A Guide to Navigating Canada's Foreign Ownership Laws for New Investors

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After a turbulent few years in global financial markets, investors and companies alike are beginning to again look outside their borders in search of foreign investment opportunities. Many eyes are on Canada, which has weathered the storm better than many other economies. With its stable banking system, abundant natural resources, relatively healthy economic performance and strong currency, Canada has risen on investors' watch lists as being ripe for strategic investments.

For the most part, Canada is open for business, with a newly elected majority Conservative government that is keen to attract foreign direct investment into various Canadian sectors. There are, however, certain federal and provincial laws that may restrict or limit foreign ownership of Canadian businesses when such investments are contrary to Canada's domestic interests, or which may otherwise impose obligations on significant foreign investments in Canada. In this latter regard, the Investment Canada Act[1] (ICA) applies to all acquisitions of control by non-Canadians of a Canadian business, and imposes a 'net benefit test' on foreign investments that exceed defined monetary thresholds. Once viewed as a relatively benign regulatory hurdle, the ICA has recently come alive in public debate, most notably as the defining factor that led to the demise of the hostile bid by BHP Billiton for Potash Corp in 2010. Canada also has certain restrictions on foreign ownership in key cultural sectors, such as broadcasting and communications. Accordingly, this article identifies and explains some of the most significant foreign ownership restrictions that foreign investors need to familiarise themselves with when evaluating potential investments in Canada, as such restrictions may impact both the structure and timing of potential acquisitions.

The ICA: ensuring foreign investments are aligned with Canada's domestic interests

The ICA applies to foreign investment in every sector in Canada. The stated purpose of the ICA is to promote foreign investment in Canada, while ensuring that foreign investment contributes to economic growth and employment opportunities in Canada.

Investments by 'non-Canadians' that constitute an 'acquisition of control' of a 'Canadian business' and exceed defined monetary thresholds are subject to review under the ICA. What constitutes an 'acquisition of control' depends on a variety of factors. In a share acquisition, the acquisition of the majority of voting shares constitutes an acquisition of control. An acquisition of control is also presumed to have occurred with the acquisition of one-third or more of the voting shares unless it can be shown that the acquired shares do not give the investor 'control in fact' over the corporation. The acquisition of less than one-third of the voting shares is deemed not to be an acquisition of control.[2]

Foreign investments that exceed the applicable monetary threshold must file an application for review with the Responsible Minister(s),[3] and must satisfy the Responsible Minister(s) that the

investment is likely to be of 'net benefit to Canada'.[4] The ICA sets out a number of factors as relevant to the 'net benefit' assessment, such as the effect on economic activity, the degree of participation by Canadians in the business, the effect on competition, productivity, product development and innovation, the compatibility of the investment with national industrial, economic and cultural policies, and the contribution of the investment to Canada's ability to compete globally.[5]

In order to satisfy the above criteria, it is customary for the investor to submit binding undertakings as a condition for receiving approval.[6] Undertakings typically include commitments relating to the maintenance of Canadian employment levels, Canadian head office functions, Canadian participation in senior management, and the making of other types of expenditures (for example, capital expenditures, R&D, charitable contributions) in Canada, with a typical duration of three to five years.[7]

Once the Responsible Minister(s) has concluded that a proposed investment will be of 'net benefit to Canada', the Responsible Minister(s) issues approval of the investment and the undertakings become binding and enforceable against the investor. If it is later determined that the investor has failed to comply with its undertakings, the Responsible Minister(s) will seek to resolve any such failures consensually but has the ability to commence proceedings seeking a variety of remedies, including payment of substantial fines or even divestiture of the acquired Canadian business.[8]

