revenues as it would alter substantially the incentive for business to shift profits out of Canada or by loading debt in Canadian businesses to avoid Canadian tax. . . .

Lower corporate income tax rates would reduce differentials in effective tax rates across assets and industries, thereby lessening distortions that affect the allocation of capital across businesses. The services sector would especially benefit from a lower corporate income tax.⁴

³ Mintz, pp. 1-2.

⁴ *Ibid.*, pp. 11, 17.

7. In a subsequent but related response to Finance Minister James Flaherty's Economic Statement on 30 October 2007, Duanjie Chen,⁵ echoed some of Professor Mintz's concerns and issued the following response:

The Finance Minister's stated aim is to reduce Canada's statutory corporate income tax rate relative to other G-7 countries; yet, while lower tax rates are welcome, comprehensive tax reforms remain very much needed. The most critical of these, in business taxation, is broadening the corporate income tax base to improve tax neutrality and enable future rate reductions, particularly at the provincial level. It would be regrettable if the federal government regarded the current proposed tax relief as "mission accomplished" while leaving key reform opportunities unpursued.

The tax rankings . . . are unlikely to remain constant until 2012. Other jurisdictions will continue to change their tax systems, and the competitive goalposts will continue to move. Finally, regardless of the currently solid fiscal fundamentals, continued tax rate reduction for business sectors may be difficult without base broadening. Equally, base broadening may be politically difficult without rate reductions.

*It is unfortunate that the federal government missed an opportunity, with its recent tax changes, to make some fundamental reforms; in particular, changes to what and how we tax, not just at what rate.*⁶

8. Moreover, when Duanjie Chen projected the effective tax rates on capital investment in Canada to 2012, he concluded that the Communications⁷ industry will have the highest effective tax rate (33.6%) of any other the industries studied – higher than Forestry, Manufacturing, Construction, Transportation and Storage, Public Utility, Wholesale Trade, Retail Trade, and Other Services.⁸
9. CanWest supports a broader-based taxation policy where mere choice of industry does not artificially increase the effective corporate tax rate of a given company. After all, there is no readily apparent justification for the Communications industry carrying a disproportionate share of the tax burden; and we encourage the Panel in this process to recommend such a change to Canada's domestic taxation policies.
10. Further, we were heartened to see the authors of the Consultation Paper recognize specific taxation-related initiatives in other jurisdictions – particularly the Republic of Ireland. As recently as August 2006 CanWest held significant interest in TV3 Television Network Ireland; and we experienced first-hand the beneficial impact of a low corporate tax rate. While the Consultation Paper notes Ireland's meteoric rise in OECD GDP per capita rankings, Professor Mintz also ties that performance to superior tax collection:

⁵ Duanjie Chen is the Weston Tax Policy Analyst, C.D. Howe Institute, and Associate, International Tax Program at the Institute of International Business at University of Toronto.

⁶ Duanjie Chen, "Flaherty's Missed Opportunity," C.D. Howe Institute e-brief (18 December 2007).

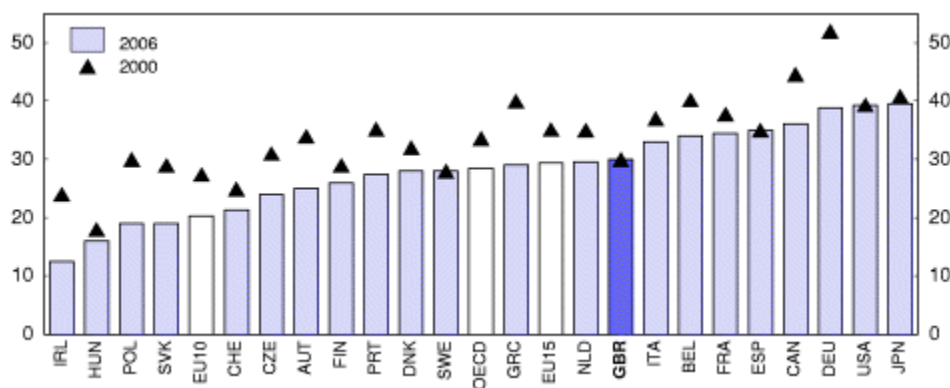
⁷ For clarity, the Communications industry included the following industrial groups: Broadcasting and Telecommunications; Publishing Industries (except Internet); Motion Picture & Sound Recording Industries; and Information Services & Data Processing Services.

⁸ *Ibid.*, Table 1, p. 2.

For many policy analysts, the Irish experience has been particularly important in this regard. Ireland has reduced its corporate income tax rate by more than 40 percent from the late 1980s to 12.5 percent today. Corporate income taxes as a share of GDP have grown from about 2.5 to 3.5 percent of GDP in 20 years. . . . Ireland collects more corporate income taxes as a share of GDP than do G-7 countries where corporate rates are well above 30 percent (only the UK collects as much corporate income tax revenue as Ireland relative to its size).⁹

11. Indeed, we believe that constant assessment of foreign taxation policies in comparable industrialized jurisdictions is a Government imperative. In time, Canada may develop a theoretically “intra-industry” integrated domestic taxation regime; but if foreign jurisdictions offer more competitive effective corporate tax rates in a given industry, or indeed across all industries, then Canadian multinationals (like CanWest) will operate at a distinct competitive disadvantage in the global economy. In short, if our cost of capital is not at least on par with our foreign competitors, then competing domestically and in the international market in the long run will be a difficult proposition.
12. To this end, we offer a graphic demonstration of Canada’s statutory tax rates in international comparison.¹⁰ The good news is that Canada’s statutory tax rates have declined since 2000. The bad news: corporate tax rates in almost all the other countries have also declined; and Canada still has significantly higher corporate tax rates than most of the other countries on the chart.

