Atlantic Institute for AIMS Market Studies

Radio Free Canada

Ending Protectionism in Canada's Communications Industries

Ian Munro

January 2013

Atlantic Institute for Market Studies

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Executive Summary

The federal government has, to varying degrees, controlled how Canadians communicate with one another and how they access information and entertainment over the nation's telecommunications, radiocommunications, and broadcasting systems since the very inception of these technologies. Key focal points for this regulation have been the extent to which Canadians can access content produced by non-Canadians and the extent to which foreigners may make investments in the Canadian communications sector.

While there have been some examples of these controls easing in recent years, there still remain significant restrictions in place regarding Canadians' choices for the content they consume and regarding communications service providers' ability to access non-Canadian sources of financing.

The legislative and policy language that underpins these restrictions is to be a mixture of ambiguity and sanctimony that provides little sense of actual benefits to be achieved and no real guidance – or constraint – to those in the business of day-to-day policy-making and regulation.

Supporters of these restrictive measures generally rely on arguments that fail to meet basic tests of logic and that are easily refuted by standard economic theory and marketplace evidence.

The negative consequences of these policies include the loss of improvements in productivity and competitiveness that typically are generated by foreign investment, inflated costs for regulatory oversight and compliance, increased risks of delays or even failures in securing beneficial broad-based trade deals, and the continued denial of individual Canadians' rights to make their own choices regarding the media and cultural content they consume.

The time has come to wind down Canadian content requirements and foreign ownership restrictions in the communications sector.

Section 1- Introduction

Legislation, regulation, and policy directed at promoting the production and consumption of Canadian media, entertainment, and communications services have a long history. The tools employed have included financial support via subsidies and tax breaks, but also restrictive measures such as limits on the amount of non-Canadian material that could be offered to consumers and prohibitions on foreign investment in certain types of assets.

This paper examines the history of and justifications for these measures, particularly the latter, restrictive ones, and their relevance, efficacy, and desirability in today's world of convergence, digitization, and globalization.

1.1 *The History*[1]

The genesis of these measures can be traced to the December 1928 Order-in-Council establishing the Aird Commission (also known as the Royal Commission on Radio Broadcasting). At this time radio service was becoming more widely available and popular across Canada.[2] As Gasher states: "[The Order-in-Council] referred specifically to the popularity of American radio among Canadian listeners and it proposed that the federal government combat these broadcasts with a network of high-powered Canadian stations with an increased expenditure on programming."[3] (Note that from the very beginning, Canadian cultural and communications policies are couched in the metaphor of "combat" with America.)

Acting on the recommendations of the Aird Commission, in 1932 Parliament established the Canadian Radio Broadcasting Commission (CRBC), with Prime Minister R.B. Bennett stating: "This country must be assured of complete Canadian control of broadcasting from Canadian sources. Without such control, broadcasting can never be the agency by which national consciousness may be fostered and sustained and national unity still further strengthened."[4] The CRBC was reorganized into the Canadian Broadcasting Corporation (CBC) in 1936.

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1 In preparing this brief timeline, I have drawn frequently from three sources: "CRTC Origins: Chronology" on the Web site of the CRTC (http://www.crtc.gc.ca/eng/backgrnd/brochures/b19903.htm); "Timeline of Canadian Federal Cultural Policy Milestones: 1849 to 2005," M. Sharon Jeannotte, Canadian Cultural Observatory, September 2006, http://www.socialsciences.uottawa.ca/governance/eng/documents/timeline.pdf; and "Appendix A: Highlights in the Evolution of Canadian Content Regulations" in Canadian Content Regulations: The Intrusive State at Work, W. T. Stanbury, The Fraser Institute, August 1998, http://www.fraserinstitute.org/researchnews/research/display.aspx?id=12825.

2 The first radio station to broadcast regular programming in Canada was launched in Montreal in 1919. Canada's first television station would go on the air in 1931, also in Montreal. Canadian urban cable television began in London, Ontario, in 1952.

3 Gasher, Mike, "Invoking Support for Public Broadcasting: The Aird Commission Revisited," Canadian Journal of Communication, Vol. 23, No. 2, 1998, p. 4, http://www.cjc-online.ca/index.php/journal/article/view/1032/938.

4 Jackson, John D. and Paul Millen, "English-Language Radio Drama: A Comparison of Central & Regional Production Units", Canadian Journal of Communication, Vol. 15, No. 1, 1990, p. 6, http://www.cjc-online.ca/index.php/journal/article/view/536/442

It is important to recognize that in the 1920s and 1930s radio was still in its early days and the technology and regulatory framework of the time provided for a very limited number of usable frequencies. Thus the "shelf space" argument – that government action is required to ensure that Canadian content is available in the marketplace – resonated strongly in that era.

