



CFTPA

*Representing television, film
and interactive production in Canada*

ACPFT

*Porte-parole de l'industrie de la production
cinématographique, télévisuelle et interactive au Canada*

Submission by the
**Canadian Film and Television
Production Association (CFTPA)**

to the
Government of Canada

Pursuant to
***Opening Canada's Doors to Foreign Investment
in Telecommunications: Options for Reform***
Consultation Paper June 2010

July 30, 2010

Preamble

1. The Canadian Film and Television Production Association (CFTPA)¹ is the national organization representing the most successful Canadian independent production entrepreneurs working in English-language television, theatrical film and interactive media. With a number of exceptions, our members are small- and medium-sized enterprises (SMEs), and they are spread out in every region of the country. Independent producers make a very significant contribution to Canada's economy, generating a large majority of the more than \$5 billion in film and television production activity that occurs each year in our country and sustaining some 130,000 jobs. And, this activity excludes the millions of dollars invested in interactive content creation and the thousands of jobs this sector supports.

2. Earlier this month, on July 13, 2010, we submitted our comments pursuant to the Government's Consultation Paper entitled *Improving Canada's Digital Advantage – Strategies for Sustainable Prosperity*. In our Digital Strategy submission, we identified the following four general, top-level principles and goals which independent producers believe should be reflected in Canada's Digital Economy Strategy:
 - First, Canada must strive to develop a broadband infrastructure that is second to none in the world;
 - Second, we must ensure that Canadians control this infrastructure;
 - Third, we believe that basic access to broadband should be available to all;
 - Fourth, Canada's Digital Economy Strategy must recognize our broadband infrastructure as being a public service that is essential both to Canada's economic prosperity and to the maintenance and enhancement of Canada's national identity and cultural sovereignty.

¹ The Canadian Film and Television Production Association is currently in a transition period and will soon change its name to the Canadian Media Production Association (CMPA).

3. With respect to the second top-level principle – **that Canadians must control the broadband infrastructure in Canada** – we stated:

“While there is clearly a need to attract foreign private investment in the building of our broadband capacity, we do not believe that the course of Canada’s economic or cultural future should be determined by foreign interests. To use a tired, yet appropriate cliché, he who pays the piper typically gets to call the tune. Canadians must not lose control of their ability to craft their own destiny.”

4. In our Digital Strategy submission, we indicated that we would expand on this position in this current process. To that end, and for the reasons set out below, **CFTPA supports Option 1** in *Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform* (the Consultation Paper), namely to increase the direct limit for both broadcasting and telecommunications to 49 percent. We unequivocally do not support Options 2 and 3 as we believe either option would ultimately result in foreign entities determining Canada’s economic and cultural future.
5. As explained in the Consultation Paper, Option 1 would result in the references to “80%” in each of paragraph 16(3)(b) of the *Telecommunications Act* and paragraph (b) of the definition of “qualified corporation” set out in *Direction to the CRTC (Ineligibility of Non-Canadians)* being replaced with a reference to “51%”. Otherwise, all other current provisions, including those related to control in fact, would remain unchanged.
6. Our support for Option 1 is based on this description. Specifically, our support for Option 1 is subject to the maintenance of the de facto control obligation as well as all the other current legal control provisions, including the requirement that, regardless of

whether a company is in telecommunications or broadcasting, at least 80% of the directors of the company and its Chief Executive Officer must be Canadian.²

The Policy Rationale for Reforming the Foreign Ownership Rules

7. In our Digital Strategy submission, we pointed out that Canada's broadband infrastructure is quickly becoming the backbone of our economy and the main pipeline for the sharing of our culture among Canadians and with the rest of the world. We therefore suggested that developing a world-leading broadband infrastructure would be the modern day equivalent to building the transcontinental railway or the TransCanada Highway. We warned, however, that a sub-par broadband infrastructure would undermine our economic well-being, the quality of life for all Canadians and the country's cultural vibrancy.
8. The CFTPA agrees with the view that Canada needs to attract increased private investment in the building of our broadband capacity. We also agree that foreign markets represent a source of potential investment that, due to current rules, are not capable of being exploited in the best interests of Canadians.
9. Canada's independent producers can certainly appreciate the need for more investment from more sources. In our case, the lack of private sector financing, including venture capital funding, is an overarching issue impacting the entire independent production industry, be it in television, theatrical film or digital media.
10. Canada's independent producers can also appreciate the importance and value of foreign investment, and the impact that reduced or restricted access to funding from foreign sources can have on Canadian industry. Again, in our own case, we have

