



10 August 2007

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

On-line: <http://support.crtc.gc.ca>

Dear Mr. Morin,

Re: Broadcasting Notice of Public Hearing CRTC 2007-11

Application by CanWest MediaWorks Inc. (CanWest) to acquire control of the broadcasting companies of Alliance Atlantis Communications Inc. (Alliance Atlantis)

Introduction and Summary

1. This is the submission of the Council of Canadians (the Council) in the matter of Public Notice CRTC 2007-11, the application by CanWest MediaWorks to acquire Alliance Atlantis Communications. The Council is intervening in opposition to the application since the transaction will result in the effective control of important Canadian broadcasting companies, as well as other significant Canadian cultural assets, falling into the hands of non-Canadians, in violation of Canada's *Broadcasting Act*, other government policies and the public interest. The Council requests an opportunity to appear at the CRTC Public Hearings to elaborate on its position.
2. Established in June 1985, the Council of Canadians brings together tens of thousands of Canadians who are working for social justice, human rights and democracy, and working to maintain Canada's political, economic and cultural independence. The Council conducts campaigns on public health care, fair trade, water as a human right, energy security and other significant public issues.
3. For purposes of its acquisition of Alliance Atlantis, CanWest has entered into a partnership with GS Capital Partners (GSCP), a private equity affiliate of Goldman Sachs and Company, a major U.S. investment banking firm. GSCP will acquire by far the largest equity interest in the controlling company that will own the company into which the broadcasting companies owned by Alliance Atlantis will be transferred. In addition, in partnership with Lehman Brothers, another U.S. investment banking firm, GSCP will provide debt financing for the proposed transaction, most of which could be anticipated to be obtained from foreign sources.

4. Given the significance of this acquisition for the Canadian broadcasting system, the Council regrets that the full details of the relationship between CanWest and GSCP are not publicly available. Also, since the application was filed by CanWest, the media has reported that the financial relationship between CanWest and GSCP has changed several times, and CanWest issued a press release on 31 July 2007 which outlined more significant changes to the financing arrangements. In addition, the Commission has authorized that many elements of the relationship can be kept confidential. It is thus very difficult for public interest groups such as the Council to analyze thoroughly the proposed ownership structure and management relationships.
5. Despite this challenge, it is clear that 63% of the equity investment and potentially 100% of the debt financing for the acquisition of Alliance Atlantis has been or will be provided by one or more non-Canadian companies. This level of financial involvement will inevitably come with significant control, despite the efforts of the companies and their lawyers to create a complex structure to obscure this fact.
6. In addition, given the intention of the parties to combine together the regulated assets of Alliance Atlantis with the assets of CanWest in 2011, and the related provisions in the shareholder agreement which permit GSCP to force the sale of broadcasting assets, the Council submits that control of CanWest may well fall into the hands of a non-Canadian company at or before that date.
7. The Council supports current rules which require that the Canadian broadcasting system and telecommunications sector remain owned and controlled by Canadians. This is essential to ensure that these sectors can continue to be regulated in the public interest.
8. Finally, the Council further submits that, if the Commission denies this application, the assets of Alliance Atlantis Communications Inc. will prove to be an attractive investment for a Canadian buyer and we are confident this buyer will be able to obtain sufficient financing, primarily from Canadian institutions and sources. We note that Corus, Rogers, Astral and others have sought or acquired new broadcasting assets in the past year. Given the growth and recent performance of specialty television services, a new player may be convinced to enter the field, which the Council would favour since this would increase the diversity of ownership in the system.

Why the Council of Canadians is Intervening in this Process

9. The Council fully supports key elements of the broadcasting policy for Canada enunciated in the *Broadcasting Act*. The very first of these requires that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” The Act goes on to provide that the system “makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty.”
10. The Act establishes objectives toward which each element of the system, including both the public sector and private companies, must contribute. These include: to provide programs that are “varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,” that showcase Canadian artists, and offer news and information about Canada

and a Canadian perspective on world events. The Act also requires a “reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern.”