In 1957, five years after the launch of CBC television and as private broadcasting developed across the country, the Fowler Commission (also known as the Royal Commission on Broadcasting) recommended that new legislation limit non-Canadian ownership of any radio or television station to 20 percent and that private broadcasters be required to provide some level of Canadian content. The following year, the Board of Broadcast Governors was established and granted the power to require broadcasters to promote Canadian content. The first regulations requiring specific types and quantities of Canadian content on television and radio came into effect in 1961; the detailed requirements were adjusted both up and down over the next several years.[5]

The year 1968 saw the introduction of a new Broadcasting Act, which tightened foreign ownership restrictions and Canadian content requirements, and the replacement of the Board of Broadcast Governors with the newly established Canadian Radio-television Commission (CRTC).[6] The new Broadcasting Act also placed the cable television industry under the jurisdiction of the CRTC. Throughout the 1970s a variety of adjustments were made to Canadian content requirements for television and AM and FM radio broadcasting.

Pay-TV (e.g., the movie network then known as First Choice) launched in Canada in 1983 and specialty channels (e.g., MuchMusic and The Sports Network (TSN)) were introduced the following year. Direct-to-home (DTH) satellite broadcasting services were launched in 1995, video-on-demand services began in 1997, and satellite-based subscription radio services commenced in 2005. In 1999 NBTel, the incumbent in New Brunswick (it is now part of Aliant), became the first telephone company to receive a broadcasting licence. As with conventional over-the-air and cable broadcasting, all these services are subject to Canadian content requirements and foreign ownership limits.

The late 1980s saw the introduction of broad foreign ownership restrictions to the telecommunications sector.[7] These events are summarized in Industry Canada's 2010 consultation paper Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform:

> "The decision to introduce foreign investment restrictions for telecommunications was made in 1987, in the context of the Canada-U.S. Free Trade negotiations. In A Policy Framework for Telecommunications in Canada, it was announced that foreign investment restrictions would be placed on all telecommunications common carriers, thereby ensuring that these would be protected in that trade agreement. There had been earlier instances of foreign investment restrictions for particular classes of carriers, such as in the licensing of cellular communications carriers in 1984, but these restrictions did not apply to all telecommunications common carriers.

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5 For example, the general Canadian content requirement for television was raised in 1962, but the quota in force for the summer period subsequently was relaxed between then and 1964.

6 In 1976 the jurisdiction of the CRTC was expanded to include telecommunications and its name was amended to the Canadian Radio-television and Telecommunications Commission.

7 However, other legislation and policies and, in some cases, Crown ownership, had effectively blocked foreign ownership of certain Canadian telecommunications companies long before the events of the late 1980s and early 1990s. See "Submission to Industry Canada's Consultation on Foreign Investment in Telecommunications," Leonard St-Aubin, 2010, http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/LenSt-Aubin.pdf/$FILE/LenSt-Aubin.pdf.

> In 1993, the foreign investment restrictions set out in the 1987 policy framework were enshrined in the Telecommunications Act. Section 16 of the Telecommunications Act requires that, in order to be eligible to operate in Canada, a telecommunications common carrier must be a 'Canadian-owned and controlled corporation,' incorporated or continued under the laws of Canada." [8]

Note that service providers who do not have their own facilities, such as resellers (e.g., Primus), are not covered by the foreign ownership restrictions of the Telecommunications Act. Also, foreign-owned carriers who were in operation on July 22, 1987, were explicitly exempted from the foreign ownership provisions of the Telecommunications Act. This grandfather exemption applied to two carriers owned by the American firm then known as GTE Corporation, BCTel and QuebecTel, the incumbent monopoly telephone companies at the time in British Columbia and portions of eastern Quebec, respectively. (BCTel and QuebecTel became part of TELUS in 1999 and 2000, respectively.)

The 1996 Radiocommunications Regulations brought radio (wireless) common carriers under the same foreign ownership regime as telecommunications common carriers. However, as part of the General Agreement on Trade in Services (GATS) Agreement on Basic Telecommunications Services, Canada agreed in 1998 to remove foreign ownership restrictions on international submarine cables and satellite earth stations. In 2010 foreign ownership restrictions were removed for providers of satellite telecommunications services (e.g., Inmarsat and Iridium).

