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Filed via epass

10 August 2007

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

Dear Mr. Morin:

Re: Application No. 2007-0700-5 (the "Application") by CanWest Media Works Inc. ("CanWest"), on behalf of Alliance Atlantis Communications Inc. (Alliance Atlantis), seeking authority for the transfer of effective control of Alliance Atlantis' broadcasting companies to CanWest – Broadcasting Notice of Public Hearing CRTC 2007-11, Item 1

Introduction

1. The Directors Guild of Canada (DGC) is submitting this intervention in respect of the above referenced application by CanWest to acquire effective control of Alliance Atlantis' broadcasting companies. DGC is a national labour organisation that represents key creative and logistical personnel in the film and television industries. Its membership includes over 3,800 individuals drawn from 47 different craft and occupational categories covering all areas of direction, production, editing and design of film and television programming in Canada. DGC wishes to appear at the public hearing scheduled to begin September 5, 2007 to elaborate on the issues raised herein.
2. DGC is a member of the Coalition of Canadian Audio-visual Unions ("CCAU") and fully supports the comments filed by the CCAU in this proceeding. Based on the analysis provided by the CCAU in its submission, the DGC is opposing the application by CanWest to acquire Alliance Atlantis. The grounds for our opposition is that approval of this application will result in Goldman Sachs and its affiliates, which are non-Canadians, obtaining control in fact of Alliance Atlantis as well as CanWest's existing broadcast assets. The foreign ownership rules are a cornerstone of the Canadian broadcasting regulatory regime and must be upheld. No exception to these rules should be permitted.
3. As also stated in the CCAU submission, DGC is very concerned about the process undertaken in this proceeding. Additional documents were filed with the Commission by the applicant

but two days before the deadline for interested parties to file interventions. DGC does not understand why interveners were not provided additional time to review the new materials given the importance and complexity of this application.

4. For the record, DGC wishes to state that it is not opposed to the notion of CanWest acquiring Alliance Atlantis. A more diverse and strengthened Canadian broadcaster would be beneficial to the Canadian broadcasting system. However, DGC is adamantly opposed to the approval of a proposal that will allow a non-Canadian entity obtain control in fact of an important Canadian media company, which would be the case if this application is approved.
5. DGC will be prepared to discuss the concerns outlined in the CCAU intervention, which relate to the ability of non-Canadians (i.e. affiliates of Goldman, Sachs & Co.) to exercise effective control of the Alliance Atlantis companies that CanWest has applied to acquire in this proceeding. Given that the issues relating to non-Canadian ownership and control of broadcasting licensees are fully addressed in the CCAU's intervention, DGC will not be addressing them in further detail in this submission.
6. In this intervention, DGC outlines its concerns relating to the nature and scope of the tangible benefits package proposed by CanWest in the Application. In the event that the Commission approves the application, we believe that it would not serve the public interest for the Commission to approve the benefits packaged proposed by CanWest in its current form. Specifically, our concerns relate to the following matters:
 - the Applicant's limited commitment to the production of original Canadian dramatic productions;
 - the applicant's proposal to extend its benefit payments to an unprecedented ten year time period;
 - the absence of any proposal to establish clear, precise benchmarks and a reporting system to ensure that the money spent on benefits is truly incremental to the broadcasting system; and
 - the proposal includes as tangible benefits funding for certain initiatives that are either not incremental to the broadcasting system or are otherwise not eligible under the Commission's benefits policy.
7. Under the Commission's benefits policy, an applicant is required to propose a package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system. In addition to being commensurate with the size and nature of the transaction, a tangible benefits package must include only those initiatives that are truly incremental and would not be realized without approval of the proposed transfer.¹

¹ Public Notice CRTC 1993-68.

