

Ownership and Control of Canada's Broadcasting, Telecommunications and Cultural Industries

Written Comments of the Director's Guild of Canada
Responding to *Sharpening Canada's Competitive Edge*
The Consultation Paper of the Competition Policy Review Panel

10 January 2008

INTRODUCTION

On 30 October 2007 the Competition Policy Review Panel (CPRP) released its consultation paper, *Sharpening Canada's Competitive Edge*, inviting comments on a range of issues relating to Canada's competition policies and its framework for foreign investment policy.

The Director's Guild of Canada (DGC) is pleased to provide the CPRP with these comments in response to *Sharpening Canada's Competitive Edge*. The DGC is a national labour organisation representing key creative and logistical personnel in the motion picture industry. Founded in 1962, today it represents over 3,800 members in 48 different craft and occupational categories covering all areas of filmmaking: direction, production, editing and design.

It is the DGC's understanding that the CPRP is conducting ongoing, direct consultations with interested parties and may also hold a public hearing later in early spring 2008. The DGC would like to participate in both of these consultation processes, if possible.

The DGC's comments on the CPRP's consultation paper focus on the importance of maintaining Canadian ownership and control of Canada's broadcasting and telecommunications sectors and its cultural industries. This a matter which the DGC considers of critical importance. Over the years, the DGC has made numerous submissions to the Standing Committee on Canadian Heritage, the Department of Canadian Heritage, Industry Canada, the CRTC and various other bodies emphasizing the need to keep Canadian communications and culture in Canadian control.

At present, there are provisions under both the *Broadcasting Act* and the *Telecommunications Act* which restrict foreign investment in key broadcasting and telecommunications entities.¹ In respect of broadcasting, the rules apply to both programming undertakings and broadcasting distribution undertakings (BDUs; e.g., cable and satellite companies). Ownership restrictions on both types of entities are important since both directly influence the programming content available to Canadians. For instance, programming undertakings determine the programs that are made available to Canadian television audiences. They also determine in large part which Canadian programs are produced and broadcast. BDUs for their part, not only carry their own or affiliated programming services but also decide, to some extent, which unaffiliated services to carry, what interactive service elements are supported, as well as how the services are packaged, priced and marketed. BDUs play a critical role in distributing and promoting Canadian culture.

In addition to the restrictions which exist under the *Broadcasting Act* and *Telecommunications Act*, foreign investment in entities involved in Canada's cultural industries is subject to review under the *Investment Canada Act*. Under this statute the direct acquisition of a Canadian

¹ Licensees under the *Broadcasting Act* (i.e., programming undertakings such as over-the-air broadcasters and specialty services, as well as distribution undertakings such as cable and DTH operators) must be Canadian owned and controlled. Under the *Telecommunications Act* Canadian carriers must be Canadian owned and controlled. In both cases, non-Canadians can hold up to 20% of the voting shares of the regulated entity, as well as up to 33.3% of the voting shares of a holding company. In addition, the regulated entity cannot be otherwise controlled by non-Canadians.

cultural business is reviewable by the Minister of Canadian Heritage if the value of assets acquired is \$5,000,000 or more. When assessing a proposed transaction the Minister must determine whether the acquisition would be of net benefit to Canada. Among other things, the safeguards provided by the *Investment Canada Act* have helped preserve the ongoing existence of the Canadian film distribution sector. This, in turn, has helped ensure that Canadian films reach Canadians.

The DGC is pleased to note that on 29 November 2007 the Minister of Canadian Heritage, Josée Verner, appeared before the House of Commons Standing Committee on Canadian Heritage and stated unequivocally that the Government has no intention of changing these foreign ownership rules:

You refer to a committee looking at competitiveness and foreign ownership. Our government has no intention of changing anything with respect to foreign ownership; I can assure you of that.

The DGC is encouraged by the Minister's strong commitment on this issue. In the DGC's view the restrictions on foreign investment have been and remain important for economic, cultural and political reasons. While the DGC recognizes that the CPRP will focus on economic issues when making its recommendations to the Government, the DGC believes it is essential to identify all of the fundamental policy considerations which must be taken into account when considering the issue of foreign investment in the broadcasting, telecommunications and cultural industries.