As broadcasting and telecommunications both became digitized and converged with one another and as Internet service became more common and more important to Canadians, the status of Internet service providers (ISPs) vis-à-vis cultural policies and regulations came into question. Dewing discusses the history on this issue:

> "… there has been controversy around the question of whether Internet service providers (ISPs), which are subject to the Telecommunications Act, are 'broadcasting undertakings' under the Broadcasting Act. While ISPs argue that they provide a content-neutral service, cultural groups maintain that they operate as broadcasting undertakings and as such should be subject to the Act. Such groups also insist that ISPs should contribute to a fund to support the creation of Canadian content. Asked by the CRTC to rule on the matter, the Federal Court of Appeal ruled in 2010 that while ISPs provide access to broadcasting, as content-neutral service providers they do not carry on as broadcast undertakings. In February 2012, the Supreme Court of Canada upheld the Federal Court of Appeal's decision." [9]

The CRTC also exempted from regulation television programming delivered through mobile phones and devices in 2006 and in 2011 it issued a report on over-the-top (OTT) broadcasting services, such as Netflix and Apple TV, which stated in part:

> "Stakeholders calling for the imposition of regulatory obligations on OTT providers demonstrated that consumer adoption of OTT services is real and growing. However, they did not submit evidence of harm to the traditional broadcast system. This is consistent with the Commission's ongoing research into new media trends.

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8 Industry Canada, Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform, 2010, p. 4, http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/TelecomInvestment-eng.pdf/$file/TelecomInvestment-eng.pdf.

9 Dewing, Michael, Canadian Broadcasting Policy, Library of Parliament Background Paper (revised), 2012, p. 7, http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-39-e.pdf.

The Commission considers that extending regulatory obligations normally achieved through licensing to exempt undertakings could lead to unintended consequences in a global, digital environment. For example, Google, the NFB and Shaw expressed concerns that regulation could be a disincentive to innovation. Shaw added that regulation could impair the ability of Canadian media companies to compete globally. The CIPPIC noted that regulations enforcing the exclusivity of access were not applicable to the Internet as the Internet was designed to ensure access for all users to all types of content regardless of their location in the world."[10]

During the past decade prominent voices began to call for at least some easing of Canada's protectionist measures in the communications sector.

The 2006 final report of the Telecommunications Policy Review Panel (TPRP), which had been appointed by the Minister of Industry in 2005, noted that the debate over foreign ownership controls in the telecommunications sector was brought into "sharp focus" in 2003 when the House of Commons Standing Committee on Industry, Science and Technology issued a report recommending "that Canadian ownership requirements applicable to telecommunications common carriers should be entirely removed, including the prohibition against foreign control. It also recommended that any changes made to the Canadian ownership and control requirements applicable to telecommunications common carriers should be applied equally to broadcasting distribution undertakings," while, during the very same year, the House of Commons Standing Committee on Canadian Heritage issued a report recommending no changes to foreign ownership restrictions for broadcasting and telecommunications due to the perceived adverse effect on the Canadian broadcasting system.[11]

The TPRP report itself recommended liberalization of the ownership regime for telecommunications carriers in two phases. In the first phase, the federal Cabinet would be given authority to waive existing foreign ownership restrictions when this was deemed to be in the public interest. There would be a rebuttable presumption that investments in a start-up or in a telecommunications common carrier with less than ten percent of the revenues in the telecommunications services market would be in the public interest. The second phase, to occur after a recommended review of federal broadcasting policy, would be geared towards broader liberalization and the establishment of a common playing field for both traditional telecommunications carriers and cable service providers. The regulation of content would be severed from the regulation of carriage.

Two years later, in 2008, the Competition Policy Review Panel endorsed the conclusions and recommendations of the TPRP regarding foreign ownership restrictions in the telecommunications sector.[12] Interestingly, neither of the two review panel reports provided any specific justification for the ten percent figure: why is it that allowing foreign ownership of firms with ten percent (or less) of market revenues would be beneficial, but allowing foreign ownership of firms with eleven, or eighteen, or twenty-one and four-ninths of a percent would not?

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10 CRTC, Results of the fact-finding exercise on the over-the-top programming services, October 2011, p. 9, http://www.crtc.gc.ca/eng/publications/reports/rp1110.pdf.

11 Telecommunications Policy Review Panel, Final Report, 2006, section 11, p. 14, http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf.

12 Competition Policy Review Panel, Final Report: Compete to Win, 2008, p. 49, http://www.ppforum.ca/sites/default/files/Compete_to_Win.pdf.

In 2010 the federal government indicated its desire for some degree of liberalization when Industry Canada issued a consultation paper that offered three options: 1) increase the foreign ownership limit for both broadcasting and telecommunications to 49 percent; 2) follow the recommendations of the two policy review panels and exempt telecommunications carriers with less than ten percent market share from foreign ownership restrictions; or 3) remove foreign ownership restrictions on telecommunications common carriers entirely. It is noteworthy that the consultation paper also stated "[w]ith respect to broadcasting content and culture, the government will not consider any action that could impair its ability to pursue Canadian culture and content policy objectives." [13]

In March 2012 the government announced that it would proceed with Option 2. Telecommunications carriers with less than a ten percent revenue share of the national telecommunications services market are now exempt from foreign ownership restrictions. Note, however, that any telecommunications carriers – no matter what their size – that also hold broadcasting licences remain subject to the old foreign ownership restrictions under the auspices of the Broadcasting Act.

