

REGULATORY AND TRADE DEVELOPMENTS

FOREIGN OWNERSHIP AND CONTROL RESTRICTIONS IN THE TELECOMMUNICATIONS AND BROADCASTING SECTORS REVISED: MOUNTAIN OR MOLEHILL?

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Introduction

This article reviews and compares the analysis and conclusions of the 2003 reports of two House of Commons Standing Committees which examined the foreign ownership and control restrictions currently applicable to the telecommunications services and broadcasting programming and distribution sectors.

In a classic battle pitting the goals of capital market competition against cultural protection, two House of Commons Standing Committees have released contradictory reports which reveal a significant divide among Parliamentarians, between those who want to maintain current foreign ownership restrictions in Canada's telecommunications and broadcasting sectors and those who feel the time has come to get rid of the regime altogether.

It is likely that affected interests will attempt to establish traction for their points of view in the next federal election. Cultural industry advocates and affected unions have recently begun to agitate against change. Notwithstanding the Government's endorsement of lifting the restrictions for the telecommunications sector, the priority that will be

attached to the necessary legislative amendments and their parliamentary timing cannot be predicted, especially as there is increasing uncertainty with respect to the outcome of the forthcoming federal election.

In April 2003, the Standing Committee on Industry, Science and Technology released its report, entitled "Opening Canadian Communications To The World",¹ which recommended that, in order to ensure the viability of the Canadian broadcasting sector, all existing minimum Canadian ownership requirements applicable to both telecommunications common carriers and broadcasting distribution undertakings (including cable and satellite television companies) be removed entirely. The Industry Committee concluded that the current restrictive system was not helping the telecommunications sector access capital and remain competitive and was having a negative impact on the ability of telecommunications companies to introduce and roll out new technology.

In its report, the Industry Committee strongly advocated that any changes made for telecommunications common carriers should be applied in an equal fashion to broadcasting distribution undertakings. The Industry Committee concluded that it was no longer appropriate, or even possible, to separate telecommunications common carriers from broadcasting distribution undertakings based on the services they provide because so many companies are concurrently involved in both sectors.

The Industry Committee's Report contrasts with the study released just months later by the Standing

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Committee on Canadian Heritage, entitled "Our Cultural Sovereignty: The Second Century of Canadian Broadcasting".² Firm in its belief that the existing rules are sufficient to allow foreign capital into the Canadian market without giving up control over key instruments of Canadian cultural development, the Heritage Committee recommended that the Government resist making any changes to the current restrictions on foreign ownership for both the telecommunications and broadcasting sectors.

The Heritage Committee was particularly convinced by the "slippery slope" argument raised by several witnesses. In its report, the Heritage Committee stated that "one wrong move could do irreparable harm to the Canadian system," and that once the damage was done, there would be no turning back. Access to truly Canadian programming would be limited, and the support programs currently in place for Canadian content providers would need to be radically altered. The Heritage Committee advocated for the maintenance of the current foreign ownership regime, believing that it effectively permits the entrance of foreign capital, while protecting Canadian broadcasters from foreign takeover.

Missing from the Heritage Committee's analysis was consideration of whether regulation of entry and product mix (especially Canadian content levels), and its collateral effect of creating a discrete Canadian rights market for non-Canadian broadcasting, by the Canadian Radio-television and Telecommunications Commission ("CRTC") was sufficient to achieve cultural policy objectives for the broadcasting sector.

There appears to be common ground that these restrictions should be eliminated with respect to facilities-based telecommunications carriers. Nevertheless, there remains substantial disagreement over whether the same changes should apply to

broadcasting distribution undertakings (which often share common network and operating resources with telecommunications carriage activities) and even sharper disagreement in relation to broadcasting distribution businesses (TV networks and channel radio stations), many of which are affiliates of telecommunications common carriers and broadcasting distribution undertakings.

The Federal Government, for its part, has endorsed in principle the removal of the telecommunications ownership restrictions, but has decided to study further the broadcasting restrictions and the relationships between the ownership regimes with an internal report deadline of late Spring 2004. There are now new Heritage and Industry Ministers, and there will undoubtedly be a federal election before there is further Cabinet attention to this issue.

We argue here that there is not now, and never was, a compelling policy rationale for the telecommunications sector restrictions, apart perhaps from liberalizing only after the U.S. did. With respect to broadcasting distribution and programming businesses, we argue that there is no longer any compelling economic rationale to maintain these restrictions (although they have obvious sentimental political value to some), in particular because the cultural development objectives of the *Broadcasting Act* could still be adequately implemented through established CRTC regulation.

