



How CanWest controls Ten

CU traces the activities that led the ABA to find CanWest in control of Channel Ten

The ABA has found CanWest Global Communications Corp. to be in a position to exercise control over the Ten Group Limited (Ten), in its report released last month (*Investigation into Control: CanWest Global Communications Corporation/The Ten Group Limited: Second Investigation*, April 1997) (Report). This second investigation into CanWest's interests in Ten, which controls the Channel Ten television licences, arises from a series of transactions that took place between November 1996 and January 1997 involving both newly-formed and existing companies controlled by CanWest. The ABA now assesses that CanWest has an overall company interest in Ten (derived from its voting interest) of 52.49%.

The breaches

The Report found CanWest in breach of sections 57(1) and 57(3) of the Broadcasting Services Act (Act). These sections state:

- 57(1)** a foreign person must not be in a position to exercise control of a commercial television broadcasting licence;
- (2)** two or more foreign persons must not have company interests in a commercial television broadcasting licence that exceed 20 per cent.

CanWest has breached s 57(1) because of its control of four companies established at its instigation in order to acquire shares in Ten and secure a majority position on the board of Ten. These companies are:

- Selli Pty Ltd;
- Turnand Pty Ltd (a wholly owned subsidiary of Leibler Media Holdings Pty Ltd (LMH), controlled by Isi Leibler);
- Numeration Pty Ltd (a wholly owned subsidiary of Copplemere Pty Ltd, controlled by Steven Skala); and
- Donholken Pty Ltd.

CanWest has breached s 57(3) because Rossendale Investments Pty Ltd, a foreign company controlled by Peter Viner, CEO of Ten, already holds a 0.8 per cent interest in Ten.

The Belshaw transaction

Skala had mentioned to Asper in August 1996 that he and Leibler might be interested in disposing of some or all of their companies' shares in Ten. However, the events and arrangements the subject of the ABA's Inquiry followed the announcement in October 1996 by Belshaw Pty Ltd, a company controlled by John Singleton, that it intended to dispose of its 10 per cent interest in Ten.

Under a 1992 Shareholders' Subscription Agreement

(Agreement), parties to the Agreement – which included Belshaw, CanWest, LMH and Copplemere – were entitled to acquire Belshaw's shares in Ten in proportion to their existing Ten shareholdings.

While CanWest was prevented from acquiring further shares (because it had reached the 15 per cent limit imposed on foreign companies), it was permitted to nominate a non-foreign company that could acquire its putative entitlement and nominated Selli.

LMH and Copplemere established subsidiaries (Turnand and Numeration) to which they transferred an amount of their existing interests in Ten (LMH 100%, Copplemere 75%) and attendant voting rights. LMH also transferred the Ten shares and attendant voting rights it had newly acquired from Belshaw. Selli, as CanWest's nominee, also acquired its portion of Ten shares from Belshaw.

All purchases of shares from Belshaw were effectively financed by a CanWest-related company, Drie Sterren Kapitaal Nederland BV (DSK). First, Selli obtained finance from DSK by issuing it convertible debentures. Selli used the finance to purchase both its portion of shares from Belshaw and Class B (non-voting) shares in Turnand and Numeration. Turnand and Numeration used this capital to finance the purchase of Ten shares from their respective parent companies, LMH and Copplemere. Selli's Class B shares are convertible into Class C (voting) shares.

A complex matrix of deeds binds the companies and their shareholders together: dual debenture agreements between DSK and Selli; call options between DSK and Selli's shareholders; a call option between Selli and LMH; and the agreement between Selli, Turnand, Numeration and the Trustee, Lintondale Pty Ltd, under which DSK was granted a charge over the assets of Selli, Turnand and Numeration.

The Donholken transaction

In November 1996, two companies, Corom Pty and Audant Communications Pty Ltd, announced their intention to dispose of their shares in Ten. Pursuant to its rights under the Agreement, CanWest again nominated Selli to purchase shares. However, another shareholder, Telecasters North Queensland Limited, objected to the proposal on the grounds that it would result in Copplemere, Turnand, LMH and Numeration each being entitled to more than 40 per cent of Ten's issued capital – an outcome the Agreement forbade.