1.2 *The Current Situation*

A high-level summary of the current state of ownership restrictions and Canadian content requirements applicable to various facets of the Canadian communications sector is presented in Table 1.

A 2012 analysis (the Foreign Direct Investment Regulatory Restrictiveness Index)[14] by the Organisation for Economic Co-operation and Development (OECD) assesses its 34 member countries[15] (including Canada) plus 22 other countries[16] on their restrictiveness in allowing foreign investment across a variety of economic sectors.

In the radio and television broadcasting sector, Canada is rated the third most restrictive of all OECD member countries after Mexico and South Korea, and the sixth most restrictive among all 56 countries surveyed, with China, Indonesia, and Malaysia also rated as being more restrictive.

In the telecommunications sector (fixed and mobile), no OECD member is rated as more restrictive than Canada, and among all 56 countries only China is rated as more restrictive than Canada in allowing foreign investment in the telecommunications sector.

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13 Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform, Industry Canada, 2010, pp. 9-10, http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/TelecomInvestment-eng.pdf/$file/TelecomInvestment-eng.pdf.

14 http://www.oecd.org/daf/internationalinvestment/investmentstatisticsandanalysis/fdiregulatoryrestrictivenessindex.htm

15 The list of member countries can be found here: http://www.oecd.org/general/listofoecdmembercountries-ratificationoftheconven tionontheoecd.htm.

16 Argentina, Brazil, China, Colombia, Egypt, India, Indonesia, Jordan, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Malaysia, Mongolia, Morocco, Peru, Romania, Russia, Saudi Arabia, South Africa, Tunisia, and Ukraine.

Table 1: Summary of Current Ownership Restrictions and Canadian Content Requirements

Sector/Service	Ownership Restrictions	Content Requirements
Terrestrial facilities-based telecommunication (wireline) or radiocommunication (wireless) carriers with 10+% market revenue share	Must be Canadian-owned and controlled; foreign investors limited to combined direct and indirect investments of 46.7% of voting shares	N/A
Terrestrial facilities-based telecommunication or radiocommunication carriers with <10% market revenue share Terrestrial non-facilities-based telecommunication or radiocommunication resellers International submarine cables Satellite earth station operators Satellite telecommunication service providers	None	N/A
Over-the-air television broadcasters	Must be Canadian-owned and controlled; foreign investors limited to combined direct and indirect investments of 46.7% of voting shares	Minimum daily levels of Canadian programming are required
Cable television service providers Direct-to-Home satellite television service providers	Must be Canadian-owned and controlled; foreign investors limited to combined direct and indirect investments of 46.7% of voting shares	A majority of the video and audio services received by each subscriber must be Canadian programming services Certain Canadian services must be carried Rules apply regarding how Canadian services are assigned to basic or discretionary tiers and how Canadian services may be bundled with non-Canadian services Non-Canadian services may not be offered on a stand-alone basis
AM and FM radio broadcasters	Must be Canadian-owned and controlled; foreign investors limited to combined direct and indirect investments of 46.7% of voting shares	Minimum required levels of Canadian music must be broadcast; precise requirements vary by time-of-day, music type, etc.
Satellite digital radio service providers	Must be Canadian-owned and controlled; foreign investors limited to combined direct and indirect investments of 46.7% of voting shares	Minimum required number of Canadian channels plus minimum ratio for Canadian to non-Canadian channels
Specialty television channels	Category 1 services, which are mandated by the CRTC to receive preferential treatment by broadcast distribution undertakings (cable and DTH service providers) must be Canadian. There are no ownership restrictions for Category 2 services.	Category 1 services are subject to minimum daily levels of Canadian programming.
Pay-television services	These services are provided by broadcast distribution undertakings, which must be Canadian-owned and controlled	Minimum daily levels of Canadian programming are required
Pay-per-view television services	These services are provided by broadcast distribution undertakings, which must be Canadian-owned and controlled	Minimum required percentage of all available titles must be Canadian
Video-on-demand services	These services are provided by broadcast distribution undertakings, which must be Canadian-owned and controlled	Minimum required percentage of all available titles must be Canadian
Over-the-top Internet-based content providers (e.g., Apple TV, Netflix)	None	None

Section 2- Arguments for Canadian Ownership and Content Requirements

Before examining arguments past and present for Canadian ownership and content restrictions in the communications sector, it is useful to recall some key distinctions, aside from the obvious Canadian versus non-Canadian division, that generally frame such discussions.

First is the distinction between telecommunications and broadcasting. To consumers, the distinction was obvious, say, twenty years ago. Telecommunications companies – like Bell Canada, Island Tel, or SaskTel – allowed you to communicate with another person via a telephone (or perhaps a pager or fax machine) and broadcasters and broadcasting distributors – like the CBC, CTV, Rogers Cable, or Vidéotron – brought the news, the hockey game, and Law & Order to the television set in your living room (and the local AM and FM radio stations brought music to your kitchen and car radios). The distinction persists in our legislative, regulatory, and institutional structures, but digitization and convergence have blurred the difference in any practical sense for consumers: “cable companies” now provide phone service, “phone companies” deliver video and audio programming, and both provide access to the Internet and the infinite forms of communication and entertainment that it makes possible.