8. It is our submission that CanWest's proposed tangible benefits package does not fully comply with this policy. With that in mind, in the event that the Commission approves the application, DGC is proposing that the Commission require CanWest to implement the following changes to its tangible benefits package:
- (i) require CanWest to provide greater details about how its benefits monies will support the production and broadcast of Canadian dramatic programs. In this regard, DGC proposes that 64% of the on-screen benefits be directed to high quality Canadian drama. This is consistent with the recent CTVgm/CHUM transaction;
 - (ii) reduce the time frame for paying out the benefit funding to seven years, or require CanWest to increase the amount of benefits payable to take into account the present value of funding made over a ten year rather than a seven year period;
 - (iii) require the applicant to submit an outline of the proposed timing of the expenditures. For instance if the term for payment is seven years, no less than a third of the funds should be expended before the end of the second full broadcast year following the Commission's decision; the next third should be spent within the ensuing two years, and the balance before the end of year 7;
 - (iv) establish benchmarks and a detailed reporting system for the benefit funding to ensure that the money spent on these initiatives is truly incremental to the combined CanWest/Alliance Atlantis broadcasting group and the Canadian broadcasting system; and,
 - (v) deny as proposed tangible benefits those initiatives that are: (a) not incremental, (b) otherwise not eligible for funding under the Commission's benefits policy or (c) lack sufficient detail for the Commission to assess their eligibility (which would include CanWest's proposals to provide funding to on-going documentary productions, entertainment magazine programs, video games and websites, undefined history programs, and existing current affairs programming).
9. Each of these changes is discussed in more detail below.

Applicants should be required to Direct Funding to Original High Quality Canadian Drama Programming Initiatives

10. Before addressing our specific concerns about the CanWest tangible benefits package, DGC would emphasize the importance of ensuring that, in proceedings of this kind, the tangible

benefits proposed include a significant contribution to on-screen initiatives and in particular funding for independently-produced original Canadian drama programming.

11. The Commission has, on numerous occasions, lamented the fact that the Canadian broadcasting system produces very little Canadian drama programming. In Public Notice CRTC 2003-54, *Support for Canadian Television Drama*, for example, the Commission highlighted the critical role that drama programming plays in the Canadian broadcasting systems:

The Commission considers that a healthy and successful Canadian broadcasting system must include popular drama programs that reflect Canadian society and project Canada's stories onto the world stage.

12. Others have also chimed in to express concern at the limited amount of drama programming available in the Canadian broadcasting system and have encouraged the Commission to adopt measures that encourage the production and broadcast of drama. In her Report to the Commission in May 2003 titled *Dramatic Choices – A report on Canadian English-language drama*, Trina McQueen highlight the fact that the availability of minimal amounts of drama programming is inconsistent with policy objectives of the *Broadcasting Act*:

It is hard to reconcile the reality of our viewing with the objectives of the *Broadcasting Act*, which through all its many versions, has insisted that programming respond to the tastes and interests of Canadians. Drama is the most appealing form of television for most Canadians. If they are not watching Canadian drama, it is hard to see how the Act is being upheld.

13. DGC shares the concerns of the Commission and Ms. McQueen relating to lack of Canadian drama programming in the system. DGC, the CCAU and other members of the coalition have in numerous proceedings over the past decade expressed concern about the decline in Canadian television drama produced and broadcast in Canada. We have also consistently expressed the view that dramatic programs made in Canada are the cornerstone of our broadcasting system. It is vitally important, therefore, to ensure that high quality, Canadian drama programs are produced in this country so that Canadians can be assured access to a window on our country's national culture, stories, imagination and passions.
14. We believe that one fairly easy way to help boost Canadian drama production would be for the Commission to require applicants who are proposing to acquire broadcasting undertakings to propose tangible benefits packages that include a significant contribution to high quality, original Canadian drama. In the case at hand, DGC proposes that the Commission required CanWest to contribute 64% of the on-screen benefits that form part of the benefits package to the independently produced Canadian dramatic programming.

This was the case in the recently approved transaction of CTVgm/CHUM, and should be the case in this instance.

