

Filed via epass

10 October 2007

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Gatineau, Quebec  
K1A 0N2

Dear Mr. Morin:

**Re: Broadcasting Notices of Public Hearing CRTC 2007-11, 2007-11-1 and 2007-11-2**

1. This is a supplementary intervention pursuant to Broadcasting Notice of Public Hearing CRTC 2007-11-1 by the Coalition of Canadian Audio-visual Unions ("CCA") in respect of the additional information placed on the public record since August 7, 2007 (the "Additional Information").
2. As stated in its initial intervention in this proceeding dated August 10, 2007, CCAU opposes the application by CanWest MediaWorks Inc. ("CanWest") and GS Capital Partners ("GSCP") to acquire effective control of the broadcasting undertakings of Alliance Atlantis through a corporation ("Jointco") owned by CanWest and GSCP. CCAU opposes the application because approval by the Commission would give GSCP and its affiliates, which are non-Canadians, overwhelming control in fact of both Alliance Atlantis and the existing television business of CanWest that is to be contributed to Jointco. This control in fact results primarily from the strategic direction for these regulated businesses that GSCP and its affiliates have imposed upon CanWest under the agreements filed with the Commission in this proceeding.

3. As is also stated in CCAU's initial intervention, this control in fact (*de facto* control) results regardless of the mechanisms adopted by CanWest and GSCP to demonstrate legal (*de jure*) control by CanWest of the day-to-day operations of Jointco and its subsidiaries. CCAU notes that no amount of tinkering with such mechanisms will resolve the fundamental problem of the *de facto* control held by GSCP and its affiliates.
4. As discussed in more detail below, certain elements of the Additional Information support CCAU's position. There is also nothing in the Additional Information that refutes the position expressed by CCAU in its initial intervention.
5. The Additional Information confirms that the equity interest of GSCP in Jointco is almost 65% of the total equity (\$480,787,353 out of a total of \$743,087,000). This gives GSCP, a non-Canadian, an extremely high economic interest in Jointco. As noted in CCAU's initial intervention, an economic interest at this level may be indicative of control in fact by the non-Canadian.
6. While substantially all of the Additional Information relating to the debt financing of Jointco is confidential<sup>1</sup>, it remains clear that GSCP has provided a substantial amount of debt financing to Jointco. CanWest has admitted in its reply to interventions dated August 20, 2007 (the "Reply") that GSCP or its affiliates hold 46% of the debt. While the Additional Information (see the response to question 12 in CanWest's letter to the Commission of September 17, 2007) states that GSCP and the other lenders wish to syndicate their loans and that GSCP and its affiliates do not intend to hold new debt issued by Jointco, the fact remains that GSCP and its affiliates underwrote Jointco's debt and contributed well in excess of a majority of the funding (whether equity or debt) required for the acquisition of Alliance Atlantis.

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<sup>1</sup> CCAU continues to hold the view that the extent to which CanWest and GSCP have been granted confidentiality is extraordinary. For example, it appears that abridgements were made to the Second, Third and Fourth Amendments to the Commitment letter filed by CanWest on September 21, 2007 for the purpose of concealing the identity of one of the lenders. CCAU does not understand the rationale for such abridgements. In any event, the extensive grants of confidentiality limit the ability of interested parties to assist the Commission in assessing the implications of the structure proposed by the applicants, and thus increase the burden upon the Commission to assess the merits of the application.

7. CCAU continues to believe that the extensive equity and debt investments by GSCP and its affiliates highlight the dependence of the Alliance Atlantis regulated undertakings and of CanWest on non-Canadians. CanWest's suggestion in its Reply that the Commission and Industry Canada do not consider non-voting equity or debt in assessing control in fact is incorrect. In fact, the report of Larry Shaw attached to the Reply states that a situation in which a "major debt holder was also an important holder of equity" would be reviewed carefully by Industry Canada. That is precisely the situation that is before the Commission in this proceeding.
8. There are also a number of other items in the Additional Information that heighten CCAU's concern that CanWest will not have effective ownership and control of Jointco. These include the following:
  - CCAU shares the apparent concern of the Commission, as set out in question 7 of the deficiency questions dated September 11, 2007 forwarded to CanWest, relating to the adverse impact that the limitation on recovery of expenses by CanWest under the Management and Administrative Services Agreement could have upon CanWest's ability to exercise its powers under that agreement.
  - CCAU was very surprised to discover from the Additional Information that CanWest had limited due diligence in respect of Alliance Atlantis until immediately prior to closing. See the responses to questions 5 and 8 in CanWest's letter to the Commission dated September 17, 2007. Given the size of GSCP's investment, CCAU suspects that no such due diligence limitations were placed on GSCP. If GSCP did indeed have superior access to information concerning Alliance Atlantis than did CanWest, CCAU submits that this is further evidence of GSCP's control over the strategic direction of both the Alliance Atlantis and CanWest regulated broadcasting undertakings.