Statutory corporate tax rates in international comparison
Combined rate, per cent



As a recent acquirer of domestic specialty television assets, while partnering with a foreign financial backer, CanWest is well-positioned to comment on several issues raised in the Consultation Paper

13. As members of the Panel may be aware, our proposed acquisition of the aforementioned AAC specialty television Broadcasting assets attracted significant public attention in 2007. One of the issues raised was the proposed structure of the transaction, whereby a non-Canadian entity,

⁹ Mintz, p. 13.

¹⁰ Source: OECD, “Economic survey of the United Kingdom 2007: Tax competition: How to remain competitive” (27 September 2007) accessible at www.oecd.org.

Goldman Sachs Capital Partners (“GSCP”), would hold for a period of time approximately 65% of the total equity of the relevant investment entity (“CW Investments Co.”), but only 33 1/3% of the Class A Voting Preferred Shares (with CanWest holding the remaining 35% of the equity, and 66 2/3% of the voting shares). The underlying decision to source the equity financing from a U.S. private equity investor was discussed in the subsequent CRTC proceeding.¹¹

14. The proposed transaction was subsequently blessed by two (2) separate Canadian independent agencies/authorities:

- on 23 April 2007, the proposed acquisition, effected through a Plan of Arrangement, cleared a review by the Competition Bureau; and
- as noted above, the CRTC approved the transfer of effective control subject to certain conditions – but in the process clearly stated that CanWest met the requirements of *de jure* control (legal control) and *de facto* control (control in fact).¹²

15. Given the recent approval of our much-publicized transaction, the Panel may wonder why we still have concerns with the current approach to foreign investment in Canadian Broadcasting. First, we note that the nature of the foreign investor in this transaction may have played a role in the approval process. GSCP is a non-strategic foreign investor with no experience operating Broadcasting assets, while CanWest has decades of experience in this very activity. In fact, the CRTC specifically referenced the role of GSCP as “only a financial investor” in paragraph 51 of the approval decision -- and it is unclear whether the Commission would have approved an identical structure with a *strategic* foreign equity investor such as Disney, NBC Universal, Time Warner, or Comcast. Moreover, although the CRTC approved the high equity levels held by a foreign investor in this instance, our transaction includes a subsequent “roll-in” of CanWest’s current Broadcasting assets in 2011 (specifically referenced in paragraphs 41-42 of the approval decision) – so we simply do not know whether the CRTC would have approved the transfer of control without that transaction-specific condition. In short, while the decision itself was viewed by some parties as “precedent-setting,” we believe that a change in case-facts could have resulted in a different decision.

16. Nevertheless, the recent involvement of CanWest in what is essentially an FDI issue has ensured that many of the issues raised in the Consultation Paper are “top of mind” with the most senior executives of the company. Our principal objectives in exploring and structuring the relationship with GSCP were to:

- (a) abide by all of the relevant ownership and control restrictions put in place by the Government of Canada, as administered by the Competition Bureau and the CRTC; and
- (b) access the necessary capital to effect this acquisition while retaining the flexibility to pursue other opportunities, in addition to preserving our ability to acquire and produce the best domestic and foreign programming possible.

¹¹ Details of the transaction may be accessed via the extensive public record generated by the written filings to the CRTC re. Application No. 2007-0700-5 and, further, oral comments made in response to Notice of Public Hearing CRTC 2007-10.

¹² For ease of reference, the discussion and CRTC determination regarding legal control and control-in-fact may be found in paragraphs 20-53 of Broadcasting Decision CRTC 2007-429.

17. In fact, the latter objective was specifically discussed in the Application phase of the CRTC approval process:

*In addition to the new programming and ownership partnerships that accompany this purchase [e.g., partnership with BBC; National Geographic; Scripps; Discovery Communications; and a host of domestic companies], our financial partnership with GSCP also has great potential to enhance the quality of our programming, and, more generally, the quality of CanWest and AAC stations and services. In short, the financial involvement of GSCP is good for CanWest and a benefit for the system. GSCP and its parent company, Goldman Sachs (GS), are global leaders in corporate equity investing. . . . We are justifiably excited about this new economic partnership. Indeed, the creative transaction formula between CanWest and GSCP rewards performance; and this challenge is good for the Canadian broadcasting system. CanWest will have the financial flexibility and market imperative to compete for, and pay for, the best programming.*¹³

18. The Consultation Paper similarly reflects a desire to ease, wherever possible, access to foreign capital, ideas, partnerships, and other resources. We especially note that the mandate of the Panel supports our own objectives in the AAC transaction:

*The Panel will examine a range of issues with an eye to ensuring that Canada's policies are modern and effective, and reflect a competitive environment that is global in scope and typified by fierce competition between national jurisdictions seeking to attract investment, people and economic opportunities. . . . Indeed, Canada's record of economic success has been predicated the ability of Canadian firms to access foreign markets, and on openness to foreign investment and immigration. The goal is to foster the development of Canadian businesses and to maximize the opportunity for Canadians to capitalize on global trade, investment and competition. The Panel's mandate is therefore to make recommendations to the government on ways to establish the domestic conditions that both encourage Canadian firms to be active and aggressive at home and abroad, and maximize Canada's attractiveness as a destination for new investment and talent.*¹⁴ [emphasis added]

19. We recognize that CanWest's domestic Broadcasting division operates within one of the six (6) identified sectoral investment regimes ("Broadcasting") – and that our regulated Broadcasting assets are subject to sector-specific ownership restrictions primarily for the reasons provided on pages 20 and 43 of the Consultation Paper. But the historical presence of sector-specific restrictions and controls on foreign investment should not somehow result in a default to a *status quo* position in those sectors. After all, if those sectors are important enough to have distinct foreign investment restrictions and controls, it logically follows that those same sectors should have a fine-tuned and modern approach to accessing foreign capital, ideas, people, and other resources to order to survive and adapt to rapidly changing landscapes in both the domestic and international marketplaces. Indeed, we submit that only an eye to the economic underpinnings of a given sector will ensure that the Government's non-economic objectives can be fulfilled on a sustained basis.

