

Review of the *Revised Foreign Investment Policy in Book Publishing and Distribution*

Your responses can be found below.

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How do you wish to be identified when your submission is posted online? You may use an organization name, a full or abbreviated personal name, or a pseudonym.

Canadian Bar Association, National Competition Law Section

Which best describes your primary perspective on books in Canada?

Other (please specify below)

Other, please specify:

Professional Association

Where do you live or work or, in the case of associations, which geographical area do you represent? (Please select all that apply.)

Canada

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1. Part VII of the discussion paper presents the following options regarding the Revised Foreign Investment Policy in Book Publishing and Distribution. Which options, in your view, would be the most beneficial?

Please explain your choice.

Given the varied nature of its membership and recognising the need for a full assessment of the views of industry participants, the National Competition Law Section of the Canadian Bar Association (the CBA Section) does not offer a view on the relative merits of the specific alternatives offered by Canadian Heritage. The CBA Section notes that, in light of current market developments, something less restrictive than the current approach to investments by non-Canadians in the book sector merits serious consideration. In addition, at page 2 of the Discussion Paper, Canadian Heritage states that one of the objectives of the review is to determine whether the current Book Policy continues “to provide opportunity for healthy

competition in the book publishing, distribution and retail industries”. The CBA Section recognizes the importance of ensuring that Canadians have access to Canadian cultural content. At the same time, the CBA Section has supported policy and regulatory options which further goals of economic efficiency and encourage competition and investment. It is well established (and recognized in the final report of the Competition Policy Review Panel, Compete to Win) that competitive markets enhance consumer welfare by, among other things, lowering prices and increasing quality, choice and innovation. More competitive markets should in turn increase both the creation of cultural content and the accessibility of that content in Canada and abroad. Accordingly, the CBA Section supports an approach to foreign investment in the book sector that recognizes the benefits of competition to Canadian consumers. In summary, the CBA Section submits that the selected option(s) should:

- Be only as protectionist as can be clearly justified based on cultural policy objectives bearing in mind that NAFTA permits the United States and Mexico to take retaliatory trade measures against Canada in response to changes inconsistent with NAFTA, but for the cultural exemption in NAFTA. There should be a clear rationale for continuing to prohibit non-Canadians from engaging in any area of activity. Also, the cost to consumers of being denied the benefits of competition should be carefully balanced against other objectives.
- Be designed to encourage creation and accessibility of Canadian cultural content by focussing on the behaviour of participants which are or could become substantially engaged in the publishing, distribution and sale of Canadian content, rather than merely whether they are Canadian-owned and controlled.
- Be both mindful of and clear in their jurisdictional scope, in view of the significant technological developments in the publishing, distribution and retail sectors since the current Book Policy was released in 1992, that enable market participants to serve Canadians on an electronic basis from anywhere in the world, without the traditional “bricks and mortar” infrastructure and without the indicia of a “Canadian business” as defined in the Investment Canada Act.
- Be consistently and transparently applied to all market participants, taking into account their unique factual circumstances, so that businesses can reasonably anticipate how the policies will be applied to their own circumstances to enable them conform their investments and activities to the Book Policy. In this regard, Canadian Heritage and the Minister should provide sufficient public disclosure of the application of the Book Policy in particular cases, by way of news releases and backgrounders.
- At a minimum, contain a de minimis exemption for ancillary book industry activities, as recommended by the Competition Policy Review Panel, so that the Book Policy would not apply if the revenues from book publishing, distribution and retail activities, along with those from any other cultural activities, were less than the lesser of \$10 million or 10 percent of gross revenues of the overall business. The absence of an exemption undermines the integrity of the Book Policy, by extending its application to activities so minor as to not be meaningful in advancing its legitimate objectives. An alternative is that, where a transaction is not otherwise reviewable, the cultural activities would not render it reviewable unless viewed in isolation they exceed the cultural activity review threshold, currently \$5 million in assets.

2. Are Canadian-owned businesses more inclined to support the creation, distribution, and/or sale of books by Canadian authors? Why or why not?