A second distinction is between “carriage” and “content”. Carriage refers to infrastructure like copper wires, co-axial cable, fibre optic links, satellites, and wireless networks, whereas content is the video, audio, pictures, text, etc., that is sent back and forth over this infrastructure. This paradigm avoids some of the obvious problems of the outdated telecommunications versus broadcasting cleavage, but it is not without its own wrinkles. There are now in Canada a number of large, integrated carriers with both significant carriage and content assets. For example:

- Rogers owns national infrastructure to provide cable television, local and mobile phone, and Internet access services, and also owns the CityTV and Sportsnet television services, among others, and a number of radio stations across the country.
- Bell Canada Enterprises (BCE) has networks to provide broadcasting distribution, local and mobile phone, and Internet access services across the country, as well as owning the CTV television network, TSN, MuchMusic, and the Comedy Network, among other television services. (BCE also recently sought, but was denied, CRTC approval for the takeover of Astral Media, owner of a number of specialty television services, such as MusiquePlus and the Family Channel, and a large number of radio stations across Canada.[17])
- Shaw, owner of the Global television network and such specialty television services as the Food Network, History Television, and Showcase, also owns infrastructure in western Canada for cable, telephone, and Internet access services.

17 See: “CRTC denies BCE’s bid to acquire Astral,” CRTC, October 18, 1012, http://www.crtc.gc.ca/eng/com100/2012/r121018.htm.

- Similarly in Québec, Québecor owns Vidéotron and its networks for cable, local and mobile telephone, and Internet access services, and also the TVA television network and a number of specialty channels including Le Canal Nouvelles and Sun News.

Any proposals for regulatory change must take into account the fact that carriage assets and content properties now often reside under the same roof.

A third distinction, formalized by the federal government's recent decision to loosen the application of foreign ownership restrictions under the Telecommunications Act, is between "big" firms and "small" ones, with ten percent of industry revenues demarcating the cut-off point in Canadian telecommunications.

The fourth and final distinction is between those companies, services, and assets that are deemed "strategic", and those that are not. Unfortunately, despite the frequency and emotion (typically righteous indignation) with which the term is injected into discussions of Canadian communications policy (as well as foreign investment policy in other sectors), no one in government, industry, academia, or elsewhere seems to be able to specify exactly what the purported "strategy" is.

Bearing these distinctions in mind, it is time to review the arguments for legislated restrictions on consumer access to non-Canadian content and on foreign investment in communications infrastructure.A useful starting point is a review of the policy objectives laid out in the Broadcasting Act and the Telecommunications Act.

Section 3 of the Broadcasting Act sets out "Broadcasting Policy for Canada." Among the multitude of points contained within that section are the following:

- 3.(1)(*a*) "the Canadian broadcasting system shall be effectively owned and controlled by
- Canadians"
- 3.(1)(*b*) "the Canadian broadcasting system … provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty"
- 3.(1)(*d*) "the Canadian broadcasting system should
  (i) serve to safeguard, enrich and strengthen the cultural, political, social, and economic fabric of Canada
  (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view"
- 3.(1)(*f*) "each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources"

With regard to foreign ownership restrictions in the broadcasting sector, section 3.(1)(*a*) clearly provides the statutory basis, but note that, like section 3.(1)(*f*), this is really a means, rather than an end, from the perspective of the Canadian broadcasting consumer.

Sections 3.(1)(b) and (d) do a better job of attempting to speak to objectives relevant to the Canadians who actually will be watching or listening to the programming, but these objectives are so broadly defined and subject to varying interpretations as to make them useless as clear guideposts for the formulation of detailed regulation and policy. Put another way, any politician or bureaucrat could justify practically any measure as “safeguarding, enriching and strengthening the cultural, political, social, and economic fabric of Canada.”

Equally nebulous is the idea of anyone being able to define “Canadian attitudes, opinions, ideas, and values.” As the saying goes, opinions (and attitudes and ideas) are like [expletive deleted] – everybody’s got one, and this is as true of Canadians as anyone else. On any given issue, Canada’s much-touted diversity will be on full display across the entire spectrum of possible opinions. The same point holds for “national identity”: ask a sample of N Canadians and you’ll likely get almost that many definitions, or even better, tally up the number of pages that have been written on the very question of how difficult it is to define Canada’s national identity.

While Canadians may be able to unite around certain core values to the point of enshrining them in our Constitution, it is demonstrably not the case that freedom of conscience, thought, expression, and association, the right to vote of all citizens, and the right to life, liberty, security, and equal protection under the law, etc., are uniquely Canadian values.