¹³ Supplementary Brief to Application to the CRTC No. 2007-0700-5, p. 12.

¹⁴ Consultation Paper, pp. 1-2.

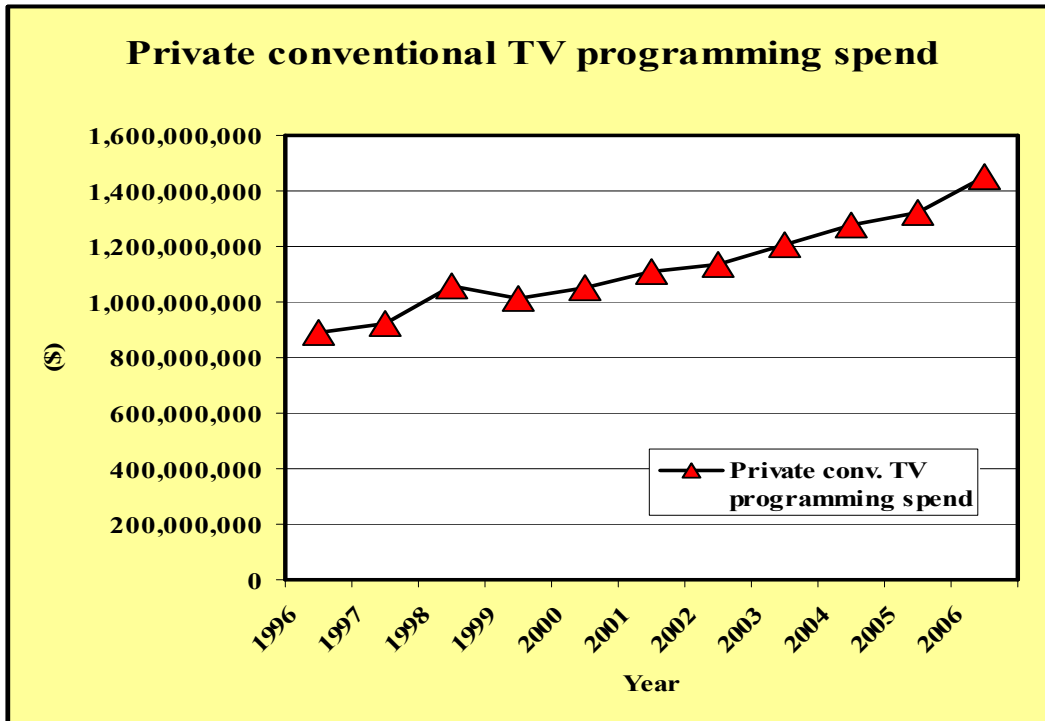
20. To this end, we specifically note that the Panel “will be interested in whether there are alternative, and equally effective, mechanisms that have less impact on Canada’s competitiveness but nevertheless meet the objectives of the various sectoral investment regimes currently in place.”¹⁵ As discussed below, we believe that those formal mechanisms are already in place for the Broadcasting sector.

The ability to readily source foreign capital in the Broadcasting sector is even more critical going-forward

21. Within the ambit of CRTC oversight, it is usually assumed that only the Telecommunications sector requires significant access to capital given the technical nature of its operations; but we submit that the capital needs of the Broadcasting sector are also increasing. We note, too, that any relaxation of foreign investment rules on the Telecommunications side, without an associated change on the Broadcasting sector, will create an unfair competitive imbalance in the system since Telecommunications companies:
- (a) now also own conventional and specialty television licences; and
 - (b) also control the distribution systems by which approximately 90% of Canadians currently receive their television signals.
22. That is, if the foreign investment regimes for Telecommunications and Broadcasting begin to differ materially, then companies like Rogers or Shaw could more readily access foreign capital for all of their operations (including Broadcasting assets) than a company like CanWest that is not classified as a Telecommunications service.
23. One oft-discussed area of concern in the Broadcasting sector is the transition from analog to digital transmission technologies. In 2006, CanWest undertook a detailed analysis of the cost to replace just its analog transmitters with digital transmitters, and concluded that the conversion process for the transmitters alone was \$61 million in capital costs for a full build-out, with an associated operational cost of approximately \$38 million over ten (10) years. The incremental revenues associated with this conversion were expected to be negligible. Nevertheless, despite other more cost effective signal delivery systems available to Broadcasters -- e.g., reliance on existing signal distributors like Rogers, Shaw, Bell ExpressVu (formally known as Broadcasting Distribution Undertakings or “BDUs”) -- the CRTC imposed a 2011 cut-off date for analog transmission *and* required continued use of over-the-air transmitters in all markets in order to access simultaneous substitution rights (a means by which domestic Broadcasters protect their respective intellectual property rights) and mandatory carriage on cable systems within local markets.
24. Moreover, transmitters represent only a partial cost of the transition to digital. Conventional and specialty television Broadcasters are also facing increased “costs of doing business” in terms of transitioning to digital newsrooms, digital rights management systems, revamped studio and editing equipment, High Definition (HD) cameras and playback systems, and so on. There are little or no incremental revenues associated with these incremental capital and operational expenditures, but the required near- and medium-term capital investment related to this transition clearly places additional financial pressures on this sector.

¹⁵ *Ibid.*, p. 20.