Legal Framework

The CRTC is charged with the responsibility of regulating both telecommunications common carriers which fall under federal jurisdiction (pursuant to the *Telecommunications Act*) and all aspects of the Canadian broadcasting system. In broadcasting matters, the CRTC is accountable to the Heritage

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Minister, although the Commissioner has considerable independence in the exercise of its regulation power.

The Heritage Minister is broadly responsible for broadcasting policy and for administering programs with respect to the broadcasting sector, within her overall cultural policy mandate. The Minister of Industry is broadly responsible for Canada's telecommunications policy although again, the CRTC's telecommunications decisions are seldom questioned by Ministers of the Cabinet as a whole.

Under the *Telecommunications Act*, to be eligible to operate in Canada as a telecommunications common carrier (a firm which owns or operates transmission facilities; resellers are not subject to the Act), a company must be a "Canadian-owned and controlled corporation," incorporated or continued under the laws of Canada.³ A corporation will be "Canadian" where not less than 80% of its board of directors are individual Canadians, and Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80% of the corporation's voting shares issued and outstanding, and the corporation is not otherwise controlled by persons that are not Canadians.⁴ By operation of Regulations under the *Telecommunications Act*, a "Canadian" can include a corporation in which non-Canadians control up to 1/3 of the voting interest. This raises the theoretical direct and indirect foreign voting interest limit to about 47%, although "control" considerations discussed below effectively keep the actual ownership level lower. Control is defined as control in any manner that results in control in fact.

It is interesting to note that Canadian ownership and control of telecommunications carriers was not an express government policy until just before concluding negotiations on the Canada/U.S. Free Trade Agreement in 1987 (the precursor to NAFTA). The announcement

was necessary to ensure that implementation of this policy (or its enactment – as occurred in the 1992 *Telecommunications Act*) could not be challenged under the Free Trade Agreement, and subsequently NAFTA.

Complimentary ownership and control restrictions are established by regulation under the *Radiocommunication Act* for telecommunications carriers that use radio transmission facilities (e.g., cellular and satellite services). Until the enactment of the *Telecommunications Act*, the Federal Government had to rely on its radio facility licensing discretion to maintain Canadian ownership and control of the telecommunications sector.

Under the *Broadcasting Act*, broadcasting licenses may only be issued to "qualified corporations" as defined in a direction from the government which establishes essentially the same Canadian ownership and control requirements as those that apply to telecommunications common carriers.

Ironically, the less controversial ownership and control reforms for telecommunications common carriers can now only be implemented in the most procedurally onerous fashion, by amending federal legislation. On the other hand, the more controversial liberalization for the broadcasting sector can be implemented by a simple Cabinet decision.

Issues Before The Committees

Industry Committee

The Industry Committee considered several questions over the course of its examination of the foreign ownership regime. The principal concern of the Industry Committee was whether foreign investment restrictions were having a negative or discriminatory effect on investment in Canadian telecommunications

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companies given that the sector is not open to competition and only some suppliers are subject to ownership and control restrictions. In this regard, the Industry Committee concluded that the current foreign ownership restrictions were likely "stifling Canada's productivity and growth" by limiting the level of foreign capital investment new entrants in the telecommunications sector could expect to receive, thereby increasing the cost of capital.

In determining that the foreign ownership restrictions are having a negative effect on telecommunications companies, the Industry Committee examined statistical evidence, provided by Statistics Canada and the OECD, that demonstrated that, while the level of investment in the Canadian telecommunications sector continues to grow, it has not grown significantly during the period in which the foreign ownership restrictions have been in effect. Witnesses reminded the Industry Committee that the OECD had recommended that the Canadian foreign ownership regime be dismantled, "as soon as possible in order to rapidly increase productivity, investment and jobs."⁵ The OECD had also concluded that Canada's foreign ownership restrictions are harmful to the development of local facilities-based competition.⁶

Many of the new entrants appearing before the Industry Committee, which experience higher debt/equity ratios relative to incumbents, encouraged the Industry Committee to remove all foreign ownership restrictions for both telecommunications common carriers and broadcasting distribution undertakings. For their part, the incumbent carriers also advocated for the complete removal of foreign ownership restrictions. However, they strongly cautioned against putting licences or a tiered approach in the place of foreign ownership restrictions.