The current Book Policy appears to assume that there is such an inclination. To the extent that this assumption is based on empirical studies, Canadian Heritage should update those studies to

verify their conclusions in light of current industry realities. There must be a strong rational basis for restrictions or obligations imposed on foreign investors that are not equally imposed on Canadian controlled companies. If the assumption that Canadian controlled entities by their nature support Canadian authors is no longer valid (which may well be the case for at least some aspects of the Canadian book industry, such as distribution and retail), this should inform the new Book Policy. In this case, it would be more equitable and consistent with broader Canadian policies geared at attracting foreign investment, and ultimately beneficial in terms of promotion of Canadian culture, to develop incentives or requirements applicable to the book industry as a whole, rather than seeking to further Canadian cultural objectives by imposing obligations on foreign investors. On the other hand, if the assumption that Canadian controlled companies in one or more areas of the book sector do have a greater propensity than foreign controlled companies to support Canadian authors, understanding empirically the extent to which this is so and the reasons will also assist in informing policy.

3. Does the presence of foreign companies in the book industry currently benefit Canadians and the Canadian book industry? Please explain your view.

The report of the Competition Policy Review Panel noted that Canada generally benefits from openness to the world and attracting greater foreign investment is in Canada's economic interest. In considering the current distinct approach for cultural businesses under the Investment Canada Act and related policies (including the Book Policy), the Competition Policy Review Panel affirmed the importance of Canadian culture. But it also emphasized that even in this context, greater openness to two-way trade, foreign investment and talent would increase competitive intensity and ultimately ensure the long-term vitality of Canadian cultural businesses. Indeed, as the Report of the Competition Policy Review Panel states: "Foregone competitive intensity may increase prices and reduce choice as well as incentives to innovate and seek out new markets. New technology and increased international exposure create new opportunities for Canadian cultural businesses in global markets, and the current Canadian cultural policy framework will need to be updated in light of this new economic reality" (Compete to Win at p.34) Accordingly, even leaving aside the benefit of additional capital that foreign investment brings, to the extent that foreign participants in the Canadian book industry contribute to more competitive markets (thereby benefiting Canadian consumers), such participation is beneficial to Canada and Canadians.

4a. What would be the impact, either positive or negative, for Canadians, authors, and the book industry, of opening the market to foreign firms not already operating in Canada? Please explain in the context of:

Book Publishing

As noted above, the CBA Section believes generally that opening Canadian markets to competition, whether from foreign or domestic participants, benefits the Canadian economy and Canadian consumers. However, in the context of the Canadian book industry, specific cultural objectives may not have been achieved through competition alone (at least in the past), despite the broad benefits of competition to consumers. It is important to assess the extent to which

Canadian cultural policy objectives are and will actually be achieved by restricting foreign investment in publishing, distribution and retailing of books. The basis for restricting foreign investment in the areas of book retailing and distribution is particularly deserving of reconsideration, given that online media operated largely by non-Canadian controlled entities have increased access to content and choice for consumers, while at the same time bringing into question the extent to which Canadian cultural policies can effectively regulate distribution of content in Canada. In addition, effective participation in a fast paced marketplace requires that publishers and distributors have access to capital to enable efficient distribution, which may not be available from Canadian sources.

4b. What would be the impact, either positive or negative, for Canadians, authors, and the book industry, of opening the market to foreign firms not already operating in Canada?

Please explain in the context of:

Book Distribution

See 4.a.

4c. What would be the impact, either positive or negative, for Canadians, authors, and the book industry, of opening the market to foreign firms not already operating in Canada?

Please explain in the context of:

Book Retail

See 4.a.

5. Are there particular types of businesses within the publishing, distribution or retail sectors of the book industry (e.g. educational publishing or online retail) that require distinct treatment under the policy?

Upon examination, it may be determined that in specific areas of the book sector Canadian controlled companies do serve to promote Canadian cultural objectives more effectively than foreign controlled companies. If this is the case, and it is confirmed that this outcome could not be replicated by offering reasonable incentives to industry participants more broadly, then distinct treatment under the Book Policy may be warranted. On the other hand, to ensure that the Book Policy is realistic and effective, it ought to take into account technological developments in the publishing, distribution and retail sectors since the current policy was released in 1992. These developments enable market participants to serve Canadians on an electronic basis from anywhere in the world, without traditional “bricks and mortar” infrastructure or the indicia of a “Canadian business” as defined in the Investment Canada Act. Where the internet has a significant role, policies directed at controlling ownership seem to be of doubtful (and declining) efficacy. Also, where cultural activities are either de minimis or ancillary to a core business, a more liberal treatment would seem desirable to avoid distorted outcomes. See in this regard our response to question 1, above.