CanWest therefore sought the establishment of a new company with functions, powers and restraints similar to



that of Selli. It arranged for three people to be approached to form the company: Richard Kennett, a former school friend of Isi Asper's son David, who had earlier approached David offering to purchase Ten shares; Anthony Hollis, a former director of Pacific Communications Pty Ltd, a wholly-owned subsidiary of CanWest; and Melda Donnelly, who had been suggested by Steven Skala. Although never having before met one another, the three established Donholken on 9 January and purchased Corom's and Audant's shares in Ten the following day.

The legal and financial arrangements between DSK and Donholken are similar to those between DSK and Selli, with the exception of call options over voting shares in Donholken.

On 27 November 1996, Selli also purchased Ten shares from Winston Capital Inc, a transaction also funded by DSK. The Report does not focus on this transaction.

Findings

The Report found CanWest wished to acquire shares in Ten owned by Belshaw, LMH, Copplemere, Corom and Audant partly in order to assemble a 'critical mass' of Ten shares that would enable a single vehicle to be used for any future float; and partly to prevent interests opposed to CanWest's from acquiring a substantial interest in Ten shares or positions on the board of Ten. In Isi Asper's words:

'antibodies can come into a company, mischief makers, stupid people...Diabolical, fiendish, cunning fronts for competitors' (transcript, p16).

The transaction documents confer a number of benefits on the members of the new shareholder companies: Leibler maintains his seat on the board, while Skala obtains a board seat instead of being Leibler's alternate (which their companies' divestiture of Ten shares would otherwise have required them to relinquish). Both receive preferential dividend payments of \$150,000 each for as long as Copplemere and LMH hold participating shares in Selli; receive tax benefits; as well as additional benefits if Ten shares held by Selli and its subsidiaries are included in any float of Ten. Kennett and Donnelly receive seats on the Ten board; while Kennett, Donnelly and Hollis receive \$100,000 annual directors' fees or dividends, and 5 per cent of the net increase in Donholken's value.

The Report found that these benefits act as incentives to preserve the current arrangements; benefits which DSK/CanWest has the power to jeopardise through provisions of the call option and convertible debentures deeds.

DSK can effectively remove the directors of Selli, Turnand, Numeration and Donholken by converting debentures in favour of a nominee which could acquire the directors' voting shares. Although this power is subject to a proviso that such an action must not breach the Act or

the Foreign Acquisitions and Takeovers Act, the documents provide no mechanism for assessing when a breach may have occurred. The Report found that, short of all parties agreeing that a breach had occurred, the proviso would be ineffectual.

In the event of a disagreement, DSK could also effectively replace the directors of the shareholder companies with others whose views coincided with it.

The Report also found that DSK's position regarding these companies differs from that of a typical 'arms length' financier, as it shares most of the commercial risks and advantages of Selli's and Donholken's shareholdings in Ten.

The Report concluded that the directors of the shareholder companies would pay particular regard to the wishes and interests of DSK, to the extent that this would not of breach their fiduciary duties.

The ABA found that the companies were established at CanWest's initiative, and developed and implemented by it without substantial changes made by the incoming directors. In its view, they are special purpose companies whose operations are subject to strict limitations imposed by DSK. These limitations, placed on the companies' structures and the terms of their financial arrangements with CanWest/DSK, means that CanWest is in a position to control the votes cast by these companies at a general meeting of Ten.

Other means of control

The Report also found CanWest to be in a position to exercise control of Ten using tests set out in Schedule 1 of the Act. Specifically, it found that CanWest is in a position to exercise control of Ten:

- in tandem with its associates, DSK, Selli and Donholken;
- because it is an *associate* of Selli and Donholken, each of which is in a position to exercise control of Ten;
- because, together with its associate, DSK, it is in a position to *control* Selli and Donholken, each of which is in a position to exercise control of Ten.
- because it is in a position to exercise direction or restraint over the disposition of the control of more than half of the shares in Ten; and
- because it is in a position to secure the appointment of at least half the board of directors of Ten.

The findings followed both from an analysis both of corporate interests and arrangements in relation to Ten and each other; and from an examination of the 'agreements, arrangements and accustomed course[s] of conduct' between the directors of the relevant companies, conducted pursuant to the provisions of the Schedule 1.

Copies of the Report are available from the ABA. See Policy File for details.