New entrants further contended they have difficulties in accessing foreign capital, and are exposed to higher costs when acquiring capital, which is not exclusively a reflection of relative risk. The Industry Committee examined research that supports new entrants' arguments on this topic. A study by Lemay-Yates Associates Inc. found that new entrants do not face a level playing field when it comes to sources of financing, and have to carry debt levels twice or three times the amount carried by major incumbents.⁷ New entrants also argued that their companies suffer because they are unable to tap into the wealth of managerial expertise in non-Canadians because of the way in which the "control" requirements had been interpreted.

The Industry Committee also considered a study conducted by Network Research Inc.⁸ for the cable industry, wherein Network Research Inc. concluded that it does not make sense to maintain foreign ownership restrictions which are unfairly restrictive to Canadian cable companies when the trend is for telephone companies and cable companies to offer the same products and services. Network Research Inc.'s research showed that the foreign ownership restrictions were having a negative impact on the cable industry. The study found that foreign ownership restrictions increase the cost of capital per month per subscriber by more than double for Canadian cable companies as compared to incumbent telephone companies. It also found that, as between these two groups, there exists a cost of capital differential of approximately 1.18%.

The Industry Committee examined several alternatives to the status quo, including taking a tiered approach to the application of foreign ownership restrictions. A tiered approach was not desirable because of the uneven playing field that may result among new entrants and incumbents, and the possibility that a

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foreign company could gain access to low cost capital by taking over a new entrant.

The option of creating a licensing scheme whereby telecommunications common carriers would be subject to "public interest" conditions, such as the development of services to remote areas, was also dismissed because of the negative impact it could have on the flow of capital and the uncertainty that it would likely create.

The final policy option examined by the Industry Committee was the complete elimination of foreign ownership restrictions. The Committee concluded that free entry would encourage the flow of capital into Canada, and would result in the lowest capital cost structure of all the options examined. To counter the concerns of those who argued that the free entry approach would threaten Canadian culture, the Industry Committee noted that Canada has other ways of ensuring that substantial foreign investment does not have a negative impact on public policy issues beyond the foreign ownership regime.

Under the *Investment Canada Act*, foreign investment in Canadian industries, including those related to Canada's cultural heritage or national identity, is reviewed on multiple levels to ensure that it is in the public interest.

The Industry Committee also concluded that current CRTC regulation of content would adequately address the impact of removing foreign ownership restrictions. In light of the fact that the result of recent convergence is that it is no longer possible to identify many companies as pure broadcasting distribution undertakings or pure telecommunications common carriers, a structural separation of content and carriage would also serve to fill the gap left by removing the foreign ownership restrictions.

Heritage Committee

In its deliberations, the Heritage Committee broadly considered two main issues: whether current foreign ownership restrictions should be retained or loosened in the broadcasting sector, and if they should be loosened, whether ownership restrictions should be relaxed for both content providers and content carriers. In the end, the Heritage Committee opposed increasing the level of foreign ownership for both aspects of the broadcasting sector, and also cautioned against removing restrictions in the telecommunications sector. The Heritage Committee held the overriding view that once Canadians give up control over what amounts to their cultural sovereignty, they can never get it back.

The Heritage Committee heard from the large distribution companies, who felt that changes to the limits for the broadcasting sector were necessary. However, even within that group there was disagreement as to whether foreign ownership limits needed to be completely abolished, as the large cable companies suggested, or just increased. Witnesses put forth the economic argument that Canadian companies must spend more money securing foreign investment and the growth of these companies is therefore suffering. The cost of creating and maintaining a competitive infrastructure is challenging and many of the larger companies felt that opening up companies for foreign investment would help to ease this burden.

The Heritage Committee also heard from unions, content creators, and supporters of public broadcasting who opposed any change to the current foreign ownership regime. In response to the cost of capital argument, some questioned whether Canadian companies were really having such a hard time raising capital. In the past few years there have seen several

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major investments in Canada's broadcasting sector, even with the foreign ownership restrictions, where most of the money raised was Canadian. Removing the foreign ownership restrictions would not change this. The Heritage Committee took the view that as existing maximum foreign ownership percentages have yet to be reached for most companies, these limits do not appear to create current constraint.

The second major issue the Heritage Committee considered was whether the foreign ownership restrictions should be relaxed for both content providers and content carriers. Those who wanted to see the maintenance of foreign ownership restrictions only for content providers, and not for distribution undertakings, argued that by controlling content, the government could still achieve its cultural policy objectives, whereas controlling distributors, who simply carry approved programming, would not serve such a useful purpose. It was argued that, as long as companies that operated in both content and carriage structured their organizations such that foreign investors could only invest up to a certain limit in the content side, Canadian content would not be sacrificed.