25. In addition to looming capital investments in digital infrastructure, the cost of acquiring and producing programming (typically the largest expense for a Broadcaster) has sky-rocketed in recent years – well above the rate of inflation. For example, between 1996 and 2006, the cost of programming for private conventional television stations increased by 63%; and over the past five (5) years, the programming spend increased by 28%, for an average annual growth rate of 6.3%.¹⁶



26. More generally, the cost of competing in a global media environment across a succession of ever-emerging distribution platforms requires significant capital investment. Historically, CanWest could look to perhaps CTV, CHUM, and perhaps a handful of other smaller participants as principal competitors on the Broadcasting side of its operations. But the advent and consumer adoption of new media technologies -- especially high-speed Internet access, digital cable and satellite set-top boxes, and mobile telephony – have brought new players into the Canadian video marketplace – and in greater numbers. Today, Broadcasting discussions increasingly include the likes of Google, You Tube, Yahoo, Facebook, Microsoft, MySpace, Comcast, Bell Canada, Telus, Rogers Communications, Shaw Communications, Vidéotron, and a host of foreign television networks that gained direct entry into the system with no adherent regulatory obligations.

27. As such, this new Broadcasting landscape clearly requires size, financial capacity, a spirit of innovation and acceptance of change, and breadth of service offerings to compete against foreign multi-media giants that do not have regulatory obligations, as well as against some of Canada's

¹⁶ CRTC Television Statistical and Financial Summaries 1996-2006. It is noteworthy that the number of reporting units actually declined between 2002 and 2006, resulting in a higher per station programming spend.

most well-heeled BDUs that have expanded and solidified their interests in several parts of the value chain by employing competitive and revenue-reducing technologies (e.g., video-on-demand; personal video recorders with ad-skipping features; out-of-market signal delivery).

28. However, while the need to readily source capital in such a competitive and dynamic environment is clear, it is our experience that domestic finance markets generally do not have the capacity to handle large capital requests across a number of parties. As explained by CanWest's CEO, Leonard Asper, during the Oral Phase of the CRTC's AAC acquisition hearing in late November 2007:

So we did approach [Canadian banks]. But the Canadian banking system is very limited. It's made up of five banks, as you know, most of whom have credit limits that they can offer to any one company. Our experience is that doesn't exceed between \$200 and \$250 million to any one company and others may -- other larger companies may have more access to that kind of capital. But in a transaction of \$2.5 billion, quite simply the Canadian bank system cannot support a transaction of this size. One needs to finance outside of the Canadian banking system.

The second part of that is that -- the other investors who can invest capital of this amount in the Canadian system are the large, super large pension funds. There is a tier and then there is a second tier of pension funds; names you know, Teachers, the Caisse de dépôt and others.

And two of those large pension -- there really are only three pension funds that have private equity envelopes that can invest in businesses of this size. Two of them own Canadian media companies already, large positions in Canadian media companies. I'm sure you can figure out who those are. The third one is -- and then the pension funds in general simply do not write cheques of this size in one week. They have a process. They have certain responsibilities and fiduciary duties and constituencies that require a much longer timeframe in which to invest to commit to investing on a scale this large.¹⁷

29. Naturally, the cost of capital is also impacted by the general availability of financing options and the risks associated with a given industry or sector.
30. In short, we believe that the ability for Canadian companies to source foreign capital is indeed one of the domestic conditions necessary to foster the continued development of Canada's Broadcasting sector – and it is our hope that the Panel recognizes this condition in its eventual recommendations.

We can no longer ignore transaction costs

31. If the Panel's objective is truly to “make recommendations to the Government on ways to establish the domestic conditions that both encourage Canadian firms to be active and aggressive investors at home and abroad, and maximize Canada's attractiveness as a destination for new investment and talent”¹⁸ then it can no longer ignore the extraordinary transaction costs and timelines associated with Broadcasting transactions.

¹⁷ Broadcasting Notice of Public Hearing CRTC 2007-10, Transcript Vol. 2, paragraphs 2504-2506.

¹⁸ Consultation Paper, p. 2.

32. In our case (and others), the approval process itself cost millions of dollars in document preparation alone – and by necessity involved a legion of legal and regulatory resources, and external valuers (see below).¹⁹
33. We understand that this particular transaction was complex, but the Panel should recognize that an acquisition involving regulated assets can result in very significant delays that affect the value of both the acquired assets and the purchaser itself; and there are approaches that could shorten these delays. For example, in many jurisdictions, the transfer of control of Broadcasting assets does not require an oral presentation or allow input/feedback from the general public. Instead, the affected parties file the required paperwork to the satisfaction of the Regulator which then renders a decision. In Canada, however, an oral process requires on the physical availability of human and other resources, and is ensconced in the *Broadcasting Act* and Rules of Procedure – and oral hearings can take several days or even weeks to complete, leading up to the subsequent formal decisions outlining CRTC rationale. As such, we suggest that the Panel recommend a review of transaction processes within the regulated sectors with a goal to shortening and simplifying required filings and/or appearances by the applicants, and the quickest possible rendering of decisions with or without supporting rationale.
34. Similarly, development of a more streamlined “bright-line” test regarding “control in fact” may be appropriate. Such an approach would simplify the application process for all interested parties (including the Regulator) and presumably shorten the regulatory process, effectively creating efficiencies throughout the system while providing a more certain and predictable investment environment for potential investors.
35. There is one transaction cost that is unique to the Broadcasting sector; and we believe this cost requires attention in this process given its impact on the competitiveness of domestic firms to compete against global media competitors and attract foreign investment.
36. The CRTC Benefits Regime attaches an incremental 10% transaction cost in the form of incremental expenditures on Canadian programming and social benefits to all transactions involving a change of control of television assets, and a 6% incremental benefits test to transactions involving a change in control of historically profitable radio stations. Notably, the CRTC exempted BDUs from the Benefits Regime in 1996 with the anticipated arrival of competition in that sub-sector²⁰ – yet it remains applicable in the other sub-sectors despite an explosion of new competition from within and outside of Canadian borders.