Ten Year Period

15. CanWest's proposal to extend its benefit payments to an unprecedented ten-year time period should be rejected by the Commission. As noted in its May 28th response to deficiencies, CanWest's rationale for extending the pay-out period by three years is to "avoid a jarring completion of the systems benefits given the close proximity of several large broadcasting transactions announced within the current fiscal year".
16. The possibility that transfers benefits will run out in seven years is not a reason for the Commission to approve CanWest's proposal to amortize its benefits expenditures over ten years. A lack of appropriate measures within the broadcast regulatory regime to support the creation of Canadian programming should not be grounds for limiting the benefits that this proposal will bring to the Canadian broadcasting system and to Canadian audiences. Two wrongs definitely do not make a right.
17. Moreover, CanWest, nor anyone else for that matter, does not know what will happen within the Canadian broadcasting sector in seven years. Perhaps by then the Commission and/or the federal government will have established a more stable and consistent mechanism for funding the production of Canadian priority programming, particularly Canadian drama.
18. Further, the same argument that is being used by CanWest in this proceeding to extend the benefit period could have been used in 2000, when several major transactions were approved by the Commission.² Yet, we are in the year 2007 and several acquisitions are being considered, or have been approved, by the Commission that will help ensure that benefits funding is made available for the production of Canadian programming and other initiatives for another seven-year period.
19. The rationale employed by CanWest might have been palatable if the Applicant had proposed increasing the present value of its benefits package to compensate for extending its funding initiatives over a ten-year (rather than seven) period. That is, however, not the case. CanWest is simply seeking special treatment from the Commission that will allow it to have an additional three-year grace period to distribute its funds. If the Commission were to approve this aspect of its application, it is highly likely that every other applicant that applies to acquire control of a broadcasting undertaking will be requesting the same extended period of time to fulfill its benefits proposal.

² In that year, CanWest and Corus acquired parts of WIC and received approval in Decisions CRTC 2000- 221 and 2000-222, CTV acquired TSN, RDI and Discovery and received approval in Decision CRTC 2000-86, and Bell Canada acquired CTV and received approval in Decision CRTC 2000-747.

20. That will not serve to strengthen the broadcasting system, and will not increase the amount of the much-needed funding available for the production of Canadian programming. As the Commission is keenly aware drama programming is by far the most expensive programming to produce. Every year, there is a shortage of funding for this programming in the Canadian broadcasting system. In our view, it would be better, therefore, to consider reducing the amount of time that benefits monies are paid out to third parties to produce Canadian programming, rather than entertaining any proposal to extend that time period. By doing this, the Commission would increase the likelihood that adequate funding would be available over the next few years to support the production of drama programming.
21. Moreover, the Commission should ensure that benefit payments are made in a timely manner. DGC notes that in the case of the Craig/CHUM matter of 2004, \$20 million of the required \$21.9 million in benefits continue to be outstanding. DGC also notes that there is a significant saving to acquiring companies when tangible benefits expenditures do not have to be made until many years later. The Commission should be vigilant about benefits packages that permit expenditures to be "back-end loaded" or at least leave the flexibility to spend the benefits monies many years from now – in this case 10 years from now. As the Commission is fully aware, \$13 million in transfer benefits for Canadian programming has much more value today and in the next seven years than it will have in 2017.
22. DGC, therefore, respectfully recommends that the Commission establish a grid by which, for example, (a) no less than a third of the funds be expended before the end of the second full broadcast year following the Commission's decision, (b) the next third within the ensuing two years, and (c) the balance before the end of year 7. This would accord sufficient flexibility while requiring some expenditures according to reasonable milestones along the way.

Incrementality

(i) Establishing an Appropriate Test for Incrementality

23. The Commission has consistently recognized that tangible benefits must be truly incremental and provide funding for initiatives that would not be undertaken in the absence of the transaction. In Decision CRTC 2000-747, the Commission emphasized this point as follows:

The Commission, in applying its benefits test, has been consistent and rigorous in requiring that expenditures proposed as benefits be truly incremental. For benefits to be accepted by the Commission, they must be directed to projects and initiatives that would not be undertaken or realized in the absence of the transaction. The Commission also generally requires applicants to demonstrate that expenditures proposed as benefits will flow predominantly to third parties, such as independent producers.