There was, as always, a distinct concern expressed that because of the geographical proximity of Canada to the United States, the Canadian broadcasting sector faced a particularly heightened threat of takeover from foreign owners. The Heritage Committee agreed, concluding that the current foreign ownership regime and the broadcasting regulatory framework in general have served to protect Canadian interests quite well and by changing the limits, the government would be inviting cultural disaster.

In its criticism of the Industry Committee's recommendations, the Heritage Committee noted that the Industry Committee focused their report on economic arguments and seemed to ignore the fact

that foreign investment restrictions are not the only feature of the equation that affect investment in the broadcasting sector in this country. While companies would no doubt benefit from access to a greater pool of capital at lower costs, there are other issues at play, including cultural and public policy issues, that seem to be impeding the ability of Canadian companies to remain competitive in the broadcasting sector.

Response of the Government

The Government's response to the Industry Committee's Report was communicated in September 2003 by the Industry Minister at the time, Allan Rock. In the Government's response, Minister Rock acknowledged that the Heritage Committee's recommendation to maintain the current foreign ownership regime was obviously at odds with the Industry Committee's finding that the restrictions needed to be dismantled. Pledging to reconcile the conflicting conclusions of the two Committees in relation to broadcasting, Minister Rock announced that the Government had immediate plans to launch an analysis of the situation, and be ready by Spring 2004 to deal with possible solutions.

The Government acknowledged two major findings of the Industry Committee. First, it agreed with the conclusion that dismantling the foreign ownership regime would benefit both the telecommunications sector and users of telecommunications services. Secondly, the Government recognized that the best way to go about changing the foreign ownership structure would be to make parallel changes for telecommunications common carriers and broadcasting distribution undertakings, although this would be a matter for further study.

Recognizing that the landscape of Canada's broadcasting sector is changing rapidly, the

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Government undertook to table an amendment as early as possible to the *Telecommunications Act*, which would require the Government to review the Act every five years to ensure it is keeping pace with technological change.

In November 2003, the Government released its response to the Heritage Committee's Report, signed by Sheila Copps in her capacity as Heritage Minister at the time. Minister Copps echoed Minister Rock's commitment to review the situation as soon as possible so the Government would be prepared to address the issue of foreign ownership in the Spring of 2004. However, by supporting the Heritage Committee's conclusion that the current foreign ownership structure is working well, and sufficiently protects Canadian cultural values from the threat of foreign takeover, Minister Copps confirmed the division of opinions among Parliamentarians.

Minister Copps disagreed with Minister Rock's response, which supported the Industry Committee's conclusion that symmetrical change was the most effective way of dealing with the issue of foreign ownership. She endorsed the concern put forth to the Heritage Committee that Canada's ability to support and promote Canadian content, thereby helping the country achieve its cultural objectives, would be jeopardized should the foreign ownership regime be dismantled. Minister Copps contended that broadcasting distribution undertakings play a major role in deciding what type of programming to carry, and that it would be more difficult to separate broadcasters from broadcasting distribution undertakings than the Industry Committee appeared to believe.

Evaluation

An important policy irony is that the telecommunications ownership restrictions actually

apply only to the more capital-intensive "facilities-based" carrier segment, the segment which has consistently been identified by the CRTC as critical to successful long-term development of competition in this sector. Arbitrage-based resellers, which theoretically should exist only as long as prices are out of line with marginal costs (but which still seem to find plenty of arbitrage opportunities more than a decade after full long distance competition was allowed), have never been subject to these investment restrictions. The result, arguably, has been an inconsistency between key policy goals and instruments in this sector.

The main issue is whether the same liberalization should occur for broadcasting distribution undertakings and, if so, whether the rules should be changed simultaneously for telecommunications common carriers and broadcasting distribution undertakings. At least timing is not a concern since the Government can change its broadcasting ownership direction when it wants and as it sees fit, as long as a new direction is tabled. At present, the earliest that removal of the telecommunications common carrier restrictions can reasonably be expected would be some time in 2005. This offers plenty of time to achieve greater consensus with respect to ownership policy of broadcasting distribution undertakings.

