# Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform

Prepared for the Department of Canadian Industry by the Canadian Conference of the Arts

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The Canadian Conference of the Arts (CCA) is pleased to participate in this consultation of Industry Canada on options for foreign ownership in telecommunications.

The Canadian Conference of the Arts (CCA) is Canada's oldest and most broadly based cultural umbrella organization. The CCA provides a national forum for the entire arts, culture and heritage community, from all disciplines and regions. CCA's mission is to provide research, analysis and consultations on public policies affecting the arts and the Canadian cultural institutions and industries. The CCA fosters informed public debate on policy issues and seeks to advance the cultural life of Canadians.

In order for Canada to be able to tell Canadian stories with Canadian voices, Canada must retain ownership of its telecommunications sector. Of course, there are other reasons to maintain the current restrictions on ownership, particularly with regards to potential threats to Canadian sovereignty. It is worth noting that most of our major trading partners (including the EU and the U.S.) also maintain foreign ownership limits, particularly in broadcasting, which is deemed to be a sector of vital national interest.

For the past several decades, the operating principle in Canadian cultural policy has been that Canadian ownership and effective control of our cultural industries will ensure more Canadian content is made available to Canadians. This is the case because it is easier to regulate Canadian owned companies than foreign owned ones. Moreover, Canadians are more likely than non-Canadians to tell our own stories and to present our own view of the world based on our own values.

Over the past two decades, Canada has allowed a growing concentration of ownership in our cultural industries in the name of making them stronger and better equipped to compete in a global environment. We now have huge Canadian conglomerates with interests in telecommunications, broadcasting, specialty services, newspapers and magazine, publishing, music and book distribution. Given this concentration of ownership and the convergence of technologies, opening up foreign ownership and control of our telecommunications can only lead to tremendous pressures to enable a similar model in cable and broadcasting. Coupled with the potential impact of trade negotiations, this could result in severe consequences for Canadian cultural sovereignty.

The best illustration of the negative impacts of foreign ownership and control of a cultural industry is to be found in the film industry. Film distribution policy does not distinguish the distribution rights for the Canadian market from North American rights for most of the largest distributors. As a consequence, foreign film distributors maintain a lock on the majority of the film distribution activity in Canada. Foreign films (i.e. US movies) occupy over 98% of screen time in English Canada. This situation is somewhat better in Québec cinemas; however, the recent case of the movie *Le concert* illustrates perfectly how French films in Québec are still subject to a US market which dictates release dates, promotion, and distribution of French films, in which Quebecers and Canadians have invested and for which there was no American financing at all. This and several other examples demonstrate how foreign controlled cultural industries can successfully shut Canadian cultural goods and services out of the market with impunity as the result of ineffective policy and loss of effective control.

Like the Chair of the CRTC, Konrad von Finckenstein, the CCA believes that it is virtually impossible to change foreign ownership rules in telecom and isolate broadcasting from the consequences of doing so. Some of Canada's largest corporations operate in all these fields. Because of the precedent created with Globalive, those companies are already applying tremendous pressure on policymakers to “level the playing field” with their competitors and to obtain access to foreign investment on the same terms. How will it be possible to deny one protagonist access to foreign investments granted to its main competitor? Where can we draw a clear line between the tangled interests of BCE, Rogers, CTVglobemedia, Shaw, Telus or Québécor?

Canada currently permits foreign investment in Canadian broadcasting and telecommunications services to the tune of over 46%; it simply prohibits foreign nationals from controlling these services. There is no conclusive evidence that lack of foreign investment has hurt either industry.

The main reason why the CCA does not believe it will be possible to enforce Canadian laws and regulations on foreign controlled companies has to do with Canada’s international trade agreements. The CCA is very concerned about the implications of NAFTA, and specifically Chapter 11, which provides foreign investors with a right to sue the Canadian government and seek compensation for government actions. Investors could sue the government for the decisions of regulatory agencies like the CRTC, if they believe the decisions violate their rights under NAFTA.

1. First, in relation to NAFTA, the CCA would point out that the *cultural exemption* is limited in scope to the cultural industries that existed at the time NAFTA was created. Importantly, this does not include the new media sector, such as interactive television, computer games, etc.
2. Second, Chapter 11 rights could potentially come into play in two ways in this matter. If the rules in Telecommunications are changed, a foreign company that decides to invest in a Canadian cable company or broadcaster could structure a deal in a way that mirrors the new telecom rules. If the CRTC were to prevent them from proceeding, they could launch a Chapter 11 challenge on the basis that they are being treated unfairly in relation to a direct competitor operating in the same marketplace.
3. Finally, if foreign companies are permitted or force entry into Canada’s broadcasting system, existing rules and regulations relating to the production and distribution of Canadian content productions may be sustainable, since the foreign company is entering the market where those rules exist. But if the CRTC or the government were to try to update the rules to reflect a new environment, the foreign company may have a cause of action under Chapter 11.

This is why the CCA is concerned that the current fast-track negotiations with the European Union include an iron-clad cultural exemption clause and avoid the granting of any clause similar to NAFTA’s Chapter 11.

The CCA continues to press for some regulatory requirements making all distribution platforms to contribute to the production of Canadian programs. Such regulation, if adopted, may be unsustainable with respect to foreign owned and controlled companies. This scenario is not improbable. A domino effect within Canada’s tightly knit telecommunications and broadcasting sector could knock down any pretence of cultural policy in the audiovisual sector.

To conclude, the CCA urges the government to maintain the requirement that all telecommunications companies operating in Canada be owned and under the effective control of Canadian interests. We therefore support maintaining the current regime and at the most, not to go beyond the 49% suggested by, amongst others, the Chair of the CRTC.

On behalf of the President and the Board of Governors of the CCA, I thank the government for the attention it will give to this request.

Alain Pineau

National Director