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Overview of Broadcasting and Telecommunications Ownership Review Regulations in Canada

Investment Canada Act Review

Amendments made in 2009 to the *Investment Canada Act* ("ICA") eliminated the requirement for review under the ICA of acquisitions by non-Canadians of Canadian businesses in the financial services and transportation sectors. However broadcasting and telecommunications remain subject to Canadian ownership and control regulations, and to review under the ICA. While the March 2009 amendments to the ICA simplified the approvals required for transactions in these other sectors, the Department of Canadian Heritage retains the jurisdiction, under the ICA, to conduct "net benefit to Canada" reviews to approve transactions in which non-Canadians acquire control of Canadian "cultural businesses." This category is defined to include Canadian businesses that carry on specified activities, including broadcasting, specifically, "radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services." Other "cultural business" activities that can trigger a "net benefit to Canada" review under the ICA include the publication, distribution and sale of books, magazines, periodicals and newspapers, the production, distribution, sale or exhibition of film or video recordings, the production, distribution or sale of audio or video music recordings, or the publication, distribution or sale of music in print or machine readable form.

Review by the CRTC

In addition to the requirements of the ICA for review of "cultural business" acquisitions, broadcasting and telecommunications companies are also subject to the authority of the Canadian Radio-television and Telecommunications Commission (the "CRTC"), an independent public authority constituted under the *Canadian Radio-television and*

Telecommunications Commission Act. The CRTC has the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate telecommunications common carriers and service providers that fall under federal jurisdiction. The CRTC derives its regulatory authority over broadcasting from the *Broadcasting Act*. Its telecommunications regulatory powers are derived from the *Telecommunications Act.*

Broadcasting

The *Broadcasting Act* (s. 3(1)(a)) requires that the "Canadian broadcasting system shall be effectively owned and controlled by Canadians." The *Direction to the CRTC (Ineligibility of Non-Canadians)* (issued by the federal cabinet, referred to as the "Direction") imposes specific requirements for Canadian ownership and control of entities that obtain broadcasting licenses. Among other things, the chief executive officer and not less than 80% of the directors of a "qualified corporation" must be Canadian (as defined in the Direction, which generally means a Canadian citizen who is ordinarily resident in Canada) and Canadians must beneficially own and control not less than 80% of the issued and outstanding voting shares of the corporation. Alternatively, if the license-holder is a subsidiary, Canadians must beneficially own not less than 66 ⅔% of the votes and the parent company may not exercise control over the programming decisions of the subsidiary.

The Direction has been considered by the CRTC in its review of a number of acquisitions of broadcasting licensee companies, including the 2007 acquisition by CanWest MediaWorks Inc. of Alliance Atlantis Broadcasting Inc., where the non-Canadian Goldman Sachs Capital Partners held a substantial ownership interest. In December, 2007 the CRTC approved that transaction, after imposing some changes on the corporate structure of the acquirer and determining that based on those changes Goldman Sachs would not exercise "control in fact" over the entity that would operate the broadcasting services.

Under the *Broadcasting Act*, the CRTC has the authority to establish regulatory frameworks for the various categories of players within the Canadian broadcasting system. In recent years, the CRTC has updated its policies that apply to conventional ("over-the-air") broadcasters and to broadcasting distribution undertakings, and has established a new group licensing policy for a consolidated industry in which companies

own both conventional and specialty television programming services. To address the trend toward consolidation, which has resulted in distributors owning conventional and specialty broadcasters, the CRTC completed its proceeding on vertical integration in September, 2011. This policy prevents vertically integrated companies from engaging in anti-competitive behavior and includes a code of conduct to ensure that distributors, broadcasters and online programming services negotiate in good faith.

Telecommunications

Section 16 of the *Telecommunications Act* and the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* impose Canadian ownership and control rules for telecommunications common carriers. Canada has among the most restrictive telecommunications ownership rules in the world and there is continued pressure on Canada to eliminate or lessen those restrictions. This issue was addressed in the June 2008 report of the Competition Policy Review Panel, *Compete to Win*.

In the 2008 auction of advanced wireless services spectrum, Industry Canada set aside spectrum for new entrants, recognizing the need for increased competition among wireless telecommunications service providers. The issue of potential set-asides in the upcoming auction of wireless spectrum in the 700 MHz band is, as of November 2011, being debated.