Ultimately, insofar as the ownership and control restrictions of broadcasting distribution undertakings are concerned, the basic problem is that the transmission facilities of broadcasting distribution undertakings can now be efficiently configured to provide telecommunications services in addition to programming transmission. A rapidly increasing revenue source for cable companies has been high speed Internet access services, essentially a broadband data service. Equally for telephone companies, both dial-up and high-speed Internet access service has

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become an increasingly important use of their networks. These products have arguably given the massive investment of telephone companies in fixed "local loop" transmission facilities a new lease on life, just at the time when local voice calling is shifting rapidly to wireless services. Internet content, including programming downloads, now represents an increasing source of competition to conventional television and radio programming. Differing ownership and control regimes would therefore create a substantial capital market distortion based essentially on choice of technology.

A review of the Heritage Committee's Report, and the witness presentations to it, suggests that there was no substantive analysis before the Heritage Committee on whether Canadian ownership and control of broadcasting distribution undertakings was necessary to ensure adequate Canadian content levels in programming undertakings and non-discriminatory carriage of Canadian programming undertakings by broadcasting distribution undertakings. Nor was much attention paid to emerging unregulated sources of competition to conventional broadcasting notwithstanding steady overall decreases in television programming viewing and radio listening over the last several years.

Since broadcasting distribution undertaking carriage is subject to detailed CRTC regulation, and the CRTC prefers as little broadcasting distribution undertaking/programming undertaking cross-ownership as possible (and carefully reviews all broadcasting mergers to ensure no erosion of Canadian content), the only available (non-sentimental) argument favouring control of broadcasting distribution undertakings would appear to be that non-Canadian owners would not invest as much in new technologies, new capacity, etc., as more local owners. Broadcasting distribution undertakings

are clearly not in a position to physically remove their assets from Canada.

This line of argument must assume either that non-Canadian broadcasting distribution undertaking investors are not rational, or that the investment returns of broadcasting distribution undertakings are chronically suppressed by CRTC regulation to a point that these investments are only attractive in the long-run to irrational Canadian investors.

Standing against these assumptions are the following considerations. Canadian broadcasting distribution undertaking returns cannot have been substantial depressed to date from the perspective of capital markets since the Heritage Committee's own arguments concluded that there is no investment capital shortage for the broadcasting sector. All broadcasting distribution undertakings are subject to fixed term licenses, and the CRTC is now ready to license competition cable television terms. Proprietors who under-fund licensees for broadcasting distribution undertakings, whether Canadian, or non-Canadian, can be disciplined by the prospect of competitive entry and measures imposed during the license renewal process, if their bond-holders have not already taken sufficient corrective action on their own.

Ultimately, there is nothing to suggest that non-Canadian proprietors of broadcasting distribution undertakings would be any more or less rational than Canadian proprietors of broadcasting distribution undertakings.

In short, the CRTC's extensive powers can ensure adequate Canadian content levels and Canadian programming carriage, and a distinct Canadian rights market for programming content, without the crutch of foreign ownership controls on the broadcasting distribution undertakings sector.

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The same arguments hold true for foreign investment restriction on the programming sector, but that battle is for another day.

Notes

¹ Report of the Standing Committee on Industry, Science and Technology, "Opening Canadian Communications to the World" (28 April 2003, <http://www.parl.gc.ca/InfoComDoc/37/2/INST/Studies/Reports/instrp03-e.htm>).

² Report of the Standing Committee on Canadian Heritage, "Our Cultural Sovereignty: The Second Century of Canadian Broadcasting" (11 June 2003, <http://www.parl.gc.ca/InfoComDoc/37/2/HERI/Studies/Reports/herirp02-e.htm>).

³ *Telecommunications Act*, 1993, c.38, section 16.

⁴ *Ibid.*, subsection 16(3).

⁵ OECD, "Regulatory Reform in Canada: From Transition to New Regulation Challenges".

⁶ OECD, "Reviews of Regulatory Reform in Canada: Maintaining Leadership Through Innovation, 2002".

⁷ Lemay-Yates Associates Inc., *Access to Capital – Impact of Foreign Ownership Restrictions on Telecom Competitors*, February 2003.

⁸ Network Research Inc., *The Implications of Foreign Ownership Restrictions Upon the Canadian Cable Television Industry*, February 12, 2003.

CAPITAL INFLOWS SHOULD COUNT AS A BENEFIT TO CANADA UNDER THE *INVESTMENT CANADA ACT*

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The Investment Review Division of Industry Canada (the "IRD") takes the view that the transfer of capital to Canada (that will be used as consideration for the transfer of the assets or shares being acquired) is not a factor that can be considered under sections 20 and 21 of the *Investment Canada Act* (the "ICA"), or that it be given no weight, when determining whether an investment is of net benefit to Canada. This note is to outline an argument as to why that view is incorrect.