From an economic perspective, the foreign ownership rules have helped ensure that Canada has strong communications and cultural industries with significant operations across the nation, employing tens of thousands of people with expertise and experience as good as that of any other workforce in the world. These industries have made significant capital investment and provided opportunities for the best and brightest of our young people. They have also had a major ripple effect throughout the economy by providing leading edge cultural and communications services and products which both assist individuals and businesses to achieve their goals and make Canada a great place to live.

On the cultural side, no country can call itself sovereign if it loses control of its communications and cultural industries. A vibrant, healthy society must be able to see and understand itself through its own films, television, radio, books, magazines and multimedia services. If it cannot do this, then its ability to develop, affirm and revise its values, institutions and place in the world will be severely compromised. It will lose its sense of self and, with that, its autonomy.

Finally, Canadian ownership and control of Canada's broadcasting, telecommunications and cultural industries is important in at least three ways from a political perspective.

First, democracy requires the free flow of ideas reflecting all sectors of society. Ceding control of Canada's communications and cultural industries to non-Canadians would almost certainly limit

the ability of Canadians to express themselves and to hear the ideas and concerns of other Canadians. This would compromise the vitality of Canadian democracy.

Second, eliminating the Canadian ownership and control restrictions would have an indirect but significant effect on Canadian sovereign control over these industries. Non-Canadian corporations must obey the laws of their home countries. Those laws can restrict not only the actions of a parent corporation but also those of its subsidiaries, including Canadian subsidiaries. If Canada were to permit non-Canadians to own and control Canada's communications and cultural industries, it could be expected that the activities of the Canadian companies would be limited by Canadian law and also by the laws of the foreign country. This would constitute an indirect diminishment of Canadian sovereignty.

Third, fundamental issues of national security could arise if sensitive Canadian communications systems - broadcasting and telecommunications - were owned and controlled by non-Canadians.

The DGC discusses these economic, cultural and political concerns in greater detail in the following sections.

ECONOMIC CONSIDERATIONS

The broadcasting, telecommunications and cultural industries have been among the fastest growing sectors of the Canadian economy for many years. In 1996, the broadcasting sector (television and cable) had annual revenues of \$4.9 billion² while the telecommunications sector had revenues of \$20.5 billion³ and cultural industries contributed over \$29.2 billion⁴ to the Canadian economy. By 2006, all of these sectors had experienced remarkable growth with annual revenues rising to \$12.8 billion⁵, \$36.1 billion⁶ and \$43.1 billion⁷, respectively.

While the past decade or more has been a time of remarkable change, the field of communications and culture is, if anything, becoming even more dynamic, more technologically advanced and more important to the overall success of Canada in the global environment. It is expected that growth in the communications sector will continue to be well above the all-industries average for some years to come. And it is certain that Canadians will both want and need to have access to leading edge broadcasting, telecommunications and cultural products and services for both personal and business purposes.

² CRTC Broadcasting Policy Monitoring Report, 2000.

³ CRTC Telecommunications Monitoring Reports: Status of Competition in Canadian Telecommunications Markets, 2001.

⁴ Statistics Canada, *Economic Contribution of Culture in Canada*, no. 23, December 2004.

⁵ CRTC Broadcasting Policy Monitoring Report, 2007.

⁶ CRTC Telecommunications Monitoring Reports: Status of Competition in Canadian Telecommunications Markets, 2007.

⁷ Statistics Canada, CANSIM, table (for fee) 379-0027. Last modified: 2007-10-31.

Canada has benefited enormously from the fact that its broadcasting, telecommunications and cultural industries have been Canadian owned and controlled. This requirement has, among other things, kept the profits generated by these sectors in the hands of Canadians who have, for the most part, reinvested in Canada. It has also ensured that Canadian products and services are, to a large extent, made in Canada, by Canadians, for Canadians. As a result, a wide range of Canadians with diverse skills have found employment in these industries. And, an equally wide range of ancillary businesses have thrived by supplying the needs of the broadcasting and telecommunications sectors. The end result has been a healthy, vibrant industry building infrastructure, creating services and products, and generating employment for Canadians.

Canada's communications infrastructure, services and content have been amongst the best in the world. It is questionable whether this would have been the case if the Canadian ownership and control restrictions did not exist.