Enforcement action by the Responsible Minister(s) is discretionary, as evidenced by the Industry Canada Guidelines.[9] The guidelines note that undertakings are based to some extent on 'projected circumstances and the monitoring of an investor's performance'; furthermore, the investor will not be held accountable if the failure to maintain the 'commitment is clearly the result of factors beyond the control of the investor'.[10] In July 2009, the Minister of Industry asked the Federal Court of Canada (FCC) to impose retroactive monetary penalties against US Steel for allegedly breaching undertakings given in connection with its 2007 acquisition of Stelco.[11] Having pledged to maintain jobs and production levels in Canada, US Steel subsequently (albeit in the context of the most significant economic crisis since the 1930s) shut down its Canadian operations and let go of hundreds of Canadian workers. US Steel's actions sparked strong public outcry in Canada, which may have been the catalyst for the government's decision to commence proceedings challenging US Steel's alleged non-compliance. US Steel responded with a challenge to the constitutional validity of the penalties sought by the government. On 25 May 2011, the Federal Court of Appeal (FCA) dismissed the appeal by US Steel and upheld the Federal Court's decision affirming the constitutionality of monetary penalties for a breach of undertakings under the ICA.[12]

State-owned enterprises

Certain types of investors, such as state-owned enterprises (SOE), can expect to experience a higher level of scrutiny in an ICA review.[13] In 2007, Canada issued SOE guidelines to help clarify its process and criteria for reviewing foreign investments by SOEs. Under the guidelines, the review will consider, as part of the standard net benefit test criteria, whether the Canadian business being acquired will continue to operate on a commercial basis regarding where it exports, where it processes, the participation of Canadians in its operations in Canada and elsewhere, the support of ongoing innovation, research and development and the appropriate level of capital expenditures required to cement the Canadian business in a globally competitive position.[14] As a result, SOEs may have to provide undertakings beyond those normally given by a privately-owned company in order to show the net benefit to Canada of an investment.[15] Even with this more onerous review process, a number of investments by Chinese SOEs were approved in 2010, including major acquisitions in the Canadian oil industry by China's PetroChina Co, China Investment Corp, and Sinopec.[16]

National security review

Another consideration in the ICA review process is whether the proposed foreign investment into a Canadian business could be injurious to national security.[17] The national security provisions under the ICA, introduced in 2009, provide Canada with a counterpart to procedures for review undertaken in other jurisdictions, such as the United States, the United Kingdom, Australia and Germany. Unlike other jurisdictions, which have provided guidance regarding the scope of a national security review and the types of transactions that will face heightened scrutiny, the criteria for evaluating transactions on national security grounds under the ICA is not transparent. There are no guidelines defining what constitutes a national security review, nor is there a process in place for investors to seek comfort as to the potential application of the ICA's national security provisions to a proposed investment. The lack of

transparency and the absence of guidelines relating to national security reviews in Canada introduces a level of uncertainty into the foreign investment review process. Accordingly, investors need to consider the likelihood of a potential investment raising national security concerns, and if necessary, factor in additional time which may be required to complete the review process.

Recent decisions under the ICA

While the ICA has been in force since 1985,[18] it has only been in recent years (after two significant decisions) that the ICA has shifted from being perceived as a relatively benign regulatory hurdle to a potentially significant, and even determinative, factor that investors must understand when evaluating the risks associated with a particular deal structure and timeline.

In May 2008, the Minister of Industry denied the proposed acquisition of Macdonald, Dettwiler and Associates Ltd (MDA) by US-based Alliant Techsystems Inc, marking the first rejection of a foreign takeover since the ICA's inception.[19] MDA was engaged in the business of information solutions and electronic information products. The Minister's objections to the transaction centred on two products, both of which were partly financed by the Canadian Government: MDA's Radarsat-2 satellite, which was focused on helping the government assert Canadian sovereignty over the Northwest Passage in the Arctic Ocean; and the Canadarm, a robotic limb used on the space shuttle and the International Space Station. Another factor that caused concern was Alliant's role as a large supplier of weapons and ammunition to the US military.[20] Certain Canadian politicians expressed fears that MDA's politically sensitive technology would not be completely secured, and the Minister of Industry ultimately concluded that he was not satisfied that the proposed acquisition of MDA would be of net benefit to Canada.[21]