24. The issue of incrementality is critical. Applicants must be required to demonstrate that the benefit spending they are proposing to undertake will exceed the expenditures that would have been incurred in the absence of the transaction. When asked in a Commission deficiency question how the Applicant proposes to measure incrementality, CanWest simply responded by indicating that the priority programming spending should be benchmarked against the spending using the existing CPE requirements imposed on each specialty service. In our view, that is not good enough.
25. The Commission will not be in a position to determine whether an expenditure is truly incremental to the Canadian broadcasting system unless there are clear benchmarks and detailed annual reporting requirements in place. This issue has to be addressed at the time of approval of the transfer of control. Our concern is that a broadcaster, like CanWest, may simply reduce expenditures on one or more of its existing broadcasting properties and shift them to a newly acquired undertaking in order to comply with its tangible benefit requirements.
26. As a result of this transaction, CanWest will have significant holdings in respect of both specialty service undertakings and OTA television stations. It would not be difficult for CanWest to reduce its spending on Canadian programming for its OTA television stations and redirect that money to the newly acquired specialty services as a means to satisfy the tangible benefit funding requirements that would flow from approval of this Application. This would result in no new funding for the broadcasting system and no incremental priority programming. While the Alliance Atlantis specialty services have CPE requirements, CanWest's OTA television stations do not. It would, therefore, be easy to avoid making any incremental payments into the system just by shifting the existing funds CanWest uses for Canadian programming on its OTA television stations to its new specialty service undertakings.
27. If the Commission simply allows CanWest to use the CPE for each of the specialty services it is acquiring as the benchmark for its benefits spending, there will be an enormous loophole that could be easily exploited by CanWest. The Commission needs to establish adequate benchmark measures to eliminate this loophole, and require CanWest to ensure incrementality not just against the CPE requirements of the specialty service undertakings that are being acquired, but against the previous year's spending by CanWest's conventional broadcasting services.
28. That is the approach that the Commission adopted in 2004 when it approved the application by CHUM Limited to acquire Craig Media in Broadcasting Decision CRTC 2004-502. In the proceeding to consider CHUM's application, DGC, the Writers Guild of Canada, Manitoba Motion Picture Industry Association and Manitoba Film and Sound all intervened to impress upon the Commission the importance of establishing a baseline for priority programming expenditures that would be based on the historical spending on such

programming by both CHUM and Craig. In that Decision, the Commission accepted the arguments of the interveners and determined that the baseline for establishing incrementality would be the combined priority programming expenditures of both CHUM and Craig:

Based on the record of this proceeding, the Commission is of the view that the baseline for establishing incrementality should be predicated on the combined priority programming expenditures of both CHUM and Craig, excluding Toronto One for the broadcast year ending 31 August 2004. The Commission considers that such an approach would take into account the historical priority programming expenditures of both CHUM and Craig, thus ensuring that the priority programming funding that CHUM has proposed as a tangible benefit is truly incremental to the priority programming expenditures made by both CHUM and Craig in the past.³

29. The same approach must be applied in the present case in respect of the benefits proposed by Canwest. For the benefits spending to be truly incremental, funding requirements that have been established for one part of the CanWest/Alliance Atlantis broadcasting group (i.e. the specialty services) cannot be used to offset the Canadian programming spending of the group's OTA television stations.
30. In view of the above, DGC recommends that the benchmark to be used in this case should be (a) the average annual expenditures on Canadian programs telecast by CanWest for the years 2004, 2005 and 2006; and (b) the CPE for the Alliance Atlantis specialty services. The figures set out in the annual returns filed for the CanWest broadcasting undertakings should be used to determine these benchmarks.
31. In addition, as the DGC indicated in its intervention in the recent proceeding to consider CTVgobemedia's acquisition of CHUM, the CTF top-up money received by these broadcasters should be excluded both from the calculation of the benchmark and in the satisfaction of the incremental spending. In order to truly benefit the Canadian broadcasting system, this must be new and real money to the system. This approach would be consistent with the Commission's decision in Broadcasting Public Notice CRTC 2004-93, *Incentives for English-language Canadian television drama*, wherein it excluded CTF top-up funding from the calculation for Incentive 3, which provides for additional advertising minutes where a licensee increases its expenditures on Canadian drama programming.

(ii) Incrementality Reporting Requirements

32. DGC also believes that the Commission's objective of ensuring that proposed benefits are truly incremental to the broadcasting system can only be achieved if it imposes an annual

³ Broadcasting Decision CRTC 2004- 502.

reporting mechanism on the acquiring entity that requires it to report precise details of its benefit spending. When asked the question in deficiencies, CanWest simply responding by stating that it would "file detailed annual benefit reports". We believe that it is imperative that the Commission define for CanWest what "detailed" should mean.

