

**A Submission by Pelmorex Media Inc.  
In response to Industry Canada's**

***Opening Canada's Doors to Foreign  
Investment in Telecommunications: options  
for Reform***

***Consultation Paper***

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## Introduction

1. Pelmorex Media Inc. (“Pelmorex”) is pleased to have this opportunity to contribute to Industry Canada’s consultation on reforming the foreign investment rules for telecommunications.
2. Pelmorex is the parent company of The Weather Network and MétéoMédia which rank among the most popular media brands in Canada and are the undisputed leaders of weather information services in Canada across all platforms, including cable, satellite, internet, desktop, mobile, radio and print. Pelmorex maintains broadcast and operating facilities in Oakville, Ontario and Montréal, Quebec as well as regional offices in Moncton, New Brunswick and Vancouver, British Columbia. We are a proud Canadian company with close to 400 employees. All of our products and services are produced and supported in both official languages.
3. We have reviewed the consultation paper *Opening Canada’s Doors to Foreign Investment in Telecommunications: Options for Reform* (hereafter the “Consultation Paper”) and have some fundamental concerns with respect to the three options to amend the foreign ownership rules for telecommunications because implementing any one of them could negatively impact Canada’s broadcasting industry.

## Overview

4. While Pelmorex is aware that there have been some reports that call for the restrictions on foreign investment in the telecommunications sector to be relaxed, we do not believe that there has been any comprehensive analysis examining foreign investment that has provided clear evidence that the current rules are, in fact, inhibiting the growth and development of Canada’s telecommunications and broadcasting industries. To the contrary, the overall robustness of the communications industry, the enormous range of communications services offered in Canada and the profitability of Canada’s communications industry all suggest that the current rules have been effective in ensuring that Canadians continue to have access to the highest quality telecommunications and broadcasting services.
5. Pelmorex believes the current limits on foreign investment in telecommunications and broadcasting have been a positive force in Canada and have enabled Canadians to benefit from the most advanced communications networks in the world. There is no pressing need to change these rules. In our view, Industry Canada should tread softly and carefully in its deliberations on amending the foreign investment rules for telecommunications and broadcasting.
6. Given the converged nature of Canada’s communications industries, both from a corporate and a technological perspective, and the close link between broadcasting and telecommunications, any changes made to the telecommunications foreign investment rules will, inevitably, impact the broadcasting industry. Canada’s larger telecommunications companies are also, in many cases, Canada’s largest broadcasting distribution undertakings (“BDUs”), and the services they provide are

frequently offered to consumers as bundled packages. Several of these companies also own and operate programming services, such as radio and television stations and pay and specialty services. The lines between broadcasting and telecommunications are blurred.

7. Therefore, while the ownership and operation may be blurred, the policy objectives of each sector remain separate and distinct; hence the concern that changes to one will result in unintended changes to the other. This reality, combined with the fact that the Canadian Radio-television and Telecommunications Commission (“CRTC”) has in recent years significantly reduced the regulatory safeguards that have historically ensured that Canada has its own vibrant and prosperous radio and television industries, means that decisions made regarding the telecommunications side of the equation could have even greater and more serious unintended consequences for broadcasting in Canada than in the past.
8. In our view, Canada’s cultural sovereignty and national identity should not be put at risk simply because a few more dollars might flow into Canada’s telecommunications industry if the current foreign investment rules are relaxed.
9. The *Broadcasting Act* was implemented to ensure that Canada’s sovereignty and cultural identity would be protected and enhanced. It was a nation building exercise that was designed to ensure that Canadians have the ability to see themselves reflected in the video and audio programming that is broadcast and transmitted in this country, while also ensuring that the best the world has to offer is available to Canadian consumers. The policy objective contained in subsection 3(1) of the *Broadcasting Act*, which requires the Canadian broadcasting system to be effectively owned and controlled by Canadians, is critical to ensuring the cultural sovereignty and national identity objectives of the Act are achieved.
10. If, despite our concerns, Industry Canada proceeds to amend the foreign ownership limits as part of this consultation, Pelmorex urges Industry Canada to undertake a complete analysis of the potential implications and unintended consequences that may result from those changes. At the very least, Industry Canada and the Government of Canada will need to ensure that the cultural sovereignty, national identity, social, linguistic and political imperatives that underline the *Broadcasting Act* can continue to be achieved. With this mind, Pelmorex supports the proposal made by Astral Media Inc. for the Government to establish a Broadcasting Policy Review Panel to consider the impact that changes to the foreign ownership rules would have on the Canadian broadcasting system.
11. In our respectful opinion, the Government should be weary of proposals that involve over-zealous attempts to reduce or eliminate the ownership rules for telecommunications carriers and broadcasting undertakings.
12. With these preliminary comments in mind, we will now address the three proposed options for change.