If foreign investment in broadcasting and telecommunications were unconstrained, there can be little doubt that one or more of the major Canadian communications conglomerates would be bought out by non-Canadians. This would inevitably lead to a "rationalization" of the operations of the Canadian entity within the context of the multinational organization. A foreign investor would look for efficiencies across all of its companies – Canadian and non-Canadian – and this would almost certainly lead to a loss of employment, expertise and possibly of infrastructure investment in Canada.

It is sufficient to consider the effect of consolidation that has already been permitted within these sectors inside Canada to understand what would happen if Canadian companies could be acquired by large foreign corporations. When Toronto-based Alliance Atlantis bought Salter Street, the Halifax operations disappeared. When Corus bought the The Women's Network, the operations of WTN were moved from Winnipeg to Toronto. Again and again, consolidation has resulted in regional operations being phased out and centralized operations being expanded, but with a net shrinkage in employment.

There is no reason to think that the same thing would not happen if a foreign investor took over a Canadian broadcasting, telecommunications or cultural products company. However, in this case the "regional" operation that would shrink or be phased out would be the Canadian operation since consolidation and concentration would take place in a global context.

For example, the development of some programming services, applications and content would likely shift from Canada to another country so as to take advantage of any economies of scope or scale which may be available for video or audio production. Expertise and employment would leave the country. And, in the long run, the Canadian operations could eventually be downgraded to a marketing and distribution role.

It is important to recognize that these types of changes need not be limited to the software/content side of things. Even the key infrastructure elements might not remain Canadian-based. Satellite radio provides a recent example where virtually all the infrastructure

associated with a broadcasting operation is located outside of Canada. If the Canadian ownership and control rules did not exist, Canada would have been a simple overflow market for the U.S. satellite radio companies and Canada would have not received even the relatively low level of infrastructure and employment that currently exists with the Canadian satellite radio operations.

An example from almost a decade ago highlights a similar concern. In the late 1990's several cable companies were investors in and used the U.S. based service @Home when first introducing their Internet services to Canadians. Much of the infrastructure (e.g., servers) for the @Home service was located in the United States. Over time, certain technical problems developed as a result of the extremely rapid growth in Internet services. Eventually, the Canadian cable companies concluded that it was better for them to control their own Internet services and they stopped using @Home. As a result, they fully developed their own Internet infrastructure – much to the benefit of Canadian Internet users and the Canadian economy.

If these cable companies had been owned by a U.S. conglomerate that also owned @Home the chances that this Canadian infrastructure would have been built seems remote. Instead, the U.S. company would likely have continued to enhance its U.S. infrastructure so as to achieve a level of efficiency and robustness sufficient to maintain an adequate quality of service. And, Canada would have been the loser.

Numerous other examples are possible. The central point is that if past experience is any guide – which it must be – then foreign ownership and control of the Canadian broadcasting, telecommunications and cultural industries would almost certainly lead to a significant loss to Canada of expertise, employment and even infrastructure. This would represent an immediate loss to the Canadian economy. It would also have longer term consequences for the country.

The loss of expertise and the displacement of decision-making power for key communications and cultural industries could only impoverish Canadian society. Canada must have a leading edge communications industry – which means the full range of highly skilled people, as well as infrastructure – if it is to compete in the global environment. However, it is difficult to see how this would be possible if there were no longer opportunities for the best and the brightest in Canada, if the highest levels of creative, technical and management expertise were lured away to more interesting foreign opportunities or shifted from the Canadian subsidiaries of multinational conglomerates and moved to the home country of the parent company.

In the DGC's submission, the economic consequences of removing the foreign ownership and control restrictions for broadcasting, telecommunications and cultural industries would be significant and long lasting. As a purchaser of content and communications services – and only marginally a creator of those products – Canada would end up with a second tier communications and cultural sector which would not participate fully in the remarkable growth driven by advances in communications technologies and services.

This second level status would have a ripple effect throughout the economy as all sectors would find themselves disadvantaged vis à vis their foreign competitors. Those competitors would have readily available to them the infrastructure, expertise and skilled workforce necessary to achieve the highest level of efficiencies in business. The Canadian companies would not. And, as a result, Canada as a nation would lose out on the opportunities available to those who lead, rather than follow.