6. Foreign investment policies exist for the periodical publishing and film distribution industries, as well as for the book industry. Do these existing policies suggest models that

could be beneficial to Canadians and to the book industry?

The various cultural policies issued by the Federal Government reflect distinct issues particular to the film distribution, periodical publishing and book industries. Each policy must therefore be considered on its own merits, and caution should be taken in attempting to export approaches under one of these policies to any of the others. In addition, the periodical publishing and film distribution policies themselves may be in need of review and updating in light of technological and other developments. We suggest that Canadian Heritage undertake a review of these policies as soon as possible.

7. Are there any new or emerging issues in the book industry, including those mentioned in the discussion paper, that are not sufficiently addressed by the current policy? If so, how should a modernized policy respond to these?

Technological change is rapidly rendering obsolescent the current Book Policy, which is focussed on the traditional “bricks and mortar” physical channels of publishing, distribution and retail. While these channels may persist for some time, technological change is also increasingly blurring the distinctions between these channels. The reach of a revised policy must be limited by the jurisdiction conferred on the Minister of Canadian Heritage under the Investment Canada Act to the establishment of a new “Canadian business”, or the acquisition of control of an existing “Canadian business”. A “Canadian business” under the Act must have “(a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the Canadian business.” Unless all three elements are present, the new Book Policy should not apply to regulate the activity of a participant in the book industry. As technology develops, fewer business models will likely be captured by the Book Policy. This being the case, the Book Policy should be revisited to ensure that it is equitably applied to all companies that compete for the business of the same consumers.

8. The existing policy specifies the kinds of net benefit undertakings that may be sought from foreign investors in cases of indirect acquisitions, such as commitments to promote Canadian authors; to support the infrastructure of the book distribution system; to improve access to the company’s Canadian marketing and distribution infrastructure; and to engage in education and research. Are there ways in which these undertakings should be modernized to better reflect the current book industry environment?

The existing policy states that the Minister of Canadian Heritage will “typically” seek one or more of the commitments itemized in the policy in relation to indirect acquisitions. Because the test for clearance is “net benefit” it would seem inappropriate to have what amounts to a presumption that undertakings will be required, particularly given the investment-specific nature of undertakings. Also, there is some doubt as to the jurisdictional competence of Canada to impose undertakings on foreign enterprises. Finally, NAFTA may constrain the ability of the government to require undertakings that are more restrictive than those currently articulated.

9. What types of commitments, including those mentioned in the discussion paper, do you think have been/would be the most beneficial to Canada and the Canadian book industry?
See our response to question 8.

What are the impacts of investor commitments related to the marketing of Canadian books, retention of Canadian staff, and sponsorship of industry initiatives and events?
See our response to question 8.

Is it beneficial to the Canadian book industry and to Canadians to require that investors commit either to expanding or restricting the scope of their businesses? If so, under what circumstances?

See our response to question 8.

10. Are there any ways in which foreign investment in the book industry, or changes to the foreign investment policy, might have a particular impact on publishers, distributors, or retailers who either work with official language communities in minority situations or are members of these communities? Please explain.

The Minister of Canadian Heritage often seeks undertakings or commitments from foreign investors as a condition for issuance of a determination of net benefit – and indeed, as suggested therein, undertakings may be given to address a variety of policy objectives. To the extent that a foreign investment is reviewable under the Investment Canada Act, any specific resulting impact on minority official language stakeholders could be addressed through the undertaking process, subject to the caveats expressed in the response to question 8.

Please provide any additional comments you have on the question of foreign investment in the book industry in Canada.

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. This submission was prepared by the National Competition Law Section of the Canadian Bar Association (the CBA Section) and approved as a public statement of the National Competition Law Section. The CBA Section welcomes the opportunity to provide its views in relation to the Book Policy.