

The New Telecommunications Sector Foreign Investment Regime and Rural Broadband

Presentation for

**Connecting the Future:
Rural Broadband Technology, Policy and Impact**

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Overview of Presentation

- A. General Telecommunications Statutory Framework
- B. Foreign Ownership Restrictions (General and sectoral)
- C. Case Study in foreign ownership restrictions: Globalive (Wind Mobile) case at the CRTC, Cabinet and judicial review
- D. 2012 revision and upcoming Spectrum Auction
- E. Effects of liberalization of foreign ownership restrictions Rural Broadband services. . .
- F. Other Policy options to promote rural broadband services?

Telecommunications Act, section 7

Canadian Telecommunications Policy: Objectives

It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

- (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
- (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
- (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
- (d) to promote the ownership and control of Canadian carriers by Canadians;
- (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
- (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
- (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
- (h) to respond to the economic and social requirements of users of telecommunications services; and
- (i) to contribute to the protection of the privacy of persons.

Foreign Ownership Restrictions General and sectoral

General Foreign Ownership Restrictions

The general (non-sectoral) restrictions on foreign ownership have a 40 year history in Canada.

1973: government passed *Foreign Investment Review Act* provides a legal mechanism for government to test whether the benefits of foreign investments outweighed the costs .

1985: restrictions relaxed with passage of the *Investment Canada Act* - requires foreign investments above a certain threshold (\$330 million in 2012) to be of a net benefit to country

While the *Investment Canada Act* provides the general framework for foreign investment in Canada, three specific sectors – **banking, telecommunications and broadcasting** have their own unique foreign ownership restrictions.

Foreign Ownership Restrictions in the Telecom sector

Canadian Ownership and Control Test

Telecommunications Act s.16(1):(old version):

A Canadian carrier is eligible to operate as a telecommunications common carrier if

(a) it is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province; or

(b) it owns or operates only a transmission facility that is referred to in subsection (5).

(new post-June 29, 2012 version) Eligibility

(2) A Canadian carrier is eligible to operate as a telecommunications common carrier if

(a) it is an entity incorporated, organized or continued under the laws of Canada or a province and is Canadian-owned and controlled;

(b) it owns or operates only a transmission facility that is referred to in subsection (5); or

(c) it has annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues, as determined by the Commission, from the provision of telecommunications services in Canada. and see section 16(6). . .

(note that only Bell, Rogers and Telus are over this threshold)

Foreign Ownership Restrictions in the Telecom sector

Canadian Ownership and Control Test

(new post-June 29, 2012 version of sec 16 allow for growth):

(6) A Canadian carrier that is eligible to operate under paragraph (2)(c) remains eligible to operate even if it has annual revenues from the provision of telecommunications services in Canada that represent 10% or more of the total annual revenues from the provision of telecommunications services in Canada **as long as the increase in its annual revenues** from the provision of telecommunications services in Canada to 10% or more of the total annual revenues from the provision of telecommunications services in Canada **did not result from the acquisition of control of another Canadian carrier or from the acquisition of assets used by another Canadian carrier** to provide telecommunications services.

Note: June 2012 changes allow a safe harbour for smaller companies (and they can grow over 10% threshold but not by merger or acq'n)

Foreign Ownership Restrictions in the Telecom sector

Canadian Ownership and Control Test

(old version) Telecommunications Act s. 16(3):

(3) For the purposes of subsection (1), a corporation is Canadian-owned and controlled if

(a) not less than eighty per cent of the members of the board of directors of the corporation are individual Canadians;

(b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than eighty per cent of the corporation's voting shares issued and outstanding; and

(c) the corporation is not otherwise controlled by persons that are not Canadians.

Note: (a) and (b) are a quantitative or *de jure* test, while part (c) is a qualitative or *de facto* test

New version (post June 29, 2012)

Canadian ownership and control

(3) For the purposes of paragraph (2)(a), an entity is Canadian-owned and controlled if

(a) in the case of a corporation, not less than 80% of the members of the board of directors are individual Canadians;

(b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80% of the entity's voting interests; and

(c) the entity is not otherwise controlled by persons that are not Canadians.