33. In Decision CRTC 2000-747, the Commission imposed the following reporting requirements on BCE when it approved its acquisition of CTV:

Accordingly, as a condition of approval, the Commission requires the filing of a detailed audited report, concurrently with the filing of the annual return for CTV Television Inc., setting out the actual expenditures on the base level amount of eight hours per week of priority programming in each of the next seven years... As part of this report, BCE shall also file a detailed breakdown of its expenditures each year on the priority programming and related initiatives accepted as benefits of this transaction. This reporting must demonstrate, over the seven-year period, the allocation of a minimum of \$140 million to on-screen initiatives relating to new priority programming, incremental to expenditures on the eight hours per week of such programming referred to above, and irrespective of any spending in excess of the base level of \$24.9 million per year on such programming.

34. It is only through the imposition of comprehensive, detailed annual reporting requirements that the Commission will be able to ensure that the initiatives funded by CanWest are truly incremental to the system. The Commission should, therefore, establish reporting requirements for CanWest in this proceeding that are comparable to those established in Decision CRTC 2000-747.

Certain Benefits Proposed by CanWest are not Appropriate

35. While DGC believes that many of the funding initiatives that are proposed by CanWest in the Application are consistent with the Commission benefits policy and previous decisions involving transactions of this nature, there are a number of initiatives that have been proposed that do not comply with the Commission's policies and are therefore unacceptable. Specifically, we are concerned that a number of the proposed funding initiatives would be inappropriate on the basis that they are either not incremental or directed to activities that are not recognized as eligible benefits under the Commission's benefits policy, or are lacking in sufficient detail for the Commission or any interested party to assess whether the proposed initiative is, in fact, appropriate.

(i) Pilot projects for scripted drama and other priority programming (\$13.5 million)

36. CanWest has proposed to fund the production of a combination of hour-long drama pilots as well as 30-minute pilots for other priority programming. While DGC recognizes that the

proposal has merit, the Applicant has failed to provide any indication of how this money will be divided among the different categories of priority programming. Our concern is that it will be the "other priority programming" that will get the bulk of this funding and very little will go to drama programming. As noted above, DGC believes that applicants that are applying to acquire control of Canadian broadcasting undertakings should be required to ensure that funding is used to support the category of programming that is the most critical in furthering the objectives of the *Broadcasting Act*, and that needs the most support in the Canadian broadcasting system.

37. With that in mind, CanWest should be required to ensure that at least 64% of its of proposed funding for pilot projects be directed toward Canadian drama, as it is this category of programming that is the most costly to develop and produce. This is consistent with the recent CTVgm/CHUM transaction in which 64% of the on-screen benefits were directed to Canadian drama.
38. In addition, script and development funding is usually reimbursed if and when a project goes into production. CanWest should, therefore, be required to return any financing that it recoups back into additional script and concept development funding and this should apply in perpetuity.

(ii) New Media Support (\$4 million)

39. The tangible benefits package proposed by CanWest includes significant funding for the "development of emerging media content", which would include things like "show-specific websites", "mobile applications", "webisodes" and "games".
40. DGC is not generally opposed to the use of a certain portion of benefits monies for the creation of programming that would be broadcast on new media platforms, such as the Internet. We do, however, oppose the use of benefits monies that would be used for initiatives that will not enrich the Canadian broadcasting system, and that are normal course costs that are incurred as a result of operating a broadcasting undertaking.
41. It is our submission that the above-mentioned new-media initiatives are not appropriate for a tangible benefits package. In the case of games, websites, webisodes and mobile applications, there does not appear to be shortage of resources in the broadcasting system for these types of activities. Moreover, these are normal course costs that are incurred as result of operating a broadcasting undertaking. Funding these initiatives would certainly not be considered incremental to the broadcasting system. They would (or should) be realized even if the Commission denied the proposed transfer.
42. Additionally, funding these initiatives would certainly not be considered incremental to the broadcasting system. They would be realized even if the Commission denied the proposed transfer.

43. DGC, therefore, proposes that the Commission require CanWest to redirect these funds to an initiative that is consistent with the Commission's benefits policy.

