Eroding Foreign Ownership Limits:

CanWest Global Communications

Initiatives in Canada and Australia

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ABSTRACT

CanWest Global Communications is a Canadian media conglomerate with announced intentions to rank among the world's dominant media owners. In early 2007, the company engineered a complicated takeover of Alliance Atlantis Communications, one of Canada's largest media companies. In partnership with U.S. investment banker Goldman Sacks, CanWest acquired 36 percent ownership of thirteen specialty television channels owned by Alliance Atlantis. Goldman Sacks acquired 64 percent ownership, a level well above foreign ownership limits. The Alliance Atlantis takeover echoed CanWest's *modus operandi* in Australia, where it took control of Network TEN in the 1990s despite similar strict limits on foreign media ownership. An investigation by the Australian Broadcasting Authority allowed the arrangement in 1995, but similar deals were subsequently outlawed. A ten-year debate in Australia over lifting a cross-ownership restriction that prevented newspaper companies from holding broadcasting licences was finally resolved in 2006 with abolition of not only cross ownership, but foreign ownership limits as well. As CanWest has long urged removal of foreign ownership limits in Canada, and as a review of these limits is currently under way, the end result of its initiatives in both countries could be the same.

Introduction

An Arab proverb warns that if a camel gets its nose inside your tent, the rest of the animal is bound to follow. (Grover & Webb, 1916) This principle of incrementalism similarly applies in such metaphors as the "domino effect," the "thin edge of the wedge," and "getting a foot in the door." In law and public policy, arguments against adopting an action due to its future self-fulfilling effects are known as "slippery slope" arguments. More worrisome in public policy are slippery slope "events," which tend to commence a descent toward an undesired result. (Rizzo & Whitman, 2003) A few large multinational owners have challenged national regulatory systems in order to expand their corporate reach. Rupert Murdoch's battles with regulators in the U.S., UK, and China have been well documented. A Canadian multimedia company has also been active and influential in challenging foreign ownership rules both at home and abroad. CanWest Global Communications and its owning Asper family have been less visible than Murdoch in their assault on foreign media ownership limits, however, perhaps because the nation they chose to first infiltrate was not a world power but ironically instead Murdoch's native Australia. This paper chronicles CanWest Global's circumvention of Australia's foreign ownership limits and its ongoing challenge to such laws in its own country. It argues that CanWest was not only influential in the 2006 lifting of foreign ownership limits in Australia, but that its influence could soon see a similar outcome in Canada as a result of slippery slope events it engineered in both countries.

Literature review

Academic research on regulation of foreign media ownership has been scant, noted Zajacz (2004), because the topic falls in a gray area between several fields.

Communication historians and policy researchers tend to ignore the international context, while scholars of international communication fail to address domestic legislation. As a result, most of the research into the genesis of and justification for foreign media ownership limits has fallen to legal scholars. (Zajacz, 2004) According to Hollifield, (1999, p. 65) most countries have prohibited or limited foreign media ownership "at least partly out of fear that foreign owners would use those outlets to manipulate public opinion in times of national crisis." As a result, multinational media ownership was not widespread outside of consumer magazines before the late 1980s, and there is thus little research on the impact of foreign ownership. (Hollifield, 1999). Literature on media deregulation has been plentiful since the late 1980s. According to Horwitz (1989, p. vii), the libertarian rhetoric of the Reagan era was underlain by a commercial ethic that promised to unleash entrepreneurship by "getting the government off the backs of the people." As communications comprise the public sphere, however, the ramifications of deregulation in these industries have ironically instead been equity-based, with a vast reduction in diversity of viewpoints. (Horwitz, 1989) Technical advances in communication that allow the transmission of information digitally across borders have been predicted by globalization proponents to render national regulatory agencies obsolete. (Giddens, 2000). Others, however, see an enduring role for the state in shaping global media markets, including in setting the citizenship requirements of media owners. (Wainsbord & Morris, 2001)