On 17 August 2010, Australian-based BHP Billiton (BHP) launched a CA$38.6bn hostile takeover bid for Potash Corporation of Saskatchewan (Potash Corp), the world's leading producer of potash and fertilizer.[22] The focus in the Canadian media centred on the loss of a 'strategic resource' to a foreign investor, and the Premier of Saskatchewan, entering into an election year, seized the opportunity to voice his concerns to the Minister of Industry and the public that BHP's bid was neither in the province's nor the country's best interests.[23] After months of political posturing played out to a large degree in the Canadian media, the Minister of Industry announced, on 3 November 2010, his conclusion that the proposed acquisition by BHP was not likely to be of 'net benefit to Canada'.[24] This news came as a surprise to many, particularly given the significant concessions BHP had been willing to offer up to the Canadian Government in the way of undertakings.[25]

The *Potash* decision stimulated significant debate throughout Canada about the ICA and many feared the decision would have a chilling effect on foreign investment into Canada.[26] There were, however, unique factors at play in *Potash*, including not only political factors (ie, impending federal and provincial elections) but also the potential for the transaction to destabilise Saskatchewan's finances.[27] These factors, taken together, call into question whether the *Potash* decision really signals a change in policy with respect to the ICA, or whether it is more accurately characterised as a perfect storm of factors that shifted public and political support away from BHP.[28]

Prior to 2008, the majority of Canadians would have never heard of the ICA and investors viewed it as little more than a necessary cost of making an acquisition in Canada. Today, the ICA has become an important factor for both investors' and politicians' alike when evaluating the political climate for foreign investment in Canada. Since the ICA came into force, over 99 per cent of reviewable transactions have been approved, including the recent high profile investment in a 'cultural business'[29] by Amazon.com in April 2010 of a proprietary Canadian book distribution facility.[30] Only two transactions were outright rejected, each of which, as noted previously, had very unique circumstances. Despite these recent decisions, and the public debates about Canada's openness, the government has repeatedly stated that it remains a strong supporter of foreign direct investment.[31]

Industry-specific limitations on foreign ownership and investment

Certain sectors of the Canadian economy have industry-specific restrictions on foreign ownership that operate concurrently with the ICA. Accordingly, transactions that are not subject to a review under the ICA may nonetheless be subject to foreign ownership controls or restrictions under other legislation. The following section provides a brief overview of some of the foreign ownership restrictions that may apply to foreign investors looking to invest in specific industries in Canada.

Broadcasting sector

Historically, the Canadian Government has been focused on curtailing foreign ownership of cultural

businesses, which it views as 'sensitive' sectors. For example, owners of broadcasting entities are subject to a comprehensive regulatory regime under the Broadcasting Act.[32] The Broadcasting Act subjects any acquisition of control of a broadcasting undertaking to review and approval by the Canadian Radio-television and Telecommunications Commission (CRTC) and imposes specific restrictions. A primary objective of the Broadcasting Act is to ensure that Canada has its own broadcasting system and that the Canadian public has access to programmes created by Canadians.[33] As a result, the Act requires that the Canadian broadcasting system be 'effectively owned and controlled by Canadians'.[34] Despite the restrictions, the rules have been relaxed since early implementation of the legislation. Currently, foreigners may own up to 20 per cent of a broadcaster and up to 33.3 per cent of a holding company that owns a broadcaster.[35]

Communications sector

The communications sector is restricted under the Telecommunications Act and the Radiocommunications Act; in order to get a licence to operate in Canada, a carrier needs ownership clearance under both Acts.[36] The topic of foreign ownership in the Canadian communications sector has been an important issue in recent years with the entry of Globalive into the Canadian wireless industry in 2008. Prior to Globalive's entry, there were only three major integrated national network operators competing in Canada, which represented an approximate 94 per cent of the national wireless market. In November 2007, the Canadian Government opened a bidding process for new spectrum licences for advanced wireless services in an effort to attract competition from new entrants into the wireless industry in Canada.[37] Globalive, funded by a transnational Egyptian-controlled company, Orascom Telecom Holding SAE (Orascom), won the bid for new spectrum licences in July 2008. However, in order to operate in Canada, it also had to comply with the Canadian ownership and control requirements (COC) under the Telecommunications Act, which requires telecommunications common carriers to be Canadian-owned and controlled.[38]