(iii) Canadian History Project (\$1.5 million)

44. The proposal to set aside \$1.5 million to support a "programming/new media project related to Canadian history that would include a programming and web/video or other new media component" is far too sketchy a description for the Commission to seriously consider this to be an eligible benefit. Even when the Commission provided CanWest with the opportunity to elaborate on the nature and scope of its "Canadian history project" in the deficiency process, the best that CanWest could do was to say that this will be a "broadcast initiative" and will include a "new media component".
45. DGC believes that before this initiative could be approved as an eligible benefit, CanWest should be required to provide details as to the nature and scope of the \$1.5 million initiative so that the funds do not end up being used to support an "other new media component" and can be adequately benchmarked.

(iv) Feature Independent Documentary Production (\$5 million)

46. DGC supports the notion of benefits monies used for the production of long-form Canadian documentaries. However, CanWest's proposal to devote significant funds to supporting a type of programming, called "feature" or "high end" documentaries, clearly would not be incremental spending for the broadcaster if a benchmark as proposed above by the DGC is not established. As outlined in the Application, CanWest is already investing significant dollars into this form of programming through its highly successful *Global Currents* program. In order for this initiative to be acceptable, the applicant must assure the Commission that it will be incremental to existing spending by CanWest and indeed the Alliance Atlantis television services.

(v) Award Shows/Red Carpet Tributes to Canadian Talent (\$13.5 million)

47. The proposal to contribute such a significant amount of money, \$13.5 million, to the production of Canadian awards ceremonies, red carpet tributes and other programming showcasing domestic talent should only be accepted as an eligible tangible benefit if the Applicant can demonstrate that it will, in fact, be used for such purposes; i.e. the recognition of Canadian talent. Canada does not need another *ET Canada* with its magazine format that focuses most of its attention on U.S. and other non-Canadian stars. Moreover, this funding should definitely not be directed toward simply enhancing CanWest's existing coverage of award shows and other red carpet moments. If the funds were to be used in this manner, this initiative would certainly not be incremental to the broadcasting system.

48. CanWest should be required to provide details at the hearing about how this initiative which will receive a significant portion of the benefits package will support the visibility of Canadian talent on television, including emerging, existing and seasoned Canadian artists.

(vi) Canada in Focus (\$4 million)

49. It is difficult to understand how a weekly current affairs show, such as CanWest's proposed *Canada in Focus*, would qualify as an eligible benefit under the Commission's policy. These weekly current affairs programs are regular fare on most OTA television networks operating in Canada and the United States. This is precisely the kind of programming that one would expect CanWest to provide as part of its ongoing normal responsibilities as an existing licensee.
50. While such an initiative might have been acceptable seven years ago when CanWest received Commission approval to acquire WIC, this type of programming is now quite common on OTA television stations, and should for that reason no longer be considered incremental to the broadcasting system.

(vii) Digitizing Archival Footage (\$5 million)

51. DGC acknowledges that CanWest's proposal to devote benefit monies to support the digitization of news footage and other programming that is stored on film and tape has qualified as a benefit in the past.⁴ At \$5 million, however, the amount of money that will be devoted to digitization represents 3.6% of the total tangible benefits package. That appears to DGC to be an inordinately high percentage for an initiative that is largely self-serving.
52. In the case of BCE's acquisition of CTV in 2000, the percentage was closer to 1.5% of the total benefits package. DGC proposes that the Commission limit the amount of money the CanWest is permitted to devote to digitizing archival footage to a similar percentage in this Application.

Conclusions

53. As outlined in this intervention, DGC is concerned that the tangible benefits package proposed by CanWest is not consistent with the Commission's benefits policy set out in Public Notices CRTC 1989-109, 1993-68 and 1999-97. Under that policy, CanWest is required to propose a package of significant and unequivocal benefits that yield measurable improvements to the Canadian broadcasting system. In addition, that benefits

⁴ Decision CRTC 2000-747.

package must be commensurate with the size and nature of the transaction and include only those initiatives that are truly incremental and would not be realized without approval of the proposed transfer.

54. We do not believe that CanWest's benefit package achieves this standard.
55. Provided that the issues relating to non-Canadian ownership and control outlined in the CCAU intervention are resolved in a manner that is consistent with the *Direction to the CRTC (Ineligibility of Non-Canadians)*, approval of the Application should not be granted until CanWest files with the Commission a revised tangible benefits package that fully addresses the concerns noted above.
56. A copy of this intervention has been sent to the Applicant.
57. All of which is respectfully submitted.

Yours truly,



Alan Goluboff
President
Directors Guild of Canada

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