² Option 1 would appear to replace the current approach of setting different foreign ownership levels for an operating company and for a holding company. In lending our support to Option 1, we assume this means that the same 49% test would apply to *each* of the operating company and the holding company. However, we urge the government to further clarify this matter.

experienced a significant decrease over the last number of years in foreign financing to Canadian certified television and theatrical film production as well as great declines in our co-production activity. As with the Canadian telecommunications industry, independent producers must look to tap foreign markets to support growth.³

11. Whether to support the production of Canadian programming or to build Canada's telecommunications infrastructure, however, a government decision to open up more opportunities for more foreign investment must be structured so as to best accomplish the desired public policy goals, as well as make practical sense.

12. The Consultation Paper identifies two policy goals associated with reforming the foreign investment rules in telecommunications. First, the Paper's Introduction section states that “the Government of Canada has made it a priority to encourage investment, innovation and competition in the [telecommunications] sector and has taken consistent policy actions to ensure Canadian consumers and businesses reap the benefits.” Second, the Paper also states, towards its end, that “[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. We strongly support both these policy goals as well as the necessity that they be linked in this reform process. Of the three options presented in Consultation Paper, we submit that Option 1, with the maintenance of the current de facto control requirements, represents the only approach that will accomplish these twin public policy goals, as addressed (in reverse order) in the following sections.

³ This is why, in our Digital Strategy submission, we called on the government to introduce an International Development Strategy for the independent production sector that would encompass three specific initiatives: i) an official co-production treaty policy framework to enhance opportunities for international co-productions – including expanding treaties to include digital media projects – and make Canada a more attractive co-producing partner; ii) a financial assistance program that would be dedicated to supporting official treaty co-productions to bolster this sector; and iii) an export development program to help Canadian producers attract more foreign financing and increase foreign sales of Canadian content, including digital content.

Ensuring the Continued Pursuit of Canadian Culture and Content Policy Objectives

14. CFTPA submits that, by limiting foreign ownership to a minority position, only Option 1 would ensure that Canadians control the broadband infrastructure in Canada. And it is only by ensuring Canadian control of that infrastructure that the government will be able to maintain its ability to pursue Canadian culture and content policy objectives.

15. We do not support Options 2 and 3 because adopting either one would allow for the real possibility that control of Canada's broadband infrastructure would, over time, shift to foreign hands. Unlike Option 1 – which would limit foreign ownership to a minority position – the other two options could lead to Canadian communications companies becoming completely foreign-owned or to new foreign start-ups eventually controlling a significant share of the market. If this were to result, foreign interests would be in a position to determine the course of Canada's economic and cultural future. The government must ensure its decisions flowing from this current foreign ownership reform process do not allow that to happen.

16. We also cannot support Options 2 and 3 because their adoption would allow for the real possibility that control of Canadian broadcasting companies would, over time, shift to foreign hands. In making this prediction, we recognize that Options 2 and 3 are intended only to apply to telecom companies and not to broadcasters. The Consultation Paper recognizes, however, that telecommunications and broadcasting are increasingly converging. As the Report of the Telecommunications Policy Review Panel pointed out in 2006, technology and markets are clearly eroding the distinction between the broadcasting and telecommunications industries.⁴ In 2008, the Report of the Competition Policy Review panel observed:

“The Internet and other information and communications technologies have changed the business landscape for these industries. In essence, with convergence, it is

⁴ Telecommunications Policy Review Panel, Final Report, 2006, http://www.telecomreview.ca/eic/site/tprp-gecrt.nsf/eng/h_rx00054.html, p. 11-7.

increasingly difficult to define distinct “telecommunications” and “broadcasting” industries or sectors, particularly when it comes to delivery or distribution networks.”⁵

17. More recently, the Chair of the CRTC stated before the House of Commons Industry Committee that:

“Broadcasting distributors now deliver telephone service. Phone companies deliver television service. The Internet delivers everything and mobile devices bring it all into your hand, wherever you are. Technological convergence has led to corporate convergence: mergers and acquisitions bring all of these services together under large ownership groups.”⁶