The CRTC (responsible for regulating the Canadian broadcasting and telecommunications sectors) investigated and held that Globalive did not satisfy the COC requirements and, as such, was in fact controlled by non-Canadians.[39] After various levels of investigation and review involving the Federal Cabinet and the FCC, the FCA ultimately upheld an Order in Council by the Federal Cabinet, giving Globalive the green light to begin operating its 'Wind Mobile' wireless phone service in Canada.[40]

Despite a turbulent entry into Canada, the success of Globalive to design its ownership structure to satisfy the COC requirements should serve as an important model for potential investors. By limiting its ownership to less than one-third of the voting shares of the Canadian business, and by increasing the number of Canadian directors on the board of the Canadian business, Globalive remained 'Canadian-controlled' and the Egyptian-controlled Orascom was able to avoid running afoul of the Telecommunications Act. Going forward, such a model could be used by potential investors in other industries to avoid the application of the ICA and other foreign ownership restrictions that have similar definitions and thresholds for control.

Financial services sector

Apart from the cultural industry, there were historically ownership restrictions in the financial services sector. The Bank Act was amended in 1967 to restrict foreign takeovers of Canadian banks after the Mercantile Bank of Canada was taken over by the US Citibank in 1963.[41] Today, foreign ownership restrictions have almost entirely been eliminated. While there continue to be ownership restrictions for large and medium banks, the remaining restrictions are aimed at limiting large institutional investors, both Canadian and foreign, from acquiring control.[42] In addition, two-thirds of directors and the chief executive officer of the bank must be resident Canadians.

Transportation sector

For other regulated industries, such as transportation, potential investors must develop ownership structures that satisfy the specific foreign ownership requirements.[43] For example, Canada limits foreign ownership of Canadian air carriers to 25 per cent and no foreigner may control a Canadian air carrier.[44] In response to this restriction, air carriers may seek to integrate aspects of their operations with international air carriers through cooperative alliances, allowing them to obtain some of the efficiencies of a merger (for example, common reservation systems) while still satisfying domestic ownership restrictions.[45]

Other sectors

Industry-specific ownership restrictions exist in several other sectors in Canada, such as book publishing and selling, collection agencies, engineering, farming, fisheries, liquor sales, mining, oil and gas, optometry, pharmacies and securities dealers, which could have a direct impact on a foreign investor's ability to invest in a particular Canadian sector. Some restrictions are more

onerous than others and therefore foreign investors are advised to consult Canadian regulatory counsel before making any financial investments.

Conclusion

To comply with foreign ownership restrictions, companies interested in investing in Canada are advised to consider the implications of the ICA and certain industry-specific legislation on their transaction structure at an early stage of their planning process. To the extent the transaction engages high profile domestic issues that are likely to stimulate public debate and potential political controversy, investors may want to consider putting government and public relations strategies in place to manage the public profile of the transaction.

At a time when governments are focused on tightening their belts, the Canadian Government is acutely aware of the significant role foreign direct investment plays in strengthening the Canadian economy. Thus, despite the recent decisions with respect to MDA and PotashCorp that may have generated some concern about crossing the border into Canada, investors should take comfort in the Canadian Government's consistent messaging that Canada remains open for business. In particular, recent cases such as *Amazon* and *Globalive*, not to mention the sheer number of foreign investments (approximately 99 per cent) that are given the green light of approval, all serve to illustrate a clear and continuing willingness of the Canadian Government to approve high profile foreign investments when they are aligned with Canada's domestic interests, and will be of net benefit to Canada.

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Notes

1 Investment Canada Act, RS 1985, c 28 (1st Supp).

2 An acquisition of control can also include the purchase of 'all or substantially all of the assets used in carrying on a Canadian business' or the acquisition of voting interests in an entity that is incorporated elsewhere than in Canada but directly or indirectly controls an entity in Canada carrying on the Canadian business. Please see the ICA at section 28(1).