Undertakings Are Becoming More Common

As a preliminary point, it is worth noting that it has become common for the IRD to seek undertakings in order to support a determination that a reviewable investment will be of net benefit to Canada. It is common for undertakings to include commitments regarding such matters as maintaining head offices, employment and capital expenditure levels. IRD does demonstrate flexibility in considering different types of undertakings that, together, may allow the IRD to recommend that the Minister approve the investment. However, IRD will not consider the fact of capital moving to Canada as consideration for the investment to be an offsetting benefit to compensate for a planned reduction in employment, for example. In effect, IRD's analysis tends to focus on factors specific to the Canadian business being acquired, even though the test set out in section 21 of the *ICA* for approving a reviewable investment is whether the Minister "is satisfied that the investment is likely to be of net benefit to Canada". [emphasis added] Consequently, undertakings that are submitted to the IRD are likely more onerous than would otherwise be the case if the fact of the capital inflow, as such and including its likely spin-off benefits to Canada, was considered by the IRD as a factor in the analysis.

The *Investment Canada Act*

Section 2 of the *ICA* provides:

Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada. [emphasis added]

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Section 20 of the *ICA* provides, in part:

20. For the purposes of section 21 [the section described above that sets out the net benefit test], the factors to be taken in account, where relevant [in determining whether an investment is of net benefit to Canada], are

(a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

...

(c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

...

(e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

(f) the contribution of the investment to Canada's ability to compete in world markets. [emphasis added]

Section 20 does not explicitly refer to capital. However, it makes reference to considering the potential impacts of an investment on Canada, not just the effects on the Canadian business that is being acquired. For example, section 20(a) makes reference to the Canadian economy. Inward flows of investment capital clearly provide benefits to the Canadian economy as a whole in that such capital, in the hands of the vendors of the acquired business, will be, directly or indirectly, invested in other business activities that will increase the size and strength of the economy, with consequential employment of Canadians and other positive factors for Canada. Similar points can be made with respect to the other parts of section 20 that are quoted above. Excluding consideration of the positive effect of the inflow of capital to the Canadian economy is contrary to the plain meaning of section 20.

If there was any doubt concerning this point, it is effectively put to rest by section 2 of the *ICA*. Section 2 is clearly intended by Parliament to be a general "purposes" section of the *ICA* and to guide those who act under the authority of the *ICA*. Section 2 recognizes that "increased capital" would "benefit" Canada. Therefore, it would clearly be contrary to Parliament's intent to not consider, or give no weight, to the fact of movement of capital into Canada in connection with an investment when determining whether the investment would be of "net benefit" to Canada.

Further, the purpose of the review is stated in section 2 to be to ensure "such benefit" to Canada. The only benefits referred to as such are increased capital and technology. Other benefits mentioned in section 2, although not referred to as such, are economic growth and employment opportunities. Capital provided to vendors in exchange for their shares or assets would clearly tend to support economic growth and economic

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activities, albeit not as part of the operations sold by the vendors.

Federal Court of Appeal Decision in *Superior Propane*

In *Canada (Commissioner of Competition) v. Superior Propane Inc.*,² the Federal Court of Appeal held that the Competition Tribunal had erred in law by narrowly interpreting the efficiency defence to a merger challenge by the Commissioner of Competition. The efficiency defence is set out in section 96 of the *Competition Act* (the "CA").³ The Court found that the Competition Tribunal had erred in applying the section 96 efficiency defence by not having considered the purposes set out in section 1.1 of the CA. The Court stated that:

despite the typically indeterminate quality and inherent inconsistencies of purpose or objective clauses, including section 1.1, statutory provisions containing general statements of legislative purpose are integral to the statute and can carry as much weight as its other sections... Thus, a purpose clause serves as a guide to the court or tribunal in its interpretation of other statutory provisions... and may establish the parameters within which it must interpret the provisions of the statute.⁴

The reasoning in *Superior Propane* would appear to be directly applicable to section 2 of the *ICA* and the proper interpretation of the net benefit test.

The Inflow of Capital Should be Considered

The *ICA* clearly states that increased capital benefits Canada. It appears obvious that capital inflow should be considered as a factor when determining whether an investment reviewable by a non-Canadian is of net benefit to Canada. This should be recognized by the

IRD in the future in the context of reviewable investments under the *ICA*.

Notes

¹ Partner, Stikeman Elliott LLP.

² (2001) 11 C.P.R. (4th) 289 (F.C.A.).

³ Section 1.1 of the CA provides:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

⁴ *Supra* note 2 at 320.