According to Mosco (1996, p. 175), globalization is just one dimension of a wider "spatialization" of media, defined as the "institutional extension of corporate power in the communication industries," that has been ongoing since the 19th Century. McChesney

(1998, p. 12) notes that “aggressive maneuvering by the dominant firms” is shaping the emerging global media market. In addition to a handful of “first-tier” global media conglomerates, such as Sony, Disney, Viacom, Time Warner, and News Corp., McChesney sees rounding out the global market “a second tier of another forty or so” firms that are strong regional players. (McChesney, 1998, p. 13) Included in that group would be CanWest Global Communications, which, in addition to Canada’s third television network and its largest newspaper chain, owns or has owned media outlets in the U.S., the UK, Australia, New Zealand, Ireland, Northern Ireland, Chile, and Turkey. In 2002, CEO Leonard Asper announced that CanWest’s ambition was “to be one of the top five media companies in the world within 10 years.” (Macklem, 2002)

The company

CanWest Communications was founded by Winnipeg tax lawyer Israel “Izzy” Asper in 1974 with television station CKND. CanWest flouted Canadian content rules from the start by airing only an estimated 20 percent instead of the 50 percent it had promised the Canadian Radio-Television and Telecommunications Commission (CRTC). (Hardin, 1985) In 1975, it acquired control of Global Television, an Ontario regional network of six stations. Global had become insolvent as a result of spending heavily on original Canadian programming that failed to attract a large audience. To turn the network around, CanWest applied the formula it used at CKND. Global became host to endless reruns of Hollywood shows, which led it to become known as the “Love Boat Network.” CanWest Global expanded from coast to coast in Canada during the 1980s by adding several new and existing stations. Despite having fewer stations than the CBC and CTV networks, it became Canada’s most profitable broadcaster as a result of the 1973

"simultaneous substitution" rule that allowed Canadian stations to cut into U.S. network shows that were carried at the same time on local cable systems and substitute their own commercials. By 1984, a federal Task Force on Broadcasting Policy estimated the rule had provided between $36 million and $42 million in revenue annually for Canadian broadcasters. (Vipond, 1989, p. 174)

One of the few scholarly studies of CanWest Global concluded it was "invisible to researchers" because it did not fit the dominant network form. It nonetheless changed television in Canada due to the "unique and carefully crafted regulatory position" devised by its owners. (Taylor, 1993) CanWest Global exploited its junior status to the national networks CBC and CTV, according to Taylor, in order to reduce costs. Because it lacked outlets in several Canadian provinces, CanWest was exempt from some obligations borne by the national networks, such as transmitting into remote locations. By confining itself to the more lucrative urban markets, CanWest could skim the cream of advertising dollars because, as far as the CRTC was concerned, it was not a network but instead a "system." CanWest Global was only required by the CRTC to invest $44 million in Canadian content for the 1990-91 programming season, half of CTV's mandated expenditure. (Taylor, 1993) The CRTC cracked down on CanWest in 1992, as it renewed its licence for only four years instead of the usual seven and demanded it increase its Canadian content. The company then turned its attention to international markets.

Going Global

CanWest first took advantage of New Zealand's near-complete deregulation of broadcasting to purchase the bankrupt network TV3, the country's first commercial television broadcaster, after the government removed foreign ownership restrictions in

late 1991 to allow the takeover. (Comrie & Fountaine, 2005) Production of original content was scaled back and imported American programming began to dominate the schedule. From a loss of NZ$22 million in 1992, TV3 turned a profit of NZ$28 million in 1996. CanWest took further advantage of the deregulated New Zealand market the following year, launching entertainment network TV4 and buying the country's third-largest radio network, More FM, for NZ$30 million. Another television broadcaster in the region went into receivership in 1991 after Australia's Network TEN began losing A$2 million a week. In contrast to the deregulated broadcasting sector in New Zealand, however, Australia imposed strict limits on foreign media ownership, with a maximum of 15 percent allowed in television. CanWest sought Australian investors for 85 percent of the A$240 million asking price for Network TEN, but was only able to get commitments for half that amount. A loophole in the country's foreign ownership rules, however, allowed CanWest to take equity in TEN as debt instead of as shares of ownership, essentially making it a creditor of Network TEN. As a result, CanWest contributed 57.5 per cent of the purchase price in 1992 but took only 15 per cent of it as voting shares. It held 42.5 per cent ownership as non-voting debentures, a long-term debt instrument similar to a bond, that paid an interest rate equivalent to TEN's rate of profit. (Edge, 2007)

