Thwarting Foreign Ownership Limits:

Policy Activism by CanWest Global Communications in Canada and Australia

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ABSTRACT

CanWest Global Communications is a Canadian media conglomerate controlled by a family of lawyers who have announced a goal of ranking among the world's dominant media owners. In early 2007, the company engineered an innovative takeover of one of Canada's largest media companies, Alliance Atlantis Communications. In partnership with U.S. investment banker Goldman Sachs, CanWest acquired 36 percent ownership of thirteen specialty television channels owned by Alliance Atlantis. Goldman Sachs acquired 64 percent ownership, a level well in excess of Canada's foreign media ownership limits. The Alliance Atlantis takeover echoed CanWest's *modus operandi* in Australia, where it had acquired majority ownership of Network TEN fifteen years earlier despite similar limits. 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 the abolition of not only cross ownership limits, but of foreign media ownership limits as well. As CanWest has long urged removal of foreign media ownership limits in Canada, and as a review of these limits was recently completed, the end result of its initiatives in both countries could be the same.

Introduction

Several notable multinational media owners have challenged national regulatory systems to expand their corporate reach. Rupert Murdoch's battles with regulators in the U.S., UK, and China, for example, have been well documented. A Canadian multimedia company that has also been active in challenging foreign ownership rules both at home and abroad has gained less global attention. CanWest Global Communications and its owning Asper family have been less high profile perhaps because the nation whose regulations they first challenged was not a world power but instead ironically Murdoch's native Australia. Through their media holdings, the Aspers have like Murdoch been ardent proponents not just of globalization, but of neoliberal economic policies in general. This paper chronicles CanWest Global's circumvention of Australia's foreign ownership limits and its ongoing challenge to such laws in Canada. It argues that CanWest was influential in the 2006 lifting of foreign ownership limits in Australia, and that its influence might eventually see a similar outcome in its own country.

Literature review

Academic research on the 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 usually 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." Multinational media ownership was thus not widespread outside of consumer magazines before the late 1980s, so there is little research on the impact of foreign ownership. (Hollifield, 1999) Literature on media ownership deregulation more generally has been plentiful since the late 1980s, however. 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, 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 pointed to by globalization proponents as rendering 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 national 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) noted that "aggressive maneuvering by the dominant firms" served to shape 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 saw "a second tier of another forty or so" firms that were strong regional players rounding out the global media market. (McChesney, 1998, p. 13) Included in that group would be CanWest Global Communications, which in addition to owning Canada's third television network and its largest newspaper chain has also 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 Global Communications was founded in 1974 by former tax lawyer and politician Israel "Izzy" Asper and several partners as CanWest Capital Corp., an investment bank with diverse holdings including television station CKND-TV. Its first station was established in Winnipeg in a manner that foreshadowed CanWest Global's international expansion. Asper was still a sitting politician, serving in the Manitoba Legislature as leader of the provincial Liberal party, when CanWest bid on a licence for a new Winnipeg television station. Its partners had no broadcasting experience. Asper initially served as a silent partner in CanWest, even disavowing an interest in the enterprise until after it was awarded the television licence, over experienced broadcasters, by the Liberal federal government. Asper quit politics to help run CanWest and eventually bought out his partners. In an innovative move, CanWest purchased the assets of television station KCND in Pembina, North Dakota, which broadcast into the Winnipeg market from 100 kilometres to the south. CanWest transported KCND's equipment across the border and reassembled it in Winnipeg, reversing the first two letters of its call sign to conform to Canadian protocol. (Edge, 2007)

Licences for third television stations in major markets across Canada had been put up for bid in the mid-1970s by the Canadian Radio-Television and Telecommunications Commission (CRTC) to provide competition for the public Canadian Broadcasting Corporation (CBC) and private CTV networks. The third stations were also intended to absorb advertising revenue that had been flowing south to U.S. stations broadcasting into Canadian markets from across the border. The CRTC also enacted a "simultaneous substitution" rule in 1973 that allowed Canadian television stations to cut into U.S. network shows that were carried at the same time on local cable systems and to substitute their own commercials. The U.S. television networks sued the CRTC and Rogers Cablevision, charging them with piracy, but the Supreme Court of Canada ruled in 1977 that the interception of cross-border broadcasting signals was legal. The Canadian government also passed Bill C-58, which in 1976 discouraged Canadian businesses from advertising on U.S. stations by making the expense not tax-deductible. The measures led to retaliation by the U.S. in a cross-border "business war" that ran until the 1988 Free Trade Agreement between the countries. (Berlin, 1990)