3 The Investment Review Division of Industry Canada, overseen by the Minister of Industry, has the principal responsibility for enforcing the provisions of the ICA. For foreign investments involving a 'cultural business', the Cultural Sector Investment Review Office of the Department of Canadian Heritage facilitates the review and the Minister of Canadian Heritage has ultimate authority under the ICA to review investments involving Canadian businesses engaged in specified cultural activities (the Minister of Industry and the Minister of Canadian Heritage are hereinafter referred to as the 'Responsible Minister(s)').

4 ICA, see note 1 above at section 16(1).

5 *Ibid*, at section 20.

6 In the years immediately following the ICA's enactment in 1985, most net benefit approvals were given on the basis of an investor's plans for a Canadian business, with undertakings required for relatively few investments. Undertakings have since become the standard basis of such approvals, with plans accepted in only rare (and exceptional) circumstances. See note 18 below for additional details about the enactment of the ICA.

7 In recent years, practitioners have noted a trend towards 'undertaking creep', whereby investors offer up (and ultimately agree to) an increasing number of undertakings with a longer duration (ie, ten years) as their initial bargaining position. As a result of these precedents, investors may be confronted with higher expectations on the part of the Responsible Minister(s) in terms of the types of undertakings that investors should give, thereby increasing the overall number of undertakings and the length of duration in which investors are required to commit to receive the necessary approvals. Since information about undertakings provided to the federal government is confidential, it remains impossible to quantify the true extent and impact of this so-called 'undertaking creep' on foreign investments.

8 ICA, see note 1 above at section 39(1)(e).

9 Industry Canada, *Guidelines – Administrative Procedures* available at: **www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#admin**. The guidelines are issued under the authority of section 38 of the ICA.

10 For example, the Minister of Industry decided not to bring proceedings against Vale SA for cutting jobs in Canada following its 2006 acquisition of Inco Ltd, despite undertakings not to lay off employees for three years. Please see 'Canada Won't Take Action Over Vale's Sudbury Cuts', *Reuters.com* (9 June 2009), available at: **www.reuters.com/article/2009/06/09/canada-labor-vale-idUSN0939913320090609**. Please note that Stikeman Elliott acted as counsel to Vale in its acquisition of Inco.

11 *The Attorney General of Canada v United States Steel Corporation and US Steel Canada Inc*, T-1162-09, Notice of Application (FCTD).

12 Shawn Neylan, 'Court Denies Stay to US Steel', *The Competitor.ca* (28 July 2010), available at: **www.thecompetitor.ca/2010/07/articles/investment-canada/court-denies-stay-to-us-steel**.

13 An SOE is an enterprise that is owned or controlled directly or indirectly by a foreign government. Industry Canada, Guidelines, *Investment by State-owned Enterprises – Net Benefit Assessment*, available at: **www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#state-owned**.

14 Industry Canada, Guidelines, *Investment by State-owned Enterprises – Net Benefit Assessment*, available at: **www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#state-owned**.

15 Examples of past undertakings by SOEs include the appointment of Canadians in senior management positions in the Canadian business, the incorporation of the Canadian business in Canada, and the listing of shares on a Canadian stock exchange.

16 In June 2009, China-based PetroChina International Investment Company Ltd purchased a 60 per cent stake in privately-owned

oil sands firm Athabasca Oil Sands Corp; please see: **www.theglobeandmail.com/globe-investor/petrochina-buys-60-stake-in-oil-sandsproject/ article1270720/**. In May 2010, China-based China Investment Corp paid CA$817m to take a 45 per cent stake in an oil stands project owned by Penn West Energy Trust; please see: **www.theglobeandmail.com/report-on-business/china-makes-billion-dollar-oil-patch-move/article1567524/**; In April 2010, China-controlled Sinopec spent CA$4.65bn for ConocoPhillips Co's nine per cent stake in Syncrude Canada Ltd; please see: **www.theglobeandmail.com/globe-investor/chinas-big-move-into-alberta/article1532062**.