CULTURAL CONSIDERATIONS

Culture is the heart of a nation. A society without a vibrant culture rooted in the day to day realities and experiences of its own people is a society that cannot realize and draw on its strengths, as well as recognize and address its weaknesses. It is a society that cannot hope to achieve its full potential and thereby contribute both to its own well being and to the well being of the world at large. It is a society that is fundamentally diminished and which, as such, is vulnerable to both failure and exploitation.

In the DGC's view, removing the foreign ownership restrictions on Canada's broadcasting, telecommunications and cultural industries would be tantamount to handing control over Canada's culture to non-Canadians. As an organization representing a significant segment of Canada's creative community, the DGC cannot fathom how anyone could think this would be a good idea.

Canadians have ample exposure to the cultures of other countries. Books, newspapers, magazines, films, television, radio and Internet services from across the globe are all readily available to Canadians. What Canadians need is a vital Canadian cultural sector which reflects Canada in all its diversity. They do not need more non-Canadian culture.

There is no reason to believe that non-Canadians would be able or even interested in cultivating a truly Canadian cultural sector. Rather, as discussed in the preceding section, the natural economic incentive for a non-Canadian owner of a Canadian business would be to streamline and integrate its operations from a global perspective. Canadian operations could be expected to shrink and would change in both character and purpose.

For example, a German-owned "Canadian" book industry would be markedly different from a Canadian-owned industry in respect of the goals it would set itself, the ways in which it would pursue those goals and the opportunities it would provide to Canadian authors. The same thing would be true with respect to film, television production, newspapers, audio services, music or any other cultural industry. Canada and Canadian culture would take second place to the overarching multinational goals and objectives and operations of the corporate owner.

It is also important to recognize that broadcasters, cable and DTH distributors and even telecommunications carriers all have a significant influence on the development and distribution of cultural products and services. These companies exercise significant control over what products and services Canadians have available to them. This fact is obvious with respect to

broadcasters, cable and DTH. However, it is also true for telecommunications carriers, such as mobile wireless operators who choose what types of products they make available to their customers, at what price and via what technology.

The decisions of all of these companies shape the cultural environment in which Canadians live. If these companies were to be foreign-owned, there is every reason to believe they would favour the products and services of their affiliated, non-Canadian companies to the maximum extent possible. They would have little incentive to attempt to nurture Canadian culture.

Finally, it is extremely important to recognize the need for a diversity and plurality of voices to properly reflect Canadian culture. Canada is a geographically and demographically diverse nation. All of Canada's regions, communities, language and ethnic groups want and need to see their own values, experiences and interests reflected by the Canadian communications and cultural sectors. This means that not only should these sectors remain in Canadian control; there must also be a plurality of companies participating in these sectors, providing a full diversity of voices to Canadians. Only in this way can Canadian culture thrive in all its richness and variety.

Overall, DGC considers it critical to the health and ongoing development of Canadian culture that ownership and control of Canada's broadcasting, telecommunications and cultural industries remain in Canadian hands. And, equally important, it is critical to the health of Canadian society and Canada as a nation that Canada's culture remain vibrant and dynamic. To abandon Canada's culture to non-Canadians would be the same as abandoning the country itself.

POLITICAL CONSIDERATIONS

Finally, the political importance of Canadian ownership and control of Canada's broadcasting, telecommunications and cultural industries must be recognized. There are at least three ways in which lifting the ownership and control restrictions would have significant political implications.

First, the Canadian democratic system is profoundly dependent on Canada's broadcasting, telecommunications and cultural industries. In order for our democracy to work, these sectors must enable the free flow of ideas reflecting all sectors of Canadian society. However, if control of Canada's communications and cultural industries were turned over to non-Canadians then the restructuring of these industries, as discussed above, and the re-orientation of their goals and priorities would almost certainly result in fewer opportunities for Canadian to express themselves, exchange views and engage in the full breadth of discourse necessary for a healthy democracy.

Foreign controlled broadcasting, telecommunications and cultural businesses would operate in an entirely different context from Canadian companies under the current situation. These foreign controlled companies would have their priorities established by non-Canadians in light of multinational objectives. The parent companies could be expected to favour their own products and services, thereby decreasing the opportunities for Canadian expression. While there would undoubtedly remain some degree of openness in a foreign controlled system, it seems almost

certain that there would be an overall diminishment in the amount and diversity of Canadian content and in the variety of venues for Canadian expression. This would necessarily impair the vitality of Canadian democracy.