And then there is “cultural sovereignty.” One definition can be found in a 1999 report from the Library of Parliament:

> “A country can be said to be culturally sovereign if it has the freedom to make the necessary decisions on its cultural future; that is, if it enjoys the necessary freedom to promote the creation, distribution, preservation and accessibility of its cultural production across its territory.”[18]

An interesting thought experiment is to replace the concept of country in this quotation with the concept of the individual: a person can be said to be culturally sovereign if he or she has the freedom to make the necessary decisions on his or her cultural future. To use the much-publicized case of the long-time, although no longer in force, ban on the American HBO network from Canadian televisions as an example, is the individual really sovereign when forbidden by the state from accessing the content of his or her choice? And when so many of our Canadian values centre on freedom, why is this denial of personal sovereignty accepted?

Turning to the Telecommunications Act, it is section 7 where Canadian Telecommunications Policy is laid out. Section 7 begins by affirming “that telecommunications performs an essential role in the maintenance of Canada’s identity and sovereignty.” Now the question of Canadian identity has been solved: it is based on the fact that we – apparently in contrast to the rest of the world – use telephones. Further specific objectives include:

- 7(d) “to promote the ownership and control of Canadian carriers by Canadians” and
- 7(e) “to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada.”

18 Jackson, Joseph and René Lemieux, The Arts and Canada’s Cultural Policy, Library of Parliament, Parliamentary Research Branch, 1999, p. 2, http://www.parl.gc.ca/Content/LOP/researchpublications/933-e.pdf.

Again we encounter means rather than ends: how precisely are Canadians actually supposed to benefit from these measures?

Moving beyond the formality of legislative language, there are several arguments that commonly appear in press articles, academic papers, and submissions to government consultation processes.

The Public Interest Advocacy Centre (PIAC) provides a useful summary regarding arguments for foreign ownership controls:

> "The primary concern with the lessening of controls in telecommunications is the fear that foreign ownership of telecommunications networks and facilities puts key elements of Canada's economic future beyond the control of Canadians, and that the operations of foreign controlled telecommunications companies will be carried out with a view to benefitting the out-of-country shareholder and not the needs of Canadians, and the Canadian economy. Secondly, the premise has been advanced that Canadian owned business will be more attuned to meeting Canadian customer needs, and will be better corporate citizens in relation to matters associated with employees and local community requirements. Finally, there is also the sense that the national importance of telecommunications networks requires a level of security and oversight that is not attainable with foreign owned telecommunications companies.
>
> The principal economic fears arise from the intuitive conclusions that foreign ownership of telecom providers would mean revenues from Canadian markets would flow back to foreign shareholders and the corporate treasuries to be invested in foreign operations or facilities that may not be beneficial to Canadian networks and their customers. Head offices, and Canadian jobs, would also leave the country with attendant loss of well-paying jobs and tax revenue." [19]

The first argument runs counter to the most basic lessons of introductory economics: in competitive markets, firms prosper only when they can get consumers to purchase their goods and services. Any firm that is not attuned to Canadian customer needs and fails to provide desired and high-quality services at attractive prices in the interest of "benefitting" out-of-country shareholders will lose market share to competing firms who are attuned to customer needs and as a result will suffer financial losses – hardly a benefit to those out-of-country shareholders. An analogous, and equally preposterous, argument might go as follows: we must prevent, say, a Japanese firm from taking over Tim Horton's because 1) the Japanese firm, not being attuned to Canadian customer needs, would offer tea and sushi rather than coffee and doughnuts, and 2) Canadians would then have no other means of accessing coffee and doughnuts.

As for the quality of corporate citizenship and employee relations, it is important to recognize corporate support for community and charitable causes, in most cases, has as much to do with marketing and brand management as altruism. Domestic and foreign-owned firms face the same incentives to create a positive image that will entice consumers to buy their products and services. Similarly, domestic and foreign-owned firms reap the same benefits from having satisfied and motivated employees. There is no logical business reason why the domestic or foreign status of a majority of a firm's shareholders would determine the way in which the firm's management treats its employees.

19 Public Interest Advocacy Centre, "Submission to Industry Canada – Opening Canada's Doors to Foreign Investment in Telecom munications: Options for Reform," 2010, p. 4, http://www.piac.ca/telecom/comments_of_the_public_interest_advocacy_centre_as sociated_with_industry_canada_consultation_on_foreign_ownership_rules_in_telecommunications/.

Claims that security, privacy, and government oversight will suffer if a Canadian communications company were to be acquired by a foreign firm also show some weakness under closer scrutiny. Canada has laws, regulations, and policies relating to national security, protection of privacy, and government oversight and they apply no matter what the nationality of a company's shareholders may be. Similarly, regulations or licence conditions that require the extension of networks to remote areas, a basic level of service to the poor, special measures to assist the disabled, etc., apply no matter the nationality of the firm's shareholders.