Foreign Investment Restrictions Debates

- Foreign ownership restrictions in Telecom begin in part in 1984, amended in 1987
- 1993 *Telecommunications Act* established current system of restrictions
- Between 2000 and 2010 there were five high level reviews of the foreign ownership restrictions
 - One parliamentary committee recommended complete removal of both telecom and broadcasting restrictions
 - Two special government panels recommended a phased in partial removal of restrictions
 - One parliamentary committee recommended no changes
 - The most recent parliamentary committee recommended clarification of the *de facto* control test (*Telecommunications Act* s. 16(3)(c))

Industry Canada's 2010 Foreign Investment Consultations

- In 2010 Industry Canada released a consultation paper on changing Canada's foreign investment regime entitled – [Opening Canada's Doors to Foreign Investment in Telecommunications](#)
- Three options were provided and feedback was invited on the various options
 - Option 1 – Increase the direct limit for foreign holdings in broadcasting and telecommunication to 49%
 - Option 2 – A two part phase in that would eventually allow companies that make up less than 10% of the total revenues of the telecom sector to be 100% foreign owned (everyone but Rogers, Bell and Telus)
 - Option 3 – Eliminate the telecommunications restrictions entirely
- The government also explicitly stated that it was not considering any changes to the *Broadcasting Act*

Globalive and the AWS Auction

- Globalive (Wind Mobile) won 30 AWS licenses spending \$442 million in the 2008 AWS Spectrum auction
- Globalive was heavily debt financed by Orascom and Egyptian telecom giant (that has since merged with Russia's VimpelCom)
- In March 2009 Industry Canada issued SPECTRUM LICENSES to Globalive after being satisfied that it met the Canadian ownership requirements
- Telus, and later Shaw, petitioned CRTC to review Globalive ownership (Public Mobile did not participate in the CRTC proceedings)

Globalive Ownership and the CRTC

- The CRTC review of Globalive culminated in [Telecom Decision CRTC 2009-678](#) (Oct. 29, 2009)

- CRTC specifically focused on whether Globalive met the Canadian ownership requirements set out in s. 16(3) of the *Telecommunications Act*:

For the purposes of subsection (1), a corporation is Canadian-owned and controlled if

- (a) not less than eighty per cent of the members of the board of directors of the corporation are individual Canadians;
- (b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than eighty per cent of the corporation's voting shares issued and outstanding; and
- (c) the corporation is not otherwise controlled by persons that are not Canadians.

Globalive and the CRTC

- CRTC concluded that **Globalive met the test** set out in 16(3)(a) and 16(3)(b) for legal control
- The majority of the decision (para. 34-119) focused on the third measure, 16(3)(c) – the control in fact test
- The CRTC relied on the control in fact test set out in the Canadian Airlines case, which was not a CRTC case but a National Transportation Agency Decision (No. 297-A-1993, May 27, 1993)
- CRTC concluded that Orascom had control in fact of Globalive because it
 - held two thirds of Globalive's equity
 - was the principal source of technical expertise; and
 - provided Globalive with access to an established wireless trademark
- **Therefore Globalive is NOT eligible to operate as a telecommunications common carrier**

Globalive and the CRTC

[14] The CRTC turned next to the requirement under [paragraph 16\(3\)\(c\)](#) that Globalive not otherwise be controlled by non-Canadians. The CRTC held that Globalive does not meet this requirement. The CRTC applied the test set out by the National Transportation Agency in its *Canadian Airlines* decision, (1993), 297-A-1993:

There is **no one standard definition of control in fact** but generally, it can be viewed as the ongoing power or ability, whether exercised or not, to determine or decide the strategic decision-making activities of an enterprise. It can also be viewed as the ability to manage and run the day-to-day operations of an enterprise. Minority shareholders and their designated directors normally have the ability to influence a company as do others such as bankers and employees. The influence, which can be exercised either positively or negatively by way of veto rights, needs to be dominant or determining, however, for it to translate into control in fact.

[15] The CRTC expressed concerns that a number of aspects of Globalive's corporate organization would give Orascom influence, including (a) Orascom's rights to appoint board members; (b) limitations on AAL's rights to dispose of its equity in Globalive Holdings; (c) the extent of Orascom's veto rights over corporate decisions; and (d) agreements between Globalive and Orascom under which Orascom provided Globalive with technical services and the right to use Orascom's WIND trademark. However, the CRTC noted that the combination of these factors would not have established that Orascom exercised "dominant and determining" control over Globalive (CRTC decision at paragraph 117).

[16] **What tipped the balance for the CRTC was the fact that Orascom had provided approximately 99 percent of Globalive's debt financing**, totalling approximately \$508.4 million. According to the CRTC, "debt levels and debt financing arrangements can be important indicia of where influence lies" (CRTC decision at paragraph 104). Globalive's reliance on Orascom – which the CRTC found may well increase in the future – combined with Globalive's apparent inability to find other financing created a situation where Orascom could exercise a great deal of continuing influence over Globalive. The combination of this debt with the CRTC's other concerns led the CRTC to conclude that Globalive was controlled in fact by Orascom, a non-Canadian (CRTC decision at paragraphs 104-112, 118). **The CRTC therefore held that Globalive is not currently eligible to operate as a telecommunications common carrier.**

[para #s from FCA decision]

Globalive Case and the Cabinet

Review

Telecommunications Act s. 12(1): Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.

Following the CRTC decision in Oct. 2009, Cabinet/the Privy Council Office (PCO) intervened and varied the CRTC decision

- Minister of Industry announced intended review of decision and invited submissions from those who participated in the hearing (and others were also received)
- The Governor in Council agreed with the CRTC that the *Canadian Airlines* test applied, and that “multiple levers of influence can, when combined, amount to control” (recitals 15 and 17).
- In this case, however, the Governor in Council concluded that Orascom’s influence on Globalive did not amount to dominant or determining control (recital 18).

Globalive Case and the Cabinet Review

- Privy Council order ([P.C. 2009-2008](#)) stated that the Canadian control requirements were **not absolute** and instead applied “when possible” and also noted that the *Telecommunications Act* should be interpreted in a way that promotes access to foreign capital
- The government also disagreed with the CRTC’s finding that Globalive was not Canadian (Though the government did acknowledge that Orasacom had influence, it stated that such control was neither strategic nor operational)
- GIC decision ordered that the CRTC decision be varied as set out in an attached Schedule. Main difference was over Orascom’s role in providing financing.
- See paragraphs 15-20 of the Schedule (set out in Paragraph 22 of the FCA decision)

Globalive v Public Mobile at the Federal Court

- Public Mobile sought judicial review of the Cabinet variance of the CRTC decision under section 18.1 of the Federal Courts Act
- Recall that Public Mobile did not participate at the CRTC but they were granted public interest standing to challenge the Order in Council
- On Feb. 4, 2011, the Federal Court ruled in the Public Mobile Case ([*Public Mobile v. Canada \(Attorney General\)*](#))
- The court quashed the Privy Council order and ruled that:
 - Cabinet had overstepped its authority in introducing the idea that the *Telecommunications Act* promotes foreign investment and stated “[I]t is for Parliament not the Governor in Council to rewrite the Act.” (para. 107 and 117)
 - The court also ruled that the Privy Council acted outside of the legal parameters of the *Telecommunications Act* when it stated that its decision only impacted Globalive (para. 118)

Globalive and Public Mobile at the FCA

- The Federal Court decision quashing the Cabinet variance of the CRTC decision was appealed to the Federal Court of Appeal
- On Jun. 8, 2011, the Federal Court of Appeal ruled in the case ([*Globalive v. Public Mobile, 2011 FCA 194*](#)) and restored the Cabinet decision
 - The court found that since Parliament had granted Cabinet the power to review CRTC decisions it intended for the Cabinet to incorporate policy concerns in its review (para. 50)
 - The court also noted that access to foreign capital serves several of the goals of Canadian Telecommunications Policy (para. 47)
- Public Mobile sought leave to appeal to SCC
- Leave denied with costs on April 26, 2012 (2012 CANLII 22095 (SCC))

Globalive and Public Mobile Case (review)

- CRTC decision: Globalive does not meet the third prong of the foreign ownership test (ownership in fact)
- Cabinet Review: orders CRTC decision be varied
- Federal Court quashes Cabinet Order and restores CRTC decision
- Federal Court of Appeal overruled Federal Court and restored the Cabinet decision
- March 12, 2012 policy announcement
- Public Mobile's leave to appeal to SCC denied (i.e. Cabinet decision stands)

March 14, 2012: Policy Announcement

Harper Government Takes Action to Support Canadian Families

<http://www.ic.gc.ca/eic/site/064.nsf/eng/07089.html>

Minister Paradis announced that:

- The *Telecommunications Act* will be amended to lift foreign investment restrictions for telecom companies holding less than a 10-percent share of the total Canadian telecommunications market -- will help telecom companies with a small market share access the capital they need to grow and compete.
- The government will be applying caps in the upcoming spectrum auctions to guarantee that both new wireless competitors and incumbent carriers have access to the spectrum up for auction.
- The government will apply specific measures in the 700 MHz auction to see that rural Canadians will have access to the same advanced services as everyone else in a timely manner.
- The government will improve and extend the existing policy on roaming and tower sharing to further support competition and will