11. The Council would add two important observations. We understand that continuing regulation of the broadcasting system is essential to ensure that the public policy objectives are met. Over the fifty years that we have had television broadcasting in Canada, the exact nature and scope of these regulations has changed continually and it is likely to do so in future in response to technological and other changes in the system. The Council submits that, if foreign companies are allowed to own Canadian broadcasters or cable companies, this will inevitably erode the ability of Canadians to regulate our system to meet our needs, most particularly in relation to measures that may be needed to respond to future developments.
12. If foreign companies are able to take control of Canadian broadcasters, cable companies or other firms involved in Canada’s broadcasting system, these foreign companies would have access to the provisions of Chapter 11 of the North American Free Trade Agreement. Chapter 11 provides foreign investors with an ability to sue governments and seek compensation for government policies or actions that investors believe violate their rights under NAFTA. Thus, current and future CRTC rules and other government cultural policies could be challenged under NAFTA if U.S. (or Mexican) firms are permitted to acquire Canadian broadcasting and cable companies. Whether such measures would be vulnerable in such a challenge is a complex issue, but we fear some might be since they are clearly discriminatory to foreign investors in Canada.
13. Even if the CRTC accepts our submission and rejects the CanWest application, given the consolidation and growth that has taken place in the broadcasting system in the past decade, the fact that total operating revenues reached \$6 billion in 2006, and the continuing profitability of Canadian broadcasters and cable companies, it would be prudent for the Commission to study the potential implications of NAFTA’s Chapter 11 since it is likely that other non-Canadian companies will in future seek to acquire media assets in Canada.
14. Also, while the *Broadcasting Act* highlights that some use the public airwaves for private profit, all Canadian broadcasters and cable companies, including specialty and digital television services not available over-the-air, benefit directly and indirectly from a range of public policies and regulations, including carriage requirements, public funding of Canadian content programs, tax credits, cable substitution rules, protection from competition and measures to encourage advertising on Canadian stations. Consequently, all private elements in the broadcasting system are legitimately required to contribute to the public objectives.
15. At this point, we would note our concern about the effects of the Goldman Sachs acquisition of the non-regulated assets of Alliance Atlantis. Importantly, these assets include ownership of Motion Picture Distribution Inc., which owns 51% of Motion Picture Distribution LP. Goldman Sachs and its Canadian partner, EdgeStone Capital Partners, are also completing the purchase of Movie Distribution Income Fund, which

had owned the remaining 49% of Motion Picture Distribution LP. While we have no complaint with the acquisition of the stake in the Crime Scene Investigation franchise (The CSIs are popular American television dramas) that is part of this deal, we are alarmed that Goldman Sachs will acquire the largest single inventory of English-language Canadian television programs and feature films.

16. For many years, Alliance Atlantis and its predecessor companies were the dominant Canadian distribution companies, virtually the only players in the English-language market. Thus, Alliance Atlantis has accumulated rights to most independently produced television programs and feature films created in the past quarter century. We note that these programs and movies are culturally-significant for Canada and its citizens and most of them have been produced with substantial public support, in the form of investment, grants, tax credits and myriad other regulations. We believe that this acquisition is in violation of government rules respecting television and film distribution companies and we trust the government will act to enforce these rules and require Goldman Sachs to divest completely its interest in Motion Picture Distribution LP to a Canadian owner.
17. The Council should also reiterate its ongoing and unwavering, if not uncritical, support for Canada's public service broadcaster. A strong and effective CBC/Radio Canada, with long-term and stable funding, must remain a cornerstone of Canada's broadcasting system.
18. Since 2004, the Council has focused on fighting deeper economic integration with the United States. This includes building awareness of and opposition to the Security and Prosperity Partnership of North America, an agreement reached by Canada, the United States and Mexico in 2005, that is paving the way for Canada to integrate our security measures with those of the United States, surrender control of our energy supplies, sell off our water, and harmonize our regulations with U.S. standards.
19. The primary vehicle driving the move to harmonize standards is the North American Competitiveness Council, a tri-nation advisory body comprised of private sector representatives from Canada, the United States and Mexico. While the deliberations of this Council are shielded from public view, we do know who sits on it.
20. The Canadian representatives include Michael Sabia, Chairman of Bell Canada Enterprises, whose ownership of CTVglobemedia was reduced to 20% only last year; the U.S. representatives include Jeffrey R. Immelt from General Electric, a company with substantial interests in television, film and cable through NBC Universal; and the Mexican representatives include Claudio X. González, President of Centro de Estudios Económicos del Sector Privado. According to Mexican media commentators, Mr. González is a close friend of the Azcarraga Family, which owns Televisa, the largest media company in the Spanish-speaking world, with interests in all of the cultural industries. Given these corporate interests and connections, the Council would be extremely surprised if the issue of broadcasting regulations, including restrictions on foreign ownership, has not been discussed at one of the meetings of the North American Competitiveness Council.