Australian media regulations also prohibited foreigners from exercising control over television broadcasters, yet the manager of CanWest's Global Television station in Vancouver moved to Sydney in 1993 as CEO of Network TEN. A complaint by the network's former director of programming that Canadians were running TEN's operations soon came to the attention of the Australian Broadcasting Authority (ABA). It

began an investigation that continued for more than a year, generated 950 pages of testimony, and subpoenaed 15,000 pages of documents. (Levine, 2002) Network TEN earnings soared under CanWest management due to cost cutting and programming changes, which saw the injection of cheap American programming, reaching A$103 million in 1995. As a result, CanWest recouped its Network TEN investment through stock dividends and debenture payments in less than three years. An ABA report eventually dismissed the complaint about Canadians of exercising control over Network TEN. (Australia, 1995)

CanWest quietly increased its ownership, however, and in late 1996 ABA officials noted that four of the network's six minority shareholders had sold out to holding companies based in Australia. The companies had bought the shares with money borrowed from a subsidiary of CanWest located in the Netherlands, and as a result CanWest was in a position to control 76 percent of Network TEN. After a second investigation, the ABA ruled CanWest in breach of the law and gave the Canadians six months to sell the extra shares or face a $2 million fine. (Australia, 1997) A change in government to a Liberal coalition led by John Howard brought proposed changes to Australia's media cross-ownership laws, but not on foreign ownership, changes to which Howard opposed. Non-voting shares were also banned, meaning CanWest would have to reduce its ownership of TEN to the 15 percent limit allowed foreigners. The situation threatened to turn into an international incident when the Canadian government warned Australia it would consider a demand for divestiture by CanWest a breach of international treaty obligations. (Davies, 1997) Finally a deal was struck in which, as part of a public listing for sale of Network TEN shares, CanWest's majority ownership

was exempted from the prohibition on non-voting shares. Broadcasting, foreign investment, and stock market regulators had all "appeared powerless against Asper flouting the Australian law," observed the *Australian Financial Review*. (Ries, 1998) TEN's share price soared, boosting CanWest's five-year Network TEN investment 27 times over to A$1.4 billion. (Brehl, 1998) "With the benefit of hindsight," noted *The Australian*, "this was the bargain of the decade." (Westfield, 1998) By Asper's death in 2003, the ingenuity of his Network TEN acquisition had come clear, according to *The Australian*.

> It was a brilliant design, and many potential foreign buyers of media assets pleaded to be able to "do a CanWest" to get around pesky foreign ownership limits. After two inquiries, the federal government put a stop to any further "CanWests." It remains a unique structure. (Asper: A life, 2003)

Foreign media ownership in Australia became tied to a decade-long debate over cross-ownership of media. The Howard government attempted twice to lift a 1987 prohibition on cross-ownership of newspapers and television, only to have the move blocked in 1998 by coalition partners and in 2001by the elected Senate. Opposition to the move was due to concerns that, because of the small size of the Australian market, a few large owners would dominate the media unless ownership was opened more widely to foreigners. (Edge, 2008) CanWest's 1999 submission to the Productivity Commission argued that "foreigners have less reason to interfere in local domestic affairs because they are less likely to have a substantial range of other investments which could lead to the risk of conflicts of interest." (Australia, 2000, p. 324) CanWest's ability to circumvent Australia's foreign ownership limits, noted Given (2002), was one of the reasons

advanced by numerous intervenors for abolishing them. The commission's report agreed, urging revision of the country's Broadcasting Services Act (BSA).