¹⁹ It is perhaps worth noting that transaction costs related to regulatory approval processes may extend well past the applicant(s) and affected regulator. The approval process may involve dozens of interested parties that may also file submissions, conduct or commission research, commission legal opinions, attend regulatory proceedings, and so on. As such, while each participant determines its degree of participation in a given process, there can be no question that the process itself generates additional and sometimes hidden transaction costs and inefficiencies. Occasionally, there are also mandatory costs applied to parties not directly involved in a given transaction. For example, in early 2006, CTVglobemedia’s (then) proposed transaction of CHUM Limited generated a significant review by the Competition Bureau that required a number of industry participants (e.g., industry competitors; advertising agencies) to file thousands of documents by court order. The mandatory requests were subsequently cancelled shortly before the deadline – regardless, millions of pages at associated document production costs and human resources were reproduced by indirect participants in an exercise that was ultimately deemed unnecessary.

²⁰ See Public Notice CRTC 1996-69, Part VII.

37. Within the past year or so, CanWest has commented in some detail on the unintended impact of the Benefits Regime on Canadian Broadcasters operating in a very dynamic and competitive landscape. If the Panel wishes to explore aspects of this particular transaction cost more closely, we recommend a review of pages 27-46 of CanWest’s written submission to Broadcasting Notice of Public Hearing CRTC 2006-5 (the TV Policy Review). The issue was also raised in last year’s Diversity of Voices proceeding (Notice of Public Hearing CRTC 2007-5). In this submission we simply wish to note:

- (a) the underlying rationale of the Benefits Regime;
- (b) the size of the actual payments, at levels that were never anticipated at the time the Benefits Regime was introduced;
- (c) the fact that these costs are only attached to transactions involving domestic television and radio assets – so are not uniformly applied across all entities under CRTC oversight; and
- (d) the attendant transaction costs in addition to the eventual payment amount.

38. We also note that the Benefits Regime itself can influence the eventual purchaser and/or the availability of domestic and/or foreign investment. After all, the cost is essentially a barrier to entry for parties who simply cannot afford an additional 10% (television) or 6% (radio) transaction expense in addition to the baseline transaction price; and it must be factored into any investment decision as an added and sometimes significant cost. In our view, such a Benefits Regime cannot possibly “create an environment that will enhance Canada’s attractiveness as a destination for investment and economic activity” as outlined in Mr. L. R. Wilson’s letter accompanying the Consultation Paper.

39. The underlying rationale for the Benefits Regime is as follows:

*... in the absence of a competitive process, application of the benefits test remains the best method of ensuring that applications for transfer of control or ownership are the best possible proposals under the circumstances, and are beneficial to the public served by the undertakings and to the Canadian broadcasting system as a whole.*²¹

40. Actual dollar figures associated with this transaction cost are significant. In 2007, there were four (4) major Broadcasting transactions – and we have indicated the incremental required Benefits payments below:

| Transaction (2007) | Tangible benefits |
|---------------------------|--------------------------|
| CanWest/Alliance Atlantis | \$151.3 million |
| CTVgm/CHUM (less Citytv) | \$128.9 million |
| Astral/Standard | \$63.3 million |
| Rogers/Citytv | \$39.5 million |

41. However, even those amounts do not truly reflect all of the transaction costs associated with Broadcasting transactions in Canada. As part of the approval process, the applicant must

²¹ As re-printed from Public Notice CRTC 1992-42: “Application of the benefits test at the time of transfers of ownership or control of broadcasting undertakings.”

typically provide an independent valuation of the transaction at significant expense,²² and provide detailed allocations of those monies over a set number of years. Yet despite this independent analysis, the CRTC still required dozens of additional clarifications regarding the approach chosen by the experienced valuator; and responses to those questions required further expense and resources over a period of several months.

42. Moreover, it should be noted that CanWest and other Broadcasters (and their respective valuers) do not always agree with the final CRTC determinations regarding Benefits payments and/or the methodology used to generate those totals. For example, a hot-button topic in 2007 was the CRTC's inclusion of "operating leases" in its valuation methodology. While this particular practice effectively increases the monies included in tangible benefits packages, it runs counter to traditional valuation methodologies employed by the world's largest and most sophisticated accounting and valuation firms.
43. To its credit, the CRTC has recently initiated a review of its Benefits methodologies with a goal to simplify the allocation of the calculated value of a transaction.²³ While such a review may clarify some of the CRTC's historic practices, and perhaps modify some of the current valuation methodologies, the simple fact remains: Despite potential tweaking, the Benefits Regime will continue to unfairly impact the competitiveness of domestic Broadcasters, especially when we consider the distinct treatment of BDUs that carry our stations/services (principally cable, DTH satellite, and telecom signal distributors) and new media entities that do not fall under this regime or indeed under CRTC oversight.
44. As such, we urge the Panel to investigate the Benefits Regime unique to the Broadcasting sector, and recommend to the Government that the Regime be removed in the face of existing and mounting competition from domestic and foreign sources, and in the interest of fair competition.
45. Moreover, in this case there are clear "alternative mechanisms that would achieve the non-economic policy objectives of the Broadcasting sector while also ensuring maximum competitiveness of firms operating in the sector." After all, the elimination of the Benefits Regime would not, of course, eliminate other elements of a transaction review. As is the case with BDU transactions, the acquirer of a Broadcasting asset would still have to justify the purchase and demonstrate to the Commission that the application as filed is "the best possible under the circumstances"; and there would still be general policies and conditions of licence, commitments, and/or expectations attached to the licence to ensure that the objectives of the *Broadcasting Act* are met and that the public interest is served.