18. All the larger telecommunications companies in Canada are now also broadcasters, and vice versa. For example, Rogers is an integrated wireline and wireless telecommunications provider, an ISP, a BDU and a broadcasting programmer. Quebecor, when it rolls out its wireless service, will be the same. Even smaller BDUs like Access Communications in Saskatchewan also provide telecom and Internet services over the same network.
19. The CFTPA submits that, because of this widely-recognized convergence, no practical distinction can be made between the country's telecom infrastructure and its broadcasting infrastructure. Moreover, the companies themselves have integrated many of their telecom and broadcasting corporate functions. As a result, it would be extremely difficult if not impossible, from a practical standpoint, to exclude

⁵ *Compete to Win*: Final Report of the Competition Review Panel, June 2008, [http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapi/Compete_to_Win.pdf/\\$FILE/Compete_to_Win.pdf](http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapi/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf), p. 46.

⁶ Testimony of Konrad von Finckenstein, Chair, CRTC, before the House of Commons Standing Committee on Industry, Science and Technology, April 13, 2010, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4420379&File=0#Int-3085022>.

“broadcasting companies” from new foreign ownership rules introduced ostensibly just for “telecom companies.”

20. Just as the once distinct communications sectors have now largely integrated to take advantage of opportunities offered in the digital age, Canada’s legislative and regulatory framework must also be adapted to the new reality. As we most recently highlighted in our Digital Economy Strategy consultation submission, we believe the time has come for the Government of Canada to give careful consideration to adopting a single “Communications Act” that would cover broadcasting, telecommunications and radiocommunications. If well structured, we believe a single Communications Act could help best position Canada for economic and cultural prosperity well into the 21st Century.

21. In its recent report entitled *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector*⁷, the House of Commons Standing Committee on Industry, Science and Technology echoed concerns about the “domino effect” that could result should the government initially attempt to grant foreign ownership flexibility only to the telecom industry:

“Opponents of the elimination of foreign ownership restrictions ... say that, irremediably, removal of restrictions for telecommunications common carriers would eventually impact broadcasting content through a ‘domino effect.’ If foreign ownership restrictions were to be removed only for telecommunications common carriers, converged players would consider this as unfair and would start applying tremendous pressure so that the removal of restrictions applies to BDUs as well. If the federal government were to allow any changes to apply to BDUs as well, then converged players involved in programming (i.e., dealing with content) could argue that changes are unfair to them and could apply pressure for the removal of foreign ownership restrictions for programming undertakings as well. Hence, a domino

⁷ <http://www2.parl.gc.ca/content/hoc/Committee/403/INDU/Reports/RP4618793/indurp05/indurp05-e.pdf>, June 2010.

effect that would open the door to foreign ownership in broadcasting, and, according to some witnesses, would affect Canada's cultural sovereignty.⁸

22. We agree with this prediction. Indeed, the Committee noted that fears of a domino effect have “been partially proven right in the sense that some converged players...have vigorously argued that changes to ownership rules should also apply to BDUs.”⁹
23. While the Committee noted that no witnesses had recommended the removal of foreign ownership restrictions for Canadian programming undertakings¹⁰, we caution that this position could very well change in the event the government actually permits unfettered access to foreign investment for the other sectors in the communications industry: we have no doubt that, in such circumstances, certain programming undertakings¹¹ would argue vigorously that they should not be left as the only services unable to benefit from unrestricted foreign financing opportunities. If they were to succeed, and programming services subsequently became foreign-owned, the government's ability to pursue Canadian culture and content policy objectives would be clearly jeopardized – if not lost entirely.
24. This being said, it is important to recognize that granting unrestricted access to foreign investment, even if it could somehow be limited for all time to telecom carriers and broadcasting distributors only, would still undermine the government's ability to achieve its cultural policy goals, since those who control the “pipes” ultimately control the content on those pipes.

⁸ Ibid, page 38.

⁹ Ibid, page 39.

¹⁰ Ibid.

¹¹ In this respect, we note that many programming undertakings are owned by integrated telecom carriers/BDUs.