Globalive Decisions

During 2009, the CRTC reviewed the ownership structure of one of the new entrants, Globalive Wireless Management Corp. (“Globalive”). It began by issuing a “Canadian ownership and control review policy” which created a framework consisting of four types of ownership reviews, and then examined Globalive’s structure under a “Type 4” review, which involved an oral, public, multi-party proceeding, on the basis that the ownership was complex or novel and that the determination would hold precedential value. In its October 2009 decision the CRTC concluded that, although Canadians held legal control since the technical requirements of the regulations were met, Globalive was “controlled in fact” by the non-Canadian, Orascom Telecom Holding (Canada) Limited (“Orascom”). Noting that a number of factors were of concern (Orascom held two thirds of Globalive’s equity, was the principal source of its

technical expertise and also provided access to an established trademark for wireless services), the Commission's decision was based on the fact that, in addition, Orascom provided the vast majority of Globalive's debt financing, and as such had the ongoing ability to determine its strategic decision-making activities. Accordingly, it found that Globalive was not eligible to operate as a Canadian telecommunications common carrier.

The precedential value of this decision was soon in doubt, however, as the federal cabinet overturned the CRTC decision in December, 2009. The cabinet referenced the telecommunications policy objectives of the *Telecommunications Act* and the fact that the spectrum auction was designed to stimulate new entry and competition in the wireless telecommunications market. In contrast to the CRTC, Industry Canada had approved Globalive's ownership under the Canadian ownership and control rules of the *Radiocommunication Act* (which are almost identical to the *Telecommunications Act* rules). The cabinet emphasized that its decision was based on the particular facts of the case and was not intended to amend Canadian ownership and control rules or policies. It disagreed with the CRTC, and concluded that Globalive was not, in fact, controlled by persons that are not Canadian. As such, it was eligible to operate as a telecommunications common carrier. Globalive launched its wireless service almost immediately thereafter.

In January 2010, another new entrant winner in the 2008 spectrum auction, Public Mobile Inc., challenged the cabinet's Globalive decision in the Federal Court, as a way of seeking clarity with respect to the Canadian ownership and control rules for telecom companies. The Federal Court struck down the cabinet decision, supporting the CRTC's ruling that Globalive was, in fact, controlled by a non-Canadian. Globalive and the federal government appealed that decision to the Federal Court of Appeal. In June, 2011, the Federal Court of Appeal overturned the Federal Court and upheld the cabinet's decision to allow Globalive to operate in Canada. Public Mobile Inc. has sought leave to appeal the matter to the Supreme Court of Canada, but as of November 2011, such leave has neither been granted nor denied.

The CRTC also reviewed the ownership and control of Public Mobile, after determining, in December, 2009, that a "Type 2" review would be appropriate. Although Public Mobile's ownership structure was complex and a decision could hold

precedential value, the evidentiary record in that case would not be improved by third-party submissions and a public hearing. In April, 2010 the CRTC determined that, subject to certain modifications, Public Mobile would be eligible to operate as a Canadian telecommunications common carrier. Similarly, the CRTC conducted a "Type 2" review of Data & Audio-Visual Enterprises Wireless Inc. ("DAVE Wireless", now operating as Mobility), and, in May, 2010, determined that it was also eligible to operate as a Canadian telecommunications common carrier.

Following the May, 2011 federal election, most commentators expected that the government would update and loosen the Canadian ownership and control rules for telecom firms, although perhaps only for those with low market shares. As of November 2011, no such changes to the ownership rules have been announced.

New Media, Internet Broadcasting

As traditional broadcasters and others have increasingly used the Internet as a delivery channel for information and entertainment, the CRTC has considered whether broadcasting delivered via the Internet should be subject to the *Broadcasting Act.* Following a proceeding held in 1998–99, the CRTC issued its New Media Exemption Order, which provides that broadcasting services delivered and accessed over the Internet are exempt from the requirements of the *Broadcasting Act* and its regulations. As such, "new media broadcasters" need not be licensed and are not subject to Canadian ownership and control rules. The New Media Exemption Order was clarified, with respect to the Internet retransmission of broadcasting services, in 2003, and in proceedings in 2006 and 2007, applied to mobile Internet broadcasting including to television broadcasting services that are received by way of mobile devices whether or not they rely on the Internet.

In June 2009, the CRTC completed its regular review of the various new media exemption orders and decided to maintain the exempt status of new media broadcasting undertakings. However, with respect to the issue of whether the *Broadcasting Act*

applies to Internet Service Providers ("ISPs") when they provide their customers with access to broadcasting content, or whether such ISPs should be subject only to the *Telecommunications Act*, the CRTC initiated a reference to the Federal Court of Appeal. In a unanimous decision issued in July, 2010, the Federal Court of Appeal ruled that the ISPs do not carry on, in whole in or in part, "broadcasting undertakings" subject to the *Broadcasting Act* when, in their role as ISPs, they provide access though the Internet to "broadcasting" requested by end-users. In March, 2011 intervening cultural groups were granted leave to appeal this decision to the Supreme Court of Canada.

Please address any questions about the regulation of broadcasting and telecommunications to Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.