CKND flouted the CRTC's Canadian content rules from the start by airing only an estimated 20 percent indigenous programming instead of the 50 percent it had promised. (Hardin, 1985) In 1975, CanWest acquired control of Global Television, a new regional network of six stations licenced in the neighboring province of Ontario that 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, and Global became host to so many reruns of Hollywood shows that it became 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 simultaneous substitution rule. 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, and was instead an affiliation of station groups. 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, 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 CBC and CTV 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 only invested $44 million in Canadian content for the 1990-91 programming season, for example, which was 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 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 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 its voting shares. It held 42.5 per cent ownership as non-voting debentures, a long-term debt instrument similar to a bond, which 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, reaching A$103 million in 1995 due to cost cutting and programming changes, including the injection of cheap American programming. 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 from a Labor 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 should have had 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 twenty-seven 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 become 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 there. The Howard government twice attempted to lift a 1987 prohibition on cross-ownership of newspapers and television, only to have the move blocked by coalition partners in 1998 and by the elected Senate in 2001. 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. 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 cross ownership. (Edge, 2008) The political *quid pro quo* for enabling the "convergence" of media touted by multi-media owners such as CanWest was also removing restrictions on foreign ownership. 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)

Foreign Ownership in Canada

Izzy Asper's three adult children, who were all trained as lawyers at his insistence, inherited control of CanWest Global and announced that they saw its future in international markets. (Macklem, 2002) One market CanWest hoped to enter was the U.S., but that country's limits on foreign ownership of broadcasters prevented an expansion southward. 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, 2003a, p. 56) Leonard Asper made his point even more strongly to the Standing Committee on Canadian Heritage in its hearings 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, 2003b, p. 420) A dissenting opinion was issued by committee members from the Canadian Alliance party, however, and it pointed out that the opposition 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 reviewing them in broadcasting. (Canada, 2006)

A 2006 change in government from Liberal to a reconstituted Conservative Party, comprised largely of members of the former Alliance party, improved prospects for lifting foreign ownership limits. CanWest was again a catalyzing agent for change through corporate maneuvering that flouted the intent, and even the letter, of the country's foreign ownership limits. 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. The CRTC noted that CanWest would manage the Alliance Atlantis channels in conjunction with its own network (Contributed Business), and thus total value of the combined enterprises would belong mostly to CanWest.

> 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, 2007a, p. 42.)

In 2007, a Competition Policy Review Panel was formed to examine Canada’s foreign ownership limits in six “sensitive” areas, including broadcasting and publishing. The panel released an initial consultation paper that foreshadowed its recommendations. “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, 2007b) Its final report, which was released in mid-2008, recommended de-coupling carriage from content in broadcasting and loosening foreign ownership restrictions on the former. "Liberalization would apply to the carriage side of broadcasting distribution, while broadcasting policies would focus any necessary Canadian ownership restrictions on 'content.'" (Canada, 2008) After CanWest's financial fortunes took a dive in late 2008, as did those of most other media companies due to the deep recession the economy entered, the Aspers again appealed to Ottawa for assistance. The company's heavy debt load, which had been taken on in its acquisitions of the Alliance Atlantis channels and of the Southam newspaper chain in 2000, left it particularly vulnerable as advertising revenues dropped. Its stock price fell from $7.20 at the beginning of 2008 to a low of 23 cents on April 14, 2009. As the company faced bankruptcy after missing an interest payment on one of its loans, Leonard Asper met with Prime Minister Stephen Harper in an attempt to gain regulatory relief. According to the *Toronto Star*, Heritage Minister James Moore "hinted the help could come in the form of looser regulations," among other measures, adding: "The role of the government is to make sure the regulatory regime, the tax regime is more flexible, more forgiving and more open in the future." (Ditchburn, 2009)

Discussion

Canada and Australia have been found to be 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 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 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 expanded entry into the Australian tent doubtless received a more favorable hearing than they then would have at that time in Canada. In policy matters, noted a pair of legal scholars, slippery slopes are greased with actions and arguments. CanWest and the Aspers have been adept at providing both.

> 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 were 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 then-Liberal federal 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 in their native country 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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