> That the rules on foreign ownership of commercial television licences and subscription television licences have been so compromised suggests they should be clarified or jettisoned. They do not appear to be achieving the BSA objective of giving effective control to Australians. (Australia, 2000, p. 338)

CanWest's submission to the 2002 Broadcasting Services Amendment Bill contended that "removal of foreign ownership restrictions on the control of commercial television broadcasting licences will permit Australian media companies to compete more successfully for investment." (Network TEN, 2002, p. 3) After gaining control of the country's upper house in late 2004, the Howard government was finally able to pass a broad package of reforms in 2006 that abolished restrictions on foreign ownership and cross ownership. (Edge, 2008) CanWest was expected to sell its majority ownership in Network TEN to a domestic newspaper company, but instead formalized its control by converting its debentures into voting shares. (Trichur, 2007) Analysts thus predicted CanWest would increase its media holdings in Australia, likely utilizing capital provided by other investors. (Willis & Robertson, 2007)

Foreign Ownership in Canada

Asper's three adult children, who were all trained as lawyers at his insistence, inherited control of CanWest Global. The second generation Aspers announced early on plans to build CanWest into something much larger than what they inherited, seeing its future in international markets. One market CanWest hoped to enter was the U.S., but that country's limit on foreign ownership of broadcasters prevented it. In hopes of persuading the U.S. to lift the restriction, CanWest regularly urged the lifting of Canada's

limits on foreign media ownership, which directly and indirectly (through a holding company) amounted to 46.7 percent. "Staying strong and healthy at home in Canada requires unfettered access to both Canadian and international capital markets," CanWest CEO Leonard Asper told the Standing Committee on Industry, Science and Technology. (Canada, 2003a, p. 14) The committee's report, *Opening Canadian Communications to the World*, urged the removal of foreign ownership limits in telecommunications and their review in broadcasting. (Canada, 2003, p. 56) Asper made his point even more strongly to the Standing Committee on Canadian Heritage, which had been tasked to examine broadcasting policy and media ownership.

> We're saying for content companies, as a practical measure in a first step, go to 49 percent. Keep the content rules, make sure you get reciprocity for it so that we can expand it to their markets and have broader outlets over which to amortize Canadian programming, for example. We also say that a second step could be to go to 100 percent. It doesn't matter, as long as there's content regulation underneath it. (Canada, 2003a, p. 415)

The Heritage committee, however, rejected the idea of lifting limits on foreign ownership of broadcasting just as emphatically as the Industry committee had endorsed it. Noting Canada's unique cultural and geographic proximity to the world's largest foreign media companies, the Heritage report called the notion "seriously flawed." Titled *Our Cultural Sovereignty*, the report warned of dire consequences if Asper's wish were granted. "One wrong move could do irreparable harm to the Canadian system. Once this happens, there will be no turning back." (Canada, 2003a, p. 420) A dissenting opinion issued by Canadian Alliance committee members, however, noted that the party supported relaxing foreign ownership rules on Canadian industry, "including telecommunications and broadcast distribution." (Abbott, 2003, 852) A 2006 report of Industry Canada's Telecommunications Policy Review Panel also urged abolishing

foreign ownership limits in telecommunications and their review in broadcasting. (Canada, 2006)

A 2006 change in government from Liberal to a reincarnated Conservative Party, largely comprised of members of the former Canadian Alliance, improved prospects for lifting foreign ownership limits. The catalyst for change, however, was again CanWest. Alliance Atlantis Communications, one of Canada's largest television and film production companies, was put up for sale in late 2006. Because it lacked outlets in the lucrative specialty cable television market, CanWest coveted the thirteen such channels owned by Alliance Atlantis, including Showcase and History Television. Despite being deeply in debt, CanWest was able to make a surprise acquisition of the channels, but only with the participation of U.S. investment banker Goldman Sachs, which in a complex arrangement contributed 64 percent of the $2.3-billion purchase price. The foreign ownership was well in excess of the 46.7 percent allowed, but CanWest insisted it, not Goldman Sachs, would be in control of the channels. Hearings into the acquisition were held by the CRTC, which asked only that the partnership agreement between CanWest and Goldman Sachs be amended to remove a clause that would have allowed two American board members (out of seven) to veto routine expenditures exceeding a certain amount. Otherwise the arrangement, which saw CanWest hold two-thirds of the company's voting shares, passed muster with the regulator, which approved it in late 2007. In allowing the purchase, the CRTC noted that CanWest would manage the Alliance Atlantis channels in conjunction with its own network (Contributed Business). The total equity in the combined enterprise would thus be mostly CanWest's.