It is time to review the governing legislation

46. As the Panel is no doubt aware, the Broadcasting sector in Canada falls under federal legislation. For the purpose of this submission, the principal governing statute is the *Broadcasting Act* and the associated *Direction to the CRTC (Ineligibility of Non-Canadians)* (the *Direction*). Of course, we are also directly or indirectly affected by a number of other statutes -- including the *Competition Act* and *Investment Canada Act* -- but our mandated relationship with the CRTC, which is empowered under the *Broadcasting Act*, necessitates a near daily assessment of CRTC Regulations and imposed licence obligations that guide our business.

²² In the recent AAC transaction, CanWest used Ernst & Young.LLP as the independent valuator.

²³ Broadcasting Public Notice CRTC 2007-139.

47. As a general comment, we believe that detailed or “micro” regulation is impairing our competitive position in a dynamic media environment that increasingly features giant multi-national foreign competitors that are not subject to regulatory oversight (e.g., Google; Yahoo), and huge domestic BDUs that are currently and aggressively campaigning to reduce their regulatory obligations.²⁴
48. We understand that the Panel has concluded that “[i]t is beyond the scope of the Panel’s mandate to comment in detail on the trade-off between economic competitiveness and other policy objectives of each sectoral investment regime.”²⁵ But a **general** conclusion that micro-regulation at the sectoral level can harm both economic competitiveness, and, by extension, the policy objectives set by the Government, and would appear to be well within the Panel’s mandate.
49. The root of the Regulatory framework, of course, may be found in the guiding statutes. It is for this reason that we urge the Panel to recommend a review of both the *Broadcasting Act* and aspects of the *Direction*. An example may prove illustrative. Sections 3(1)(e-f) of the *Broadcasting Act* reads as follows:
- . . . each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming*
- each broadcasting undertaking shall make maximum use, and in no case less than predominant use of Canadian creative and other resources in the creation and presentation of programming . . .*
50. The CRTC has interpreted these aspects of Broadcasting policy, in combination with other stated policies, in a very detailed way that restricts our operations in a number of ways, including: the scheduling of our programming; the amount and types of domestic programming that we must broadcast at certain times of the broadcast day and evening broadcast period; and the sources of our programming. For purpose of illustration, consider the requirement that conventional television stations schedule at least eight (8) hours of “priority programming” per week in peak viewing periods (7:00 p.m. to 11:00 p.m.) -- representing 29% of our weekly prime-time schedule.²⁶ Priority programming was defined by the CRTC to include *only* the under-represented programming categories of: Canadian drama; Canadian long-form documentaries; Canadian music, dance, and variety programs, Canadian regionally-produced programs (generally outside of Toronto, Montreal, and Vancouver); and Canadian entertainment magazines.
51. That is a very narrow and proscriptive interpretation of the *Broadcasting Act*, and in our opinion has layered onto our obligations a very complex and subjective condition that restricts our choices and operations, and impacts audience levels and associated potential revenues. Moreover, in order to satisfy another Broadcasting policy [subsection 3(1)(i)(v) of the *Broadcasting Act*], the CRTC added further restrictions to “priority programming” mandating that at least 75% of the priority programming be sourced from the independent production community. In a world where content ownership is increasingly important in order to access as many distribution channels as possible, the inability to use one’s own resources (where deemed appropriate) simply makes Canadian Broadcasters less competitive domestically and abroad.

²⁴ Notice of Public Hearing CRTC 2007-10 as subsequently amended.

²⁵ Consultation Paper, p. 20.

²⁶ For more details on this obligation, please see Public Notice CRTC 1999-97 and Public Notice CRTC 1999-205.

52. The Panel may also be interested in a landmark 2004 CRTC decision that tied licence-specific increases to Canadian programming expenditure (CPE) levels on specialty television services to profitability levels (i.e., the higher the historic profitability of a given service, the higher the required spending allocation to Canadian programming in the next licence term):

*Licensees whose historical PBIT levels have been in the 20 to 24% range will be required to increase their minimum annual expenditures on Canadian programming by an increment of three percentage points over the amounts specified in their existing conditions of licence. Increments of four and six percentage points will be required of licensees whose historical PBIT levels have been between 25 and 29%, and 35 and 39%, respectively. Licensees with historic PBIT levels above 40% will be required to increase their minimum annual expenditures on Canadian programming over the amounts specified in their existing conditions of licence by an increment of seven percentage points. Licensees having a historical PBIT of less than 20% will be required to make minimum expenditures on Canadian programming at the same levels required by their existing conditions of licence.*²⁷

53. It is difficult for us to see how such a policy could possibly incent specialty television Broadcasters to improve their efficiencies or productivity. Enhancements to profitability margins and superior market performance were simply “taxed” by the Regulator, while poorer performing services were spared the increases but had to maintain existing levels which themselves may have played some part in the financial performance.

54. We also have concerns regarding the possible regulation of new media by Canadian Broadcasters. The Chair of the CRTC recently raised this issue at a speech during the CAB Convention in Ottawa on 5 November 2007:

Many of my regulatory colleagues from around the world were very interested in what we are doing with our New Media Project Initiative. As you all know, the CRTC, through this initiative, is looking at regulatory issues of content and access that have been raised by the arrival of new technologies.

Since we are the regulators of broadcasting, our main focus is on commercial television delivered over the Internet and through mobile devices. We are only interested in content that is professionally produced. We are not concerned with all the other aspects of New Media, such as the way it may alter consumer behaviour, facilitate the production of user-generated content or establish new forms of social networking.