- The Additional Information contains a revised version of the Registration Rights schedule to the Shareholders Agreement which relates to the conduct of an initial public offering of Jointco. One of the revisions (in section 3.3(b)) gives GSCP priority over CanWest in including its shares in an offering initiated by Jointco. While such priority perhaps makes sense where the offering has been initiated by GSCP, CCAU questions whether such priority is defensible when the board of directors of Jointco, which is to be controlled by CanWest, will have determined that Jointco should effect an initial public offering.
9. Following a review of the Additional Information, CCAU continues to have concerns with respect to the regulatory process relating to this application.
  10. While CanWest's letter to the Commission dated August 23, 2007 states that CanWest has filed blacklines against versions of documents filed previously with the Commission, CCAU is unable to locate on the public record a blacklined version of the Shareholders Agreement showing the changes made from the August 1 draft previously filed. But it is clear that changes have been made. CCAU notes that CanWest responded by letter dated September 17, 2007 to questions posed by the Commission in relation to some of the changes made to the Shareholders Agreement.
  11. CanWest's letter to the Commission dated August 23, 2007 also states that CanWest and GSCP and/or their affiliates have entered into a number of Ancillary Agreements "copies or descriptions of which have not been previously provided". CanWest then provides a brief description of each of the Ancillary Agreements. One of the Ancillary Agreements is stated to be an "ERISA Side Letter Agreement" under which Jointco and its subsidiaries "have agreed to provide Goldman Sachs with certain consultation rights in order to assist Goldman Sachs in complying with its obligations under the ERISA laws in the United States."

12. CCAU is unable to locate on the public record a copy of the ERISA Side Letter Agreement. CCAU notes that GSCP was already provided with rights for the purposes of compliance with ERISA in section 4.15 of the Shareholders Agreement, and that the extent of such rights was the subject of deficiency questions from the Commission to which CanWest responded on June 1, 2007 (question 16) and June 13, 2007 (question 9). Without access to the ERISA Side Letter Agreement, CCAU cannot comment on the extent to which the “consultation rights” granted to Goldman Sachs increase the control in fact by GSCP and its affiliates. CCAU observes, however, that consultation rights are considered carefully by other regulators, including Investment Canada, in assessing whether or not control in fact by a non-Canadian exists.
13. For all of these reasons and for the reasons set out in CCAU’s initial intervention, CCAU submits that the public record of this proceeding demonstrates strong grounds for a determination by the Commission that GSCP would have control in fact of the Alliance Atlantis broadcasting businesses, and of the existing CanWest Canadian television business, if this application were approved. Since the *Broadcasting Act* requires that licensed broadcasting undertakings must be effectively owned and controlled by Canadians, and since control in fact by non-Canadians of licensed broadcasting businesses is prohibited by the Direction, it follows that the application must be denied.
14. As previously advised, CCAU does not wish to appear at the public hearing. However, individual members of CCAU that appear at the public hearing will be prepared at the hearing to respond to any questions that the Commission may have concerning this supplementary intervention or CCAU’s initial intervention.
15. We are attaching a copy of our e-mail and fax cover sheet confirming that a true copy of this intervention has been sent to the applicant by both e-mail and fax.

All of which is respectfully submitted.

Yours truly,

COALITION OF CANADIAN AUDIO-VISUAL UNIONS,



Steven Waddell  
National Executive Director  
Alliance of Canadian Cinema, Television  
and Radio Artists (ACTRA)



Peter Murdoch  
National Vice President  
Communications, Energy and Paperworkers  
Union of Canada (CEP)



Alan Goluboff  
President  
Directors Guild of Canada



David Hardy  
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Maureen Parker  
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