The second political concern with foreign ownership would be the effective diminishment of Canadian sovereign control over these critical industries. While Parliament would still be able to enact laws affecting these companies, they could also be indirectly subject to non-Canadian laws. This could have a significant effect on the activities of the foreign controlled Canadian companies.

For example, if a Canadian company were acquired by U.S. interests, then that company – and its executives – would be subject to restrictions on their activities under a number of U.S. laws, including the *Trading with the Enemy Act*, the *International Security and Development Cooperation Act* and similar statutes. These laws have a very real effect.

ESPN, the U.S. sports channel, was fined because its Argentine subsidiary, ESPN Sur, had a contract with Cuba relating to participation of the Cuban volleyball team at a sports event in Argentina. There is no reason to believe a Canadian subsidiary of a U.S. company would be treated differently. In fact, experience suggests the opposite. Wal-Mart was fined because some of the pajamas sold to its Canadian operations might have originated in Cuba.

Canadian broadcasting, telecommunications and cultural companies could face clear directives from a corporate parent not to engage in activities which are perfectly legal under Canadian law, but illegal under the law of another country such as the United States.

The prospect of corporate fines is a minor inconvenience compared to the fate that could face executives. Ry Cooder was fined \$100,000 and banned from further work in Cuba after making the *Buena Vista Social Club* film and album. Michael Moore faces legal problems after visiting Cuba to make his movie, *SICKO*. And, it isn't just famous American who face prosecution.

James Sabzali, a Canadian citizen, was convicted in 2002 of selling chemicals used for purifying water to Cuban hospitals while he was working in Canada for a U.S. corporation. Mr. Sabzali made the mistake of accepting a promotion, moving from the Canadian subsidiary of a U.S. company to a position with the U.S. parent company, and subsequently moving to the United States where he was arrested, charged, tried and convicted of breaching the U.S. restrictions on dealings with Cuba. In 2003, Mr. Sabzali's conviction was overturned on the grounds of prosecutorial misconduct, unrelated to the jurisdictional question. In 2005, Mr. Sabzali pleaded guilty to a lesser offence and was given one year probation and a \$10,000 fine. Under the original charges, Sabzali faced possible life imprisonment and a fine of up to \$19 million.⁸

⁸ Assistant U.S. attorney Joseph Poluka told Canadian Press: "You need to educate your audience." According to Mr. Poluka, Mr. Sabzali's case demonstrates that "you're not allowed to violate the laws of this country just because you live outside it". A more complete history of Mr. Sabzali's legal ordeal can be found at www.canadiannetworkoncuba.ca.

It is highly unlikely that Canadian executives in the broadcasting, telecommunications or cultural industries would expose themselves to the possibility of a prosecution in the United States for failing to comply with U.S. laws while they were working for the Canadian subsidiary of a U.S. corporation. There could be similar (or worse) consequences if a Canadian company were owned by nationals of a foreign country other than the United States.

The potential chilling effects on Canada's broadcasting, telecommunications and cultural industries could be significant. The end result would be that international investments, joint ventures and possibly even news reporting and similar activities would be constrained, not by Canadian laws, but the laws of the country where ownership ultimately resides. This would constitute a serious diminishment of Canadian sovereignty and could ultimately undermine the proper functioning of the Canadian democratic system.

Finally, foreign ownership of Canada's broadcasting and telecommunications systems would raise fundamental issues of national security. It is difficult to see how it could be acceptable for the transmission or broadcast of critical Government communications to be under the control of a non-Canadian entity.

CONCLUSION

In the DGC's view, Canada should not be willing to turn over control of its broadcasting, telecommunications and cultural industries to foreigners. These industries are unique. They are economically significant in their own right while also being important to the economic success of other businesses. And, they play a critical role with respect to the cultural and political health of the entire nation.

There is no compelling reason why the government of Canada should lift the foreign ownership restrictions and, as argued above, many reasons why it should not. In particular, there is no reason to believe that lifting these restrictions would result in greater investment in these industries than is currently taking place or improve their competitiveness or efficiency. On the other hand, permitting foreign ownership of Canada's broadcasting, telecommunications and cultural industries would have significant negative economic, cultural and political effects. In the DGC's view, there can be no doubt that the existing restrictions should remain in place.