> The Commission asked for and received from CanWest a confidential third-party valuation of the Contributed Business. Taking CanWest's

> equity share in the AA Companies and the Contributed Business together (using the confidential valuation referred to above), CanWest's share of the equity in the venture will be more than 50%. Looking at matters in this light, the Commission finds no merit in the argument that GSCP's equity position will give them control in fact. (Canada, 2007, p. 42.)

In 2007, a Competition Policy Review Panel was formed to re-examine Canada's foreign ownership limits in six "sensitive" areas, including broadcasting and publishing. Mandated to issue its report in mid-2008, the panel released an initial 50-page consultation paper titled *Sharpening Canada's Competitive Edge* that suggested its recommendations might be a foregone conclusion. "In the twenty-first century, economic success will not be achieved by being backward or inward looking. The goal is to foster the development of Canadian businesses and to maximize the opportunity for Canadians to capitalize on global trade, investment and competition." (Canada, 2007)

Discussion

Canada and Australia have been found highly comparable as media markets due to their similarities in vast geography, small population, and common heritage. Due in large part to restrictions on foreign ownership, concentration of media ownership in both countries has historically been among the world's highest. Canada was thought to have the most highly-concentrated press ownership following a series of corporate transactions in 1980 that prompted a fruitless Royal Commission on Newspapers. (Dunnett, 1988) Concentration of press ownership in Australia rose after the 1987 prohibition on cross-ownership, however, and by the early 1990s it was said to have surpassed Ireland with the world's highest level. (Brown, 1993) According to Flew (2001), a neoliberal phase in policy discourse began in Australia in 1992, just as CanWest was making its investment in Network TEN, with the result being an opening up of the broadcasting market at the

expense of the public interest. As members of the owning Asper family have often proclaimed neoliberal positions on fiscal policy and public broadcasting, their arguments for allowing the camel's nose into the Australian tent doubtless received a more favorable hearing than they then would have at that time in Canada. In deregulation, slippery slopes are greased both with actions and arguments, both of which the Aspers have been adept at providing.

> Sometimes slippery slopes appear to involve only actions: One action leads to another. But in the cases of law, ethics, and public policy, the actions usually require justification. Hence, first and foremost, slippery slopes are slopes of arguments: One practical argument tends to lead to another, which means that one justified action, often a decision, tends to lead to another. (Rizzo & Whitman, 2003, p. 541)

Conclusions

Limits on foreign ownership of domestic media outlets in Australia had been imposed in 1956, according to Hitchens (2006, p. 83), to "protect national sovereignty by preventing foreigners being able to influence domestic opinion." In Canada, a 1969 directive to the CRTC by the federal Liberal government set a limit of 20 percent on voting shares of any broadcasting company, resulting in the repatriation of 16.3 percent of such shares in television. (Skinner & Gasher, 2006, p. 60) Hollifield (1999, p. 79), who studied coverage of the 1995 Quebec independence referendum in Canadian-owned U.S. newspapers, found evidence that foreign ownership "influences newspaper coverage and editorial commentary about key political issues in the parent company's home country." The Aspers have demonstrated in Canada a proclivity for influencing news coverage by their media holdings in favor of their neoliberal, pro-Israel views. (Edge, 2007) Their editorial interference has been a perfect example of why foreign ownership limits were originally enacted. In deciding whether to lift such limits, policy makers should focus

more on the example such owners set than on the slippery slope arguments they make and the slippery slope events they engineer.

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