## Option 1 – 49 Percent Proposal

13. The first option identified in the Consultation Paper, while not clearly defined, seems to propose an increase in the threshold for foreign ownership of telecommunications common carriers and broadcasting undertakings from the current 20% ownership limit of an operating company's voting shares up to 49%. The proposed increase would appear to apply only at the licensee/operating company level. The Consultation Paper does appear not to propose any change to the current limits at the parent or holding company level. It states that with the exception of the change to section (b) of the definition of "qualified corporation" set out in the *Direction to the CRTC (Ineligibility of Non-Canadians)* (the "Direction"), "All other current provisions... would remain unchanged". If implemented, this amendment to the Direction would allow a foreign entity to hold 49% of the voting shares at the operating company level and an additional 33 1/3% of the shares at the holding company level, which would mean that the total direct and indirect foreign ownership of a broadcasting licence would exceed 50%.
14. Pelmorex is profoundly concerned with the potential negative implications of such a significant change in the ownership limits for broadcasting. A decision to adopt this option should only be taken after a more thorough review of its implications for the Canadian broadcasting system and its impact on the policy objectives of the *Broadcasting Act*, which includes the requirement for Canadians to effectively own and control the broadcasting system.
15. There is no doubt that increasing the direct limit for foreign ownership to 49% will result in loss of some degree of control by Canadians and a corresponding increase in influence by foreign interests. There is no way around that. Moreover, as noted, under this proposal, a foreign entity will be able to hold, in addition to 49% of the voting shares of the operating company, 33 1/3% of the voting shares of the holding company. Taken together, this would mean the total direct and indirect foreign ownership and control of the Canadian broadcasting undertaking would be well above 50%, and would, therefore, contravene subsection 3(1) of the *Broadcasting Act*.
16. It is Pelmorex's view that any change to the direct limits on foreign ownership that might result from this consultation should not be applied to those entities that operate Canadian programming undertakings. Content decisions have to remain with entities that are clearly owned and controlled by Canadians, in order to ensure that the cultural sovereignty and national identity objectives of the Act are achieved. Canadian programming undertakings should, therefore, be excluded from any proposal to increase the direct foreign ownership limits to 49% for broadcasting undertakings.
17. Moreover, if a BDU is permitted to avail itself of the increased foreign ownership limit, then it should be required to make a choice. If it wants to continue to own programming undertakings and be actively involved on the content side of the broadcasting system in Canada, then it should abide by the current rules (which limit

foreign ownership of voting shares to 20%). If, on the other hand, it wants to take advantage of the more liberal ownership regime, then it should be required to divest of its programming interests. It would become a pure distributor, akin to a telecommunications common carrier, at that point and only then would be able to boost its foreign ownership to an amount greater than 20% but no more than to 49%.

18. Pelmorex firmly believes that such a separation between carriage and content is needed because the CRTC has, in recent years, eliminated many of the regulatory safeguards that were put in place to ensure that BDUs give prominence to Canadian programming services and Canadian content.
19. In Broadcasting Public Notice 2008-100 and in other policy decisions over the past decade, the Commission has announced fundamental changes to the regulatory framework governing the distribution of programming services by BDUs, including the elimination of most rules governing how channels are packaged and marketed to consumers. As a result of these changes, BDUs in Canada will soon have significantly greater control over the distribution and packaging of programming services, even to the extent of being permitted to offer customers packages of programming services that contain no Canadian services.
20. If foreign entities are allowed to exercise greater control over Canadian BDUs, this will undoubtedly result in greater prominence and more support for foreign programming services, at the expense of Canadian services. BDUs that are under the influence of foreign entities will have no incentive to ensure that Canadians can access Canadian programming services and Canadian content.
21. In Pelmorex's view, any decision by Industry Canada to relax the foreign ownership limits for BDUs should include a corresponding re-application of the packaging and carriage requirements for BDUs, the elimination of which was announced by the CRTC in Broadcasting Public Notice 2008-100 and in other policy decisions that have been issued over the past decade. Canadian programming services will need to have regulatory safeguards in place to prevent them from being washed aside in the sea of foreign ownership.
22. It needs to be understood that BDUs have an enormous impact on the content providers they distribute. BDUs directly affect programming services through their ability to package, price and promote those services. They negotiate the wholesale fees they pay to programming services they distribute, which affect the viability of each service and its ability to meet the CRTC's programming obligations.
23. BDUs also impact what Canadians can see on their TV screens and, in some instances, on their computer screens through the aggregation of content online. They perform an active role in determining the nature of the content that is provided to subscribers by making key decisions as to which services are distributed, how those services are promoted and marketed and at what the price they are offered.