55. The CRTC plans to hold extensive proceedings on new media in the current calendar year so at this time we do not know the direction this discussion will take. We simply wish to register the possibility that “professionally produced” Broadcasting content may be singled-out for some kind of special regulated regime. At first blush, this would place Canadian Broadcasters at a distinct competitive disadvantage since control over foreign Internet content (if even technically possible) would be problematic for a host of reasons and would involve multiple stakeholders.

²⁷ Broadcasting Public Notice CRTC 2004-2: “Introduction to Broadcasting Decisions CRTC 2004-6 to 2004-27 renewing the licences of 22 specialty services.”

56. In short, only a renewed interest in, and assessment of, Broadcasting policy objectives could result in an appropriate balance between economic imperatives on the one hand, and cultural objectives on the other. Given the changing dynamics of the domestic and global media industry, and particularly the new competitive global landscape made possible by widespread adoption of digital technologies, we encourage the Panel to echo these sentiments in its eventual recommendations, and “start the ball rolling” toward legislative reform as a way to initiate reform at the Regulatory level. We provide further details on this recommendation in the sections below.

The *Broadcasting Act* has not been reviewed since 1991

57. As noted *Canadian Broadcasting Regulatory Handbook 8th ed.*:

The 1991 [Broadcasting] Act constituted the first significant revision to the Broadcasting Act since the passage of the former Act in 1968. The 1991 Act was based in substantial part on the recommendations of the Task Force on Broadcasting Policy which was published in September, 1986.

58. Thus, it has been about seventeen (17) years since the enactment of the current governing statute – and the underlying policy recommendations as presented in the Caplan-Savageau Task Force Report were made almost twenty-two (22) years ago. Even in a static environment this is a long time between legislative assessments and amendments.

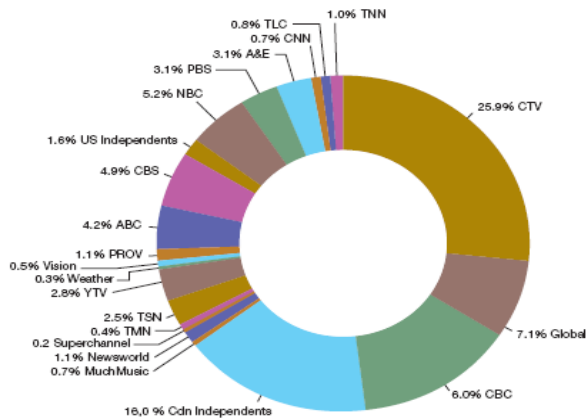
59. But the intervening time has been anything but static. The Broadcasting sector has undergone a sea change since 1986/1991 – and the current *Act*, although flexible in many regards, is simply no longer capable of handling the volume or nature of those changes. In the section below, we briefly discuss some of the more salient environmental and competitive changes that have occurred in the Broadcasting sector in recent years.²⁸ These changes have generally resulted in a need to more readily access additional capital to stay competitive with a growing list of domestic and international competitors, but they also highlight the risks and adherent financial considerations associated with investment in this sector:

Fragmentation in the traditional television viewing universe

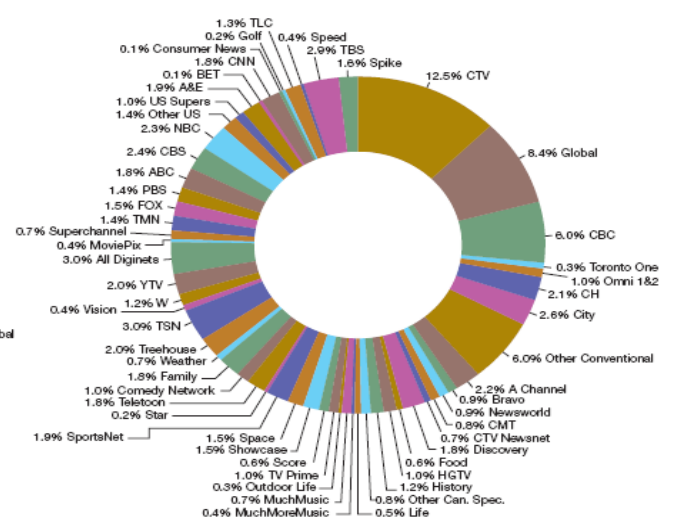
60. The business model and competitive landscape for domestic television has changed dramatically since 1986/1991. The chart below is sourced from a report prepared by the Canadian Association of Broadcasters (CAB) released on 5 November 2007 entitled *Broadcasting 2007: A Report from the Industry*. Note that the early comparative data is sourced from 1996 – ten (10) years *after* the Caplan-Savageau Report recommendations that led to the eventual 1991 *Act*.

²⁸ Limited space does not permit a full discussion of all of the changes. However, the development, roll-out, and increased consumer adoption of ad-skipping technologies certainly has the potential to disrupt the traditional Broadcasting business model, and its effect is already being felt. Moreover, we should also highlight a material decline in total viewing hours (highlighted on p. 46 of the *2007 Broadcasting Policy Monitoring Report*) and a very significant decline in television audience to Top 40 programming that essentially drives conventional television revenues and subsidizes typically less profitable domestic programming despite population increases. Also, the movement from a linear exhibition model to everywhere/anytime viewing models (e.g., video-on-demand) is clearly one of the most challenging aspects of the new Broadcasting landscape.

Viewing to English Services 1996



Viewing to English Services 2005-6



61. Simply, the number of viewing choices in English-language alone has exploded in recent years. And while additional choice has been a boon to BDUs (especially large cable and DTH satellite systems that have effectively extended their product lines), the additional choice has proved problematic to Broadcasters that compete aggressively for audience and associated revenues. Consequently, this has resulted in consolidation efforts to re-aggregate those audiences.