17 There is no definition for 'national security' and there are no monetary thresholds that must be exceeded to trigger a national security review. National security review applies to all investments made after 12 March 2009.

18 Parliament first passed the Foreign Investment Review Act (the 'FIRA') in 1974. The FIRA established the Foreign Investment Review Agency to review direct foreign investment proposals with final approval by the Governor in Council. The intention of the FIRA was to increase the benefits that Canadians would receive from the foreign investments. The FIRA was heavily criticised and in 1985, Parliament amended and renamed FIRA to the Investment Canada Act with the new mandate of encouraging investment in Canada.

19 Stikeman Elliott acted as counsel to Alliant Techsystems Inc.

20 'Canada Blocks Technology Sale' *Financial Times.com* (10 April 2008), see: **www.ft.com/cms/s/0/d0310584-0720-11dd-b41e-0000779fd2ac.html#axzz1VIQvMPfy**.

21 The reasoning for the determination by the Minister of Industry that the proposed transaction did not satisfy the 'net benefit' test was never publicly released. Please see Industry Canada, News Releases, 'Minister of Industry Confirms Initial Decision on Proposed Sale of Macdonald, Dettwiler and Associates Ltd to Alliant Techsystems Inc,' (8 May 2008).

22 Stikeman Elliott acted as counsel to PotashCorp.

23 Government of Saskatchewan, 'Premier Wall Says Province Cannot Support Potash Takeover Bid' (23 October 2010), available at: **www.gov.sk.ca/news?newsId=9c2ac5ac-ccf6-4923-96dc-d6efaa38007e**.

24 Industry Canada, 'Minister of Industry Confirms Notice Sent to BHP Billiton Regarding Proposed Acquisition of Potash Corporation' (3 November 2010), available at: **www.ic.gc.ca/eic/site/ic1.nsf/eng/06031.html**.

25 Among others, BHP offered to establish its global potash headquarters in Saskatoon, maintain current levels of employment for five years, forego all tax benefits to which it was legally entitled, and invest in the University of Saskatchewan to create a Mining Centre of Excellence. For a comprehensive description of BHP's undertakings; please see: **http://beta.images.theglobeandmail.com/archive/01007/Read_BHP_s_bid_wit_1007201a.pdf**.

26 In 2011, TMX Group, owner of the Toronto Stock Exchange, announced a plan to merge with the London Stock Exchange to create a trans-Atlantic stock and derivatives market operator. While the proposal did not get approved by TMX Group shareholders, and therefore was never subjected to an ICA review process, there was a great deal of public commentary on whether the ICA would have hindered that process had it gone forward. Please see 'TMX-LSE Merger Faces Tough Political Path', *Globe and Mail.com* (9 February 2011), available at: **www.theglobeandmail.com/news/politics/tmx-lse-merger-faces-tough-political-path/article1900315**; and 'TMX Merger Brings New Global Status, Renewed National Debate', *Globe and Mail.com* (9 February 2011), available at: **www.theglobeandmail.com/globe-investor/tmx-deal/tmx-merger-brings-new-global-status-renewed-national-debate/article1899943**.

27 The transaction would have had a negative effect on the annual revenues of the Saskatchewan Government, which relies heavily on the taxes paid by PotashCorp.

28 For a detailed discussion of *MDA*, *Potash*, *US Steel* and more, see D Jeffrey Brown and Michael Kilby, 'Canada: Still Open for Business? PotashCorp and the *Investment Canada Act*' (2011) *Journal of European Competition Law & Practice*, Vol 2, No 4 (2011), 396-404.

29 ICA, see note 1 above at section 14.1(6). Cultural businesses are defined under the ICA as businesses that are engaged in the sale, publication or distribution of books, music recordings, film and video, periodicals, magazines and newspapers.