24. The influence BDUs have over the broadcasting system has only increased in recent years with the universal adoption of the marketing technique known as bundling. Bundling, which involves offering subscribers telecommunications services, like wireless and wireline telephony and Internet services, together with broadcasting services, has enabled these companies to further enhance their gatekeeping role in the broadcasting system. The only way for a television service to gain access to the subscribers of a particular BDU is to negotiate a carriage arrangement with that BDU. If the licensee of a television service is unable to negotiate a carriage arrangement with a BDU, this effectively means that the service has no ability to reach that BDU's subscriber base.
25. If the influence of foreign entities increases, there will be greater incentive and pressure for BDUs to promote their own services and foreign-based services.
26. A large "Canadian" BDU that has 49% of its voting shares held by a media conglomerate like Comcast or Time Warner will have programming decisions forced on it. When a U.S. media conglomerate does a deal with a U.S. broadcaster, like FOX, it will most certainly negotiate for preferential treatment, carriage and/or positioning in Canada. In turn, Comcast or Time Warner will "suggest" to its Canadian BDU partner they help out. The same will apply when it comes to video on demand ("VOD") arrangements. The content provided by VOD services in Canada will become even more predominantly foreign than it is today.
27. In view of the above, if the 49% option is adopted by Industry Canada, then in addition to the CRTC re-instating regulatory safeguards, the 49% option should only be applied to pure distributors of content, such as telecommunications common carriers and BDUs that do not hold ownership interests in programming undertakings (whether those programming undertakings are licensed by the CRTC or operate via the internet). This provides an additional means by which the Government can mitigate the ability of BDUs with a large foreign ownership position to influence the content they distribute.
28. Furthermore, in no circumstances should BDUs that are licensed to operate under the *Broadcasting Act* be authorized under the Direction to increase the foreign direct and indirect ownership of their operating companies above the 49% limit. This would mean that if 49% of a licensed BDU company's voting shares are held by a foreign entity, then the licensee would be prohibited from having any of the voting shares of its holding company held by a foreign entity.
29. Finally, we believe it would make sense for Industry Canada to increase the direct foreign ownership limits on a gradual basis, whereby the ownership levels would be allowed to increase by smaller increments over a period of 10 to 15 years. This would enable Industry Canada and stakeholders in the telecommunications and broadcasting industries to properly assess the impact increasing foreign ownership of Canadian telecommunications and broadcasting companies would have on the broadcasting system in this country. If at any point during that period of time it becomes apparent that the impact of relaxing the foreign ownership rules is adverse

to Canada, then the decision could be made to limit foreign ownership at a level below the 49% threshold outlined in Option 1.

### **Option 2 – The Under 10% Proposal for Telecommunications Carriers**

30. The second option outlined in the Consultation Paper would involve amending only the *Telecommunications Act* so that telecommunications common carriers with telecommunications revenues of less than 10 percent of total telecommunications market revenues would be relieved of the current ownership rules outlined in section 16 of the *Telecommunications Act*.
31. This option raises concerns for Pelmorex as well.
32. First, as a practical matter, the fact that a smaller telecommunications company would have the advantage of foreign capital to leverage its operations in Canada would mean that it would quickly exceed the 10% threshold and achieve revenues that would be comparable to all other telecommunications carriers. Otherwise why would they invest if there is no opportunity to grow the investment beyond 10%? At that point, it would be difficult, from a policy perspective, to maintain foreign ownership limits on some carriers and not others, when their revenues would be comparable.
33. Second, we are also concerned that the 10% threshold option would, in time, be extended to BDUs who would lobby hard for symmetrical treatment. BDUs already consistently call for symmetrical regulation when it is to their benefit. They compete with telecom carriers in the provisions of local telephone and Internet services and increasingly wireless services and would demand access to the same foreign capital to ensure competitive equity.
34. BDUs have repeatedly expressed the view that they cannot separate their telecommunications business from the broadcasting distribution business for the purpose of ownership. If Industry Canada were to permit companies that operate BDUs to take advantage of the 10% rule, then it could have an enormous negative impact on the broadcasting system in Canada.
35. As noted above with respect to Option 1, BDUs already have a material impact on the content providers they distribute. BDUs directly affect programming services through their ability to package, price and promote those services. The larger they are the greater the impact they have. In many instances, they can determine success or failure of a programming service. The use of bundling to market the complete range of broadcasting and telecommunication services has only increased that power in recent years. If the foreign entities are allowed to effectively own and control BDUs in Canada there will be greater incentive and pressure for those BDUs to promote and favour their affiliated foreign services to the detriment of Canadian owned and controlled services.