The rise of new, unregulated media

62. The degree of traditional video competition in English-language markets is clearly illustrated above; but those charts do not account for new and unregulated media that compete for audience time and advertising dollars. In 1986/1991, the Internet barely existed; and it was certainly not understood by the general populace as the revolutionary communications/media vehicle that would forever change world commerce, media consumption, and advertising spend patterns. We know now that it is not only feasible to deliver high-quality video (and audio) over the Internet, but that a majority of Canadian households actually have the ability to receive high-quality programming using high-speed Internet in their households. (According to CRTC data collection, the percentage of Canadian households with high-speed Internet increased from just 36% in 2003 to 60% in 2006.²⁹) Moreover, the ability to monetize Internet content is clearly apparent, and the trend is unmistakable:

Advertising revenues trends 2002 to 2007

| Canadian online advertising revenue (\$000,000) | | | | | Forecasted |
|---|------|------|------|-------|------------|
| 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
| 176 | 237 | 364 | 562 | 1,010 | 1,337 |
| % increase | 37% | 54% | 54% | 80% | 32% |

Source: Interactive Advertising Bureau of Canada: as sourced from *CRTC Broadcasting Monitoring Report 2007*

²⁹ *CRTC Broadcasting Monitoring Report 2007*, p. 125.

63. For perspective, those nascent Internet advertising revenues, which at \$1 billion are nearly six (6) times higher than the 2002 level, already represent 46% of the total revenues generated by private conventional television stations in 2006.³⁰
64. And while Canadian online advertising revenue increased by an astonishing 80% year-on-year, private television stations actually recorded a total revenue *decline* in the most recent data available from the CRTC.³¹ Even the advertising revenue growth of the specialty television sub-sector (15%) pales in comparison to the advertising revenue growth on the Internet.
65. As consumers (or future consumers) access other platforms for their media needs – e.g., Internet users for audio-visual access; mobile technologies for out-of-home consumption – Canadian Broadcasters have no choice but to follow those customers to their chosen destinations and provide them with content they crave whenever/wherever they might be at a given moment. Expansion into those activities comes at a price.

Erosion of traditional boundaries

66. As expressed in “An Analysis of the over-the-air television market in Canada” prepared by Communications Management Inc. in September 2006:

The first assumption about borders is that the reference is to geographic borders – technology now allows reception of signals that challenge the previous concepts of how media markets are defined.

But geographic borders are only one type of border that is being eroded by technology. New technology also erodes the borders between media of different types, between media and advertisers, and between media and consumers. For example, Web sites of print media now might carry audio or video features. And the advertisers who help to pay for the media, and the consumers who receive the media, now are also becoming competitors for the media.³²

67. In short, while the *Broadcasting Act* was clearly designed to be flexible, it was not possible for the drafters of the legislation to anticipate the revolution in communications that swelled shortly after its most recent incarnation. We believe the Panel would be well-served to recommend an evaluation of that governing statute to adjust for the realities of the current environment.

Similarly, after ten (10) years, it is time to review the *Direction*

68. As outlined in paragraph 16 of the AAC approval decision, in April 1997, the Governor in Council issued a *Direction* to the CRTC respecting the Ineligibility of Non-Canadians to be issued Broadcasting licences by the CRTC, or to have those licences renewed or amended:

³⁰ CRTC Television: Statistical and Financial Summaries 2002-2006.

³¹ *Ibid.*

³² As attached as Appendix B to CanWest’s submission in respect of Broadcasting Notice of Public Hearing CRTC 2006-5, pp. 45-46.

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

69. The Direction provides a detailed definition of “qualified corporation” – which establishes that non-Canadians may hold a maximum of 20% voting interest in a licensee company, and a maximum 33 1/3% voting interest in the parent company that controls the licensee company.³³ We do not support the complete elimination of foreign ownership voting share restrictions at this time; but we do believe that the current parent company restriction at 33 1/3% could be raised to a higher level in order to encourage additional foreign direct investment in the Broadcasting sector. As such, in this submission we recommend that:
- (a) the current maximum non-Canadian voting interest in the licensee company be maintained at 20%; but
 - (b) the current maximum non-Canadian voting interest in the parent or holding company be raised from 33 1/3% to 49%.
70. This would ensure that a majority of the voting interests in each element of the ownership structure would be still held by Canadians, while permitting a higher level of foreign investment in individual circumstances.
71. To this end we note that there are numerous other control mechanisms *already* in the system to preserve Canadian control over the Canadian Broadcasting system and individual Broadcasting licences. For purpose of illustration (and this list is not exhaustive):
- The Direction contains mechanisms to ensure that the Chief Executive Officer (CEO) be Canadian -- or where the corporation has no CEO, the person performing functions that are similar to the functions performed by the CEO must be Canadian. The Direction also mandates that at least 80% of the Board of Directors must be Canadian.
 - The CRTC can impose a Condition of Licence on a given licensee to establish an Independent Programming Committee to ensure that all programming decisions -- as defined in individual decisions -- are made by individuals not associated with the non-Canadian investor(s).
 - Perhaps most importantly, each Broadcasting licence is subject to a number of Regulations, CRTC Conditions of Licence, and/or regulatory expectations/commitments that create obligations at the licence-specific level. Adherence to these obligations would continue *regardless* of ownership positions or level of foreign investment.
72. In short, loosening the allowable foreign voting interest at the holding company level would not result in any diminution of the other available control mechanisms and protections.

³³ SOR/97-192, 8 April 1997: *Direction to the CRTC (Ineligibility of Non-Canadians)*.