Delivery of communications services is dependent on vast and highly expensive networks of physical infrastructure – wires, cables, antennas, etc. – and any company's ability to profitably utilize these assets depends on it keeping its telecommunication, radiocommunication, and or broadcasting licence(s) in good standing. A firm, whether domestic or foreign-owned, that fails to obey the law is liable to have its licence(s) revoked, thereby eliminating its ability to generate revenue and essentially forcing it into a fire-sale of its network assets.

Furthermore, there are Canadian laws and regulations of general application that allow for the review, and possibly denial, of proposed takeovers on national security grounds. Experts in this field may argue for changes to these provisions, but this is quite different than a blanket statement that 'no foreigner need apply, ever'.

In his submission to the 2010 Industry Canada public consultation process, St-Aubin captures the point nicely:

> "If it were true that foreign-owned firms are more inclined not to respect Canadian laws and regulations, and are actually able to do so, then Canada has a problem that far exceeds the scope of this consultation. For this would be true in all sectors of the economy, most of which have no Canadian ownership rules. Think only of foods and pharmaceuticals that touch directly every Canadian. Is there a valid concern that foreign firms operating in Canada are not respecting Canadian laws and regulations? Or is this concern only valid with respect to telecommunications? If the latter, how so? Some have argued that privacy protection or national security are served by Canadian ownership, but both areas are subject to law and regulation. Are foreign owners somehow able to evade such legal requirements or do the laws themselves need to be strengthened to address whatever concerns exist?" [20]

An exception to the preceding argument may exist, however, in the case of the proposed takeover of a Canadian firm by a state-owned company or sovereign wealth fund. The recent move by the China National Offshore Oil Corporation (CNOOC), a firm owned by the Chinese government, to acquire the Canadian energy firm Nexen has focused considerable attention on this question. Writing in the National Post, economist Jack Mintz argues that the efficiency-enhancing and benefit-creating aspects of corporate takeovers in general may not be present when the purchaser is a state-owned firm.[21]

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20 St-Aubin, Leonard, "Submission to Industry Canada's Consultation on Foreign Investment in Telecommunications," 2010, p. 3, http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/LenSt-Aubin.pdf/$FILE/LenSt-Aubin.pdf.

21 Mintz, Jack, "Limit state takeovers," National Post, July 24, 2012, http://opinion.financialpost.com/2012/07/24/jack-mintz-lin takeovers/.

As for the hollowing out of Canada’s head offices, Statistics Canada dispels the myth:

> “Much of the dynamism in Canada’s head office sector actually comes from foreign-controlled firms. The head offices of foreign-controlled firms contributed to all of the gains in the number of head offices over the past 6 years and accounted for 6 out of 10 new jobs created. The effect of foreign takeovers has not been to reduce the number of head offices in Canada nor head office employment. As a result of foreign takeovers, more new head offices were created than lost and employment in head offices was as high after the takeovers had occurred than before.” [22]

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22 Beckstead, Desmond and W. Mark Brown, “Head Office Employment in Canada, 1999 to 2005,” Insights on the Canadian Economy, Statistics Canada, 2006, p. 15, http://publications.gc.ca/collections/Collection/Statcan/11-624-M/11-624-MIE2006014.pdf.

Section 3 - Ramifications of Canadian Content and Ownershship Policies

Having examined arguments for and counter-arguments against policies that inhibit consumer access to foreign content and restrict foreign investment in Canada's communications sector, it now is time to examine the ramifications of these measures.

The 2006 final report of the Telecommunications Policy Review Panel cited several benefits of foreign direct investment (FDI), stating "The economic case for liberalization of FDI is so well established in Canada and other OECD countries that the main area of economic debate is not whether it boosts domestic competitiveness and productivity, but by how much." The report notes that foreign investment adds competitive pressure to all firms in a market, and can drive the adoption of foreign technology by, and augment the human capital stock and management expertise, of domestic firms. Looking at the communications sector specifically, the report cites research estimating that "foreign ownership restrictions increase the cost of capital by at least $1.06 per month per subscriber for an incumbent telephone company and by at least $2.61 per month per subscriber for Canadian cable companies."[23]

Even former opponents now agree that the Canada-US and NAFTA free trade agreements have been enormously beneficial for Canada. Canada currently is seeking to conclude a free trade agreement with the European Union and to join the Trans-Pacific Partnership, which now comprises nine member countries representing a combined GDP of over $17 trillion. Canada's success in completing these trade deals could be impeded by reluctance to liberalize its foreign investment policies in traditionally highly-protected sectors like communications and agriculture. Should the European deal founder, for example, annual GDP gains of $12 billion could be lost, equivalent to 80,000 new jobs or $1,000 of income for the average Canadian family, according to the federal Department of Foreign Affairs and International Trade.[24]

There also are bureaucratic and administrative costs to consider. Where rules on Canadian ownership and content exist, government officials must be employed to apply and enforce them, and firms incur costs of compliance, including additional legal due diligence efforts, the time and effort associated with preparing and submitting regulatory filings, and additional accounting practices that would not be required as part of normal business. This effect is exacerbated in the wireless sector where firms may have to deal with both Industry Canada and the CRTC in two separate and uncoordinated review processes, as happened to Globalive following its winning bids for spectrum licences in a 2008 Industry Canada auction.