25. In this respect, we share the concern expressed by the Chairman of the CRTC, that a communications company whose controlling minds are not Canadian would be unable (and likely unwilling) to promote and exude Canadian culture and values.¹²
26. We disagree with those who argue that the CRTC, through regulation, would be capable of ensuring that foreign-owned distributors continue to make the same cultural contributions that Canadian-owned and controlled BDUs currently make. While we accept that CRTC regulations would presumably apply to BDUs whether foreign- or Canadian-owned, we also wish to highlight that many BDU decisions which affect Canadian programming services and influence consumers' programming choices are not directly governed by CRTC regulations.
27. For example, BDUs have a great deal of discretion over how they package programming services to their customer, particularly given the CRTC's recent decision to remove tiering and linkage rules¹³ which, amongst other things, will grant BDUs new flexibility to offer all-foreign service packages. Retail and wholesale pricing are unregulated, as is marketing support. And BDUs can choose whether or not to allocate digital capacity to non-mandatory digital Canadian services¹⁴ and, if so, which such services they will carry. As Astral Media Inc. testified before the Industry Committee:

“BDUs make programming decisions every day. They control and decide which programming services consumers will have access to. They make critical decisions about which services to market, promote, and offer, and how much they pay to these programming services and how much they charge consumers. This BDU influence over programming services may increase, given the recent CRTC decision regarding the value for signal of conventional television stations. Therefore, any liberalization

¹² Speech by Konrad von Finckenstein, Q.C., Chairman, Canadian Radio-television and Telecommunications Commission, to Canada 2020 panel on "Telecom in Canada: A New Owner's Manual", Ottawa, Ontario, May 6, 2010, <http://www.crtc.gc.ca/eng/com200/2010/s100506.htm>.

¹³ Broadcasting Public Notice CRTC 2008-100, <http://www.crtc.gc.ca/eng/archive/2008/pb2008-100.htm>.

¹⁴ Currently referred to as "Category 2 services" but soon to be renamed "Category B services": *ibid.*

of BDU ownership restrictions could easily result in an unacceptable level of influence by non-Canadians over the television broadcasting system.”¹⁵

28. Thus, in the event a new majority foreign owner of a Canadian BDU were also to own its own foreign non-programming or programming services¹⁶, it would not only have the motivation but also a great deal of unregulated flexibility to carry, package and promote those foreign services, potentially to the detriment (whether obvious or subtle) of Canadian services. We submit that the only way the government could keep such inevitable behaviour in check would be to limit foreign interests to holding only minority positions in Canadian communications companies (as contemplated in Option 1) and to maintain the current de facto control requirements.

Encouraging Investment, Innovation and Competition and Ensuring Canadian Consumers and Businesses Reap the Benefits

29. The CFTPA favours increased and vigorous competition in the communications industry – indeed, we are very concerned about the extremely high degree of consolidation that has reduced competition in Canada's television broadcasting and distribution markets.¹⁷ We submit, however, that competition must be fair if it is to be sustainable. This is another reason why we support Option 1: by being equally applicable to new entrants and incumbents, telecommunications carriers and broadcasters, and “pure players” as well as integrated (broadcasting and telecom) companies, Option 1 will contribute to fair and sustainable competition that will serve to benefit Canadians for the long term. In contrast, Options 2 and 3, by favouring one

¹⁵ <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4491398&File=0>.

¹⁶ Assuming the CRTC has authorized the programming service(s) for distribution in Canada.

¹⁷ With only four large broadcast corporate groups now in English Canada there are effectively few selling opportunities in the television market for independent producers. The few Canadian television broadcasters that remain are using their dominant position in the marketplace to secure unreasonable terms from Canadian independent producers.

sector or sub-sector to the exclusion of others¹⁸, would not only be unfair but could undermine structural advances already made and services offered by Canada's largest communications companies, ultimately leading to negative consequences for Canadian consumers and for Canada's digital economy overall.

30. We would agree with those who have argued that there is no public policy benefit to disadvantaging larger or integrated companies by restricting their access to the same opportunities to raise foreign capital as would be granted their smaller or single, telecom industry competitors. We also agree that, in a converging world, a single-industry (i.e. telecom) solution would do little to help Canada build a world-leading broadband infrastructure: not only would it preclude the integrated companies from accessing new or increased foreign investment sources to fund the further expansion of their own networks, it would also serve as a disincentive for “pure play” telecom companies to innovate in the development of the type of converged (broadcasting/telecom) services which consumers in Canada and around the world now demand.