21. The Council is participating in this CRTC process because it believes the foreign ownership restrictions are critical to maintaining appropriate regulations in our broadcasting system. In turn, such regulations are essential to ensuring that the private sector players have appropriate responsibility for achieving the objectives of the *Broadcasting Act*, including editorial diversity and bringing Canadian stories and artists to our television screens. All of this is essential for our democracy, our culture and maintaining our sovereignty.

Goldman Sachs and Company is Taking over Alliance Atlantis and CanWest

22. The structure proposed by CanWest and GSCP is complex and many of the details are not apparent because of extensive claims for confidentiality that have been approved by the Commission. The Council is concerned that important information about how GSCP's dominant ownership position will be reflected in ultimate control of the regulated assets is being at least partially hidden from public view.

23. In order for the CRTC public processes to be substantive, we believe the Commission should not permit parties to maintain confidential information. We reject the proposition that release of certain information would affect the competitive position of any company. In a regulated sector such as cable television and broadcasting, in which there are now only a few large players, all of which are public companies, there is little information that would not be known by competitors. Since the Commission itself receives this information, it is only the public interest participants in the CRTC processes who remain in the dark. The Council believes that full disclosure of all information would enable the public processes to be more effective and this would be of benefit to the Commission.

24. Notwithstanding that certain important features of the deal are confidential, we submit there is enough information on the public record to support our position that the CRTC should deny the application, because GSCP, a foreign firm, will control the regulated assets in fact, and this is contrary to the *Broadcasting Act*.

25. As noted in CRTC 2007-11, CanWest is seeking authority for the transfer of effective control of Alliance Atlantis' broadcasting companies to a corporation ("Amalco") that will be controlled by a corporation ("Jointco") that will be owned by CanWest and GS Capital Partners ("GSCP"), a private equity affiliate of Goldman Sachs and Company. It is proposed that Jointco, through a number of wholly-owned subsidiaries, would control the 18 specialty television broadcasting services of Alliance Atlantis, acquire a minority interest in three other services and acquire a 50% partnership interest in one other service.

26. CanWest will own 66 2/3% of the voting shares of Jointco and GSCP will own the remaining one-third. However, GSCP's economic interest in the Alliance Atlantis licences would be substantially greater. In its 31 July 2007 press release, CanWest stated that it would contribute \$262 million of the (reported) \$702 million equity investment to be provided by CanWest and GSCP. As a result, CanWest will have an equity interest of only 37.3% in Jointco, while GSCP will have an equity interest of 62.7%.

27. The application also contemplates that CanWest will enter into a management and administrative services agreement with Amalco under which, among other things, CanWest purportedly will manage the regulated assets and have sole control over programming decisions.
28. A significant feature of the proposed structure is that CanWest and GSCP have agreed that CanWest and its affiliates will contribute CanWest's existing broadcasting business to Amalco on or before March 31, 2011 in exchange for a possibly increased equity interest in Jointco. The extent to which CanWest's equity interest will increase is dependent upon the combined cash flow of the contributed business and the Alliance Atlantis business, the debt of the combined entity, and the target rate of return of GSCP. CanWest and GSCP have been granted confidentiality for the details of the formula, but press reports suggest CanWest's equity interest in the combined business would reach 50%, if the EBITDA (earnings before interest, taxes, depreciation and amortization) of the combined TV assets rise to \$200 million from their current estimated level of \$160-170 million, and the debt remains at its current level.
29. GSCP's economic interest in Alliance Atlantis is compounded by the fact that GSCP, together with Lehman Brothers, has agreed to provide to Jointco and its subsidiaries a significant amount of debt financing. The total purchase price of all Alliance Atlantis assets is \$2.3 billion and CanWest has allocated a value of \$1.369 billion to the regulated assets. The total equity contribution by CanWest and GSCP to acquire these assets appears to be \$702 million, leaving \$667 million to be financed through debt. While it was anticipated that some of the debt financing would be syndicated to other lenders through an offering of high yield bonds, it appears from the 31 July 2007 press release that GSCP and Lehman Brothers will now provide the debt financing in the form of bridge financing. The release notes: "The bridge financing replaces the originally contemplated high yield debt offering, which has for the time being been deferred due to recent turmoil in the North American debt markets."
30. If GSCP's share of the debt financing is 70% and its equity investment is 63% of the total equity, it has a dominant position and the substantial part of the financial risk. If Lehman Brothers provides the remaining 30% of the debt financing, the financial involvement of non-Canadians in the regulated assets increases.
31. The companies have gone to very great lengths to attempt to comply with the technical requirements of the *Direction to the CRTC (Ineligibility of Non-Canadians)* (*the Direction*) issued to the CRTC by the Cabinet under the *Broadcasting Act*, which provides that the Commission may not issue, amend or renew a broadcasting licence to a person who is not a Canadian. Thus, it would appear that all the companies involved in the regulated assets satisfy the requirements relating to jurisdiction of incorporation, the ownership by Canadians of at least two-thirds of the voting shares, and the lack of influence over programming decisions of the licensee by any corporation that does not meet specified share ownership, officer and board of directors' requirements. The proposed