Finally, there are the losses of freedom experienced by Canadian consumers who wish to make their own choices regarding the communications and entertainment products and services that they enjoy and by Canadian investors who are denied the ability to freely dispose of investments they have made to those who would offer the best price.

23 Telecommunications Policy Review Panel, Final Report, 2006, section 11, pp. 16-17, http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf.

24 http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx?view=d

Section 4 - Conclusions and Recommendations

The time has come to wind down Canadian content requirements and foreign ownership restrictions in the communications sector.

Contrary to the emotive nationalistic rhetoric, the economic and policy cases for and the evidence regarding the benefits of these measures are weak. Furthermore, technology is rendering them impractical and irrelevant. As discussed in a prior AIMS publication:

> "Consumers are no longer limited to a handful of viewing and listening options in each hour of the day. Radio and television from all over the world — and, of course, from all over Canada — can be accessed via the Internet. And rather than being bound to broadcasters' schedules, consumers can enjoy their programming choices at their own convenience by downloading files to desktop computers, laptops, cellular phones, or iPods, or by recording programs to personal video recorders. This increase in access works in the opposite direction as well. Canadian-content producers can now use the Internet to make their products available worldwide much more easily, quickly, and cheaply. Also, technological advances (like the development of new media) are eroding the CRTC's ability to apply and enforce Canadian-content rules. For example, as more and more Canadians choose to listen to radio stations via the Internet, the size of the Canadian listening audience whose musical consumption conforms to the commission's edicts for Canadian content diminishes."[25]

Even without these technological changes, the existence of Canadian content requirements for broadcasters still cannot force consumers to watch or listen to the mandated content.
Turning to more specific and practical recommendations:

- Convergence within the communications sector should be fully embraced by government policy and legislation. Telecommunication service providers and broadcast distribution undertakings – of all sizes – should be placed on a level playing field by removing all foreign ownership restrictions.
- Any concerns regarding national security should be dealt with via instruments of general application like the Investment Canada Act and the National Security Review of Investments Regulation.
- The roles of the CRTC, Industry Canada, the Competition Bureau, and the Department of Canadian Heritage should be reorganized to provide more efficient and more effective regulation and policy-making, consistent with the real-world structure of the communications sector.[26]
- It should be recognized that some valuable and socially important forms of cultural content will not be produced by the marketplace on its own. Here gaps should be filled through direct public expenditure via the Department of Canadian Heritage and/or the CBC, rather than through measures that restrict Canadians' choices. A public dialogue should be initiated to identify these gaps and the level of financial support that would be considered acceptable and appropriate by the Canadian public.

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25 Munro, Ian, The End of That 70s Show: Rethinking Canada's Communications Regulatory Institutions for the Twenty-first Century, The Atlantic Institute for Market Studies, 2009, pp. 19-20, http://www.aims.ca/site/media/aims/Communications.pdf.

26 See Munro, Ian, The End of That 70s Show: Rethinking Canada's Communications Regulatory Institutions for the Twenty-first Century, The Atlantic Institute for Market Studies, 2009, http://www.aims.ca/site/media/aims/Communications.pdf, for details.

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Books & Papers

Signal Strength: Setting Stage for Canada's Wireless Industry into the Next Decade
Ian Munro
Canada's licensing framework for cellular and PCS (personal communication systems) providers is in serious need of an overhaul. The paper, *Signal Strength,* says these spectrum licences should have strong property right characteristics and the licence fee regime should be amended to provide clarity and certainty.

Chicken Little Eats Crow: How the Critics Got it Wrong about Spectrum Auctions
Ian Munro
This paper suggests that Canadian governments build on the existing auction model for wireless communications licences. Among the recommendations, the paper concludes governments should embrace auctions as the means of allocating other assets, such as timber rights, drilling rights, and broadcasting licences.

The End of that '70's Show: Rethinking Canada's Communications Regulatory Institutions for the Twenty-First Century
Ian Munro
Communications consultant and former AIMS research director Ian Munro explores the antiquated rules that govern Canada's communications sector. He calls for a complete overhaul and makes strong recommendations on how to bring the regulatory regime into the 21st century.

Commentaries

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Andreas Korfmann
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Doin' the PRPP walk
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