31. We also note that Option 2 contemplates that a smaller company which, because of its initial size, would qualify for unlimited access to foreign investments would remain qualified even if it were ultimately to grow so as to exceed the proposed (10 percent) threshold. We consider this approach to be unfair, as it obviously contemplates – and even appears to embrace – the possibility that a foreign-owned company will, as a result of its privileged access to foreign financing, gain sufficient market share to match, or even surpass, its Canadian-owned competitors in the market. Moreover, under Option 2, the foreign-owned company would continue to benefit from special access to foreign funds to further entrench its new market power over Canadian companies. We do not see a compelling rationale for this approach.

¹⁸ Option 2 would apply only to new and small “pure play” telecommunications carriers with telecommunications revenues of less than 10 percent of total telecommunications revenues, and not to broadcasters, integrated companies or larger incumbents. Option 3 would only apply to telecommunications common carriers and not to broadcasters or integrated companies.

32. By placing all participants on the same footing, Option 1 would create an environment in which all telecom and broadcasting companies could focus on the end-goal of improving Canada's place in the global digital economy. On the other hand, adoption of either Option 2 or 3 would put both beneficiaries and non-beneficiaries in the position of having to make artificial or inefficient business choices – such as restructuring their operations – in order to garner, or maintain, easier and broader access to foreign capital. Forcing Canadian communications companies to divert their attention and resources in this manner would, in our view, undermine Canada's digital competitiveness.
33. We also share the concerns of others that allowing unfettered foreign ownership or control of our communications infrastructure, as contemplated in Options 2 and 3, would not serve to benefit Canadian consumers and businesses that rely on that infrastructure. For example, we agree with the prediction that foreign companies entering the Canadian communications market would have little interest in expanding or improving services for rural Canadians but would instead, for pure business reasons, focus their investments and activities on the more lucrative urban markets.
34. We also agree that allowing Canadian communications companies to be majority-owned or controlled by foreign companies would result in Canadian jobs leaving the country, in a reduction in Canadian-based research and development, and in key strategic decisions affecting Canada's economy and culture being made in other countries. All of these inevitable results would significantly and, we fear, irreversibly impact negatively on the Canadian economy.

The De Facto Control Requirements

35. As noted at the outset of this submission, our support for Option 1 is subject to all other current legal control provisions as well as the control in fact test remaining in place.

36. We would highlight that, absent a de facto control requirement, all the negative results associated with the adoption of Option 2 or 3, as described above, could still materialize even if foreign interests were to remain precluded from majority ownership of Canadian communications companies.¹⁹
37. The recent case of Globalive would appear to raise some issues with respect to the consistency with which the current de facto control provisions are interpreted. In our view, there is something wrong with the system when, following extensive consultation and analysis of the same facts, an independent quasi judicial administrative tribunal can reach one conclusion while the executive branch of government can arrive at a fundamentally different conclusion.
38. This uncertainty, in our view, is problematic for all affected parties, and particularly for foreign investors Canada is attempting to attract. Clarity, therefore, would be in the best interests of all industry participants and stakeholders, the regulator and the government. Accordingly, we urge the government to clarify the concept of control in fact and put in place a transparent process to ensure the concept is interpreted consistently across government and from one case to another.

Conclusion

39. In our view, Option 1 represents the best approach to encourage investment, innovation and competition in the communications sector and thereby help Canada develop a broadband infrastructure that is second to none in the world. We believe that, by increasing the direct foreign ownership limit for telecommunications and broadcasting from the current 20% to 49%, Option 1 would allow for the continued

¹⁹ The de facto control test may examine, amongst other relevant considerations, corporate governance; shareholder rights; commercial arrangements between the company and non-Canadians; and economic participation of the company and non-Canadians: see Telecom Decision CRTC 2009-678, <http://www.crtc.gc.ca/eng/archive/2009/2009-678.htm>.

pursuit of Canadian culture and content policy objectives while generating meaningful new opportunities for increased financial investment in the Canadian communications industry. In turn, such increased investment would support the kind of innovation by all participants that will be necessary to develop a world-leading broadband infrastructure and generate the most benefits for consumers and businesses.

40. For all the above reasons, CFTPA submits that the adoption of Option 1 as outlined in the Consultation Paper is the only suitable approach for the government to take in reforming the foreign ownership rules for Canadian communications companies.

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