30 Viewed as an investment into a Canadian cultural sector (book distribution), and thus subject to a more rigorous review by the federal government, the Amazon deal was nonetheless approved. Please see 'Amazon Given Green Light to Set up Shop in Canada' (12 April 2010) at: **www.theglobeandmail.com/globe-investor/amazon-given-green-light-to-set-up-shop-in-canada/article1532080**. Please also see Canadian Heritage Press Release dated 12 April 2011 available at: **www.pch.gc.ca/pc-ch/infoCntr/cdm-mc/index-eng.cfm?action=doc&DocIDCd=CJM100011**.

31 See, for example, Stephen Harper, 'Speech from the Throne' (3 March 2010), *Government of Canada online*: **www.speech.gc.ca/eng/media.asp?id =1388**.

32 Broadcasting Act, SC 1958, c 22.

33 The purpose of the Broadcasting Act is to 'safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada'; *Ibid*, at section 3(1).

34 Broadcasting Act, see note 33 above.

35 *Ibid*.

36 Telecommunications Act, SC 1993, c 38; Radiocommunications Act, RSC 1985, c R-2. The restrictions on ownership under the Telecommunications Act are such that foreigners may own up to 20 per cent of a telecommunications company and up to 33.3 per cent of a holding company that owns a telecommunications company. There are also ownership and control requirements under the Radiocommunications Act that apply with respect to acquiring licensed wireless networks.

37 For more information, see 'Canadian Ownership "Restored": Federal Court of Appeal puts the Wind back in Globalive's sales', *The Competitor.ca* (9 June 2011), at: **www.thecompetitor.ca/2011/06/articles/competition/canadian-ownership-restored-federal-court-of-appeal-puts-the-wind-back-in-globalives-sails/**.

38 In general, to meet this requirement, at least 80 per cent of the members of a corporation's board must be Canadian, at least 80 per cent of its voting shares must be held by Canadians, and the corporation may not be otherwise controlled by non-Canadians.

39 The CRTC had concerns in relation to four areas of Globalive's structure, namely, corporate governance, shareholder rights, commercial arrangements between Globalive and non-Canadians and the economic participation by non-Canadians in the operation of the Canadian business. For more on the CRTC decision, please see 'CRTC follows the money, concludes Globalive does not satisfy Canadian ownership and control requirements' (3 November 2009), at: **www.canadiancommunicationslaw.com/telecomunications/crtc-follows-the-money-concludes-globalive-does-not-satisfy-canadian-ownership-and-control-requireme**.

40 The Federal Cabinet, disagreeing with the findings of the CRTC that Globalive was non-Canadian controlled, varied the decision through an Order in Council. The Order in Council held that Globalive satisfied the COC requirements. The Federal Cabinet decision was then appealed, first to the Trial Division (which overturned the Order in Council) and then to the FCA. The FCA held that the position taken by the Federal Cabinet was both rationale and defensible based on the evidence.

41 The Bank Act has since evolved. The Financial Consumer Agency of Canada Act made substantial changes to the ownership, business powers and corporate governance provisions of all federal legislation affecting banks.

42 Large banks are those with equity in excess of CA$5bn. Individual investors (domestic or foreign) of large banks are limited to 20 per cent ownership of any class of voting shares and up to 30 per cent of any class of non-voting shares. Medium banks, with equity between CA$1 and CA$5bn, allow 65 per cent of the shares to be held by individuals. Small banks, defined as those with equity less than CA$1bn, are not subject to any ownership restrictions, except for Ministerial approval.

43 Industry Canada, Other Restrictions on Foreign Ownership available at: **http://investincanada.gc.ca/eng/ establish-a- businessstart-business-Canada/foreign-ownership-restrictions.aspx**.

44 The Canada Transportation Act allows the Governor in Council to change the foreign ownership percentage, but only an amendment to the Act can remove the no-foreign-control provision. Please see David Gillen, *Foreign Ownership Restrictions in the Canadian Aviation Industry: A Review and Assessment*, (March 2008), Research Paper Prepared for the Competition Policy Review Panel, at p 1.

45 Industry Canada, Competition Policy Review Panel, *Compete to Win Final Report*, (June 2008), available at: **www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/ Compete_to_Win.pdf**, at p 41.