36. Again, Pelmorex strongly believes that Industry Canada needs to be mindful of the fact that the CRTC has removed many of the safeguards that were put in place to ensure that BDUs give prominence to Canadian programming services and Canadian content. Any amendment to the foreign ownership rules that would inevitably be extended to BDUs would potentially harm Canadian broadcasters who will have to negotiate the terms of carriage for their programming services in Canada with foreign owned and controlled entities.

### **Option 3 – The Removal of all Telecom Ownership Rules**

37. The third option outlined in the Consultation Paper involves the repeal of section 16 of the *Telecommunications Act* and would allow all telecommunications common carriers to operate in Canada without any Canadian ownership requirements.

38. This draconian proposal is clearly untenable in Canada and raises the same “slippery slope” concern noted above with respect to the proposal to eliminate the foreign ownership rules for those telecommunications carriers with revenues of less than 10 percent of total telecommunications market revenues. Any proposal to remove ownership rules for telecommunications carriers will ultimately be applied to BDUs as well.

39. This would, in turn, have serious negative consequences for Canadian programming services that are seeking access to or are being carried by BDUs that are owned and controlled by foreign entities.

40. In a regulatory environment where the CRTC has relaxed, or is at least intending to relax or eliminate many of the safeguards upon which Canadian programming services have traditionally relied in order for their voices to be heard in Canada, any decision to remove foreign ownership requirements for BDUs would have a devastating impact on the Canadian broadcasting system.

### **Conclusion**

41. It is Pelmorex’s respectful submission that before Industry Canada even considers implementing one of the three options noted in the Consultation Paper, it needs to conduct a more thorough and complete analysis of the far-ranging and unintended consequences on the Canadian broadcasting system associated with relaxing the foreign ownership rules for telecommunications in Canada.

42. If, following that analysis, a decision is made to implement one of the three options set out in the Consultation paper, then Industry Canada would need to conduct a further proceeding to consider the types of safeguards that would have to be put in place to ensure that Canada’s broadcasting industry is not negatively impacted and unfairly disadvantaged by these changes to the ownership regime and that the

objectives of broadcasting policy set out in the *Broadcasting Act* are not undermined. As outlined in the comments filed in this consultation by Astral Media Inc., this review should be conducted by a Broadcasting Policy Review Panel, which would be tasked with the job of developing safeguards to support Canada's cultural industries. These safeguards would include strengthening the regulations applicable to BDUs to ensure that:

- (i) all Canadian programming services are able to access BDU networks;
- (ii) every package of programming services offered to Canadians contains a preponderance of Canadian services;
- (iii) the prices charged to subscribers for services and packages of services are just and reasonable;
- (iv) the wholesale rates payable to programming undertakings are fair and equitable and consistent with the specific licensing obligations established for each programming service; and
- (v) the non-programming content provided by BDUs does not negatively impact the development of programming provided by licensed Canadian programming services,

43. In addition, in the event that Industry Canada adopts one of the three options proposed in the Consultation Paper and applies the relaxed foreign ownership rule to BDUs, it should be made clear that any BDU or other aggregator of programming content that wants to take advantage of the new foreign investment thresholds (and thereby increase its foreign ownership above the current 20% level) would be required to divest of its interests in Canadian programming services.

44. In closing, Pelmorex submits that under no circumstances should the ownership levels of companies owning programming undertakings be changed, and any changes that are implemented to the foreign ownership rules for carriers and for BDUs should only apply to entities that have divested of their programming interests. Changes to the foreign ownership rules in Canada would require a rebalancing of the current regulatory to ensure that Canadian services are not adversely affected and have the ability to continue to contribute to the cultural, social and political objectives that underlie the *Broadcasting Act*.

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