management and administrative services agreement appears to give CanWest control over programming decisions of the Alliance Atlantis broadcasting undertakings.

32. However, there are other elements which contradict this understanding and, taken together, establish that GSCP would have ultimate control of Jointco, and thus of the regulated broadcasting assets, in violation of the Direction.
33. The terms of the relationship under which the assets of CanWest will be contributed to Amalco by March 2011 are very complicated and difficult to analyze without access to information the Commission has approved to be confidential. However, according to press reports, CanWest is obligated to maximize the economic value of all the assets and is constrained in terms of the transactions that can take place between regulated assets owned by CanWest and the assets being acquired from Alliance Atlantis. This contradicts the management agreement which alleges to give sole control of all these broadcasting undertakings to CanWest until they all come under the Amalco umbrella. This suggests that GSCP is heavily influencing the strategic direction of Jointco. Unconstrained by these strategic objectives, CanWest might make different decisions in the coming years either for its own reasons or in response to CRTC requirements.
34. In response to the Commission's deficiency questions, the applicant has noted that one of the rights afforded to GSCP under the U.S. *Employee Retirement Income Security Act*, is the right to "consult with and express its views and opinions with the management of the company and its subsidiaries on reasonable notice and at reasonable times on all matters relating to the operation of the company and its subsidiaries." This is a powerful tool for GSCP to exercise control and directly contradicts the self-serving provision which attempts to suggest that such rights do not extend to the right to direct, manage or control Jointco. The Council submits that GSCP might leave itself vulnerable to a future claim from its employees if it attempts to opt-out of its rights under U.S. law.
35. There is also a "right of first offer" provision in the shareholders agreement which is also approved as confidential. CanWest has explained that this provision gives GSCP the right to offer to sell its interest to CanWest at a specified price and terms. If CanWest elects not to purchase GSCP's shares, or were unable to do so at the time they were offered, CanWest must sell its shares to a third party to which GSCP would also sell its shares. This right of first offer thus allows a non-Canadian minority voting shareholder, GSCP, to force the sale of the shares of the Canadian majority voting shareholder, CanWest.
36. Finally, the Council would note that it is evident that any investor who is contributing so much money, both absolutely and relatively, will require sufficient assurance that it will receive a fair return on that investment. While it may be content to leave day-to-day management decisions to a minority partner, it will need to have ultimate control since it has assumed the greatest risk. This is fundamental to how our capitalist system works. Perhaps this control comes with the right of first offer provisions or perhaps it simply flows from the overall strategic direction it has given to Jointco for the period leading to March 2011 when the ownership of both Alliance Atlantis and CanWest will be subject

to review. Or perhaps it lies in some of the provisions which the Commission has approved to be confidential. Wherever it lies, we are convinced it is part of the relationship between CanWest and GSCP.

Conclusion

37. For all of these reasons, the Council urges the Commission to reject the application. The Council also believes that, if the Commission reaches this decision and forces the parties to sell the regulated assets of Alliance Atlantis, a Canadian buyer would come forward. The specialty and digital channels owned in whole or in part by Alliance Atlantis are valuable and profitable assets in a sector of the industry that continues to grow. For specialty television services, advertising sales have been growing, subscriber revenues are strong and there is no reason to expect that this will change in the foreseeable future. Canadian-owned firms must be given an appropriate opportunity to acquire these assets in conformity with the *Broadcasting Act*.
38. We appreciate having this opportunity to contribute to this important process and we look forward to appearing at the Public Hearings to expand on our submission and to answer any questions the Commission may have.



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Board of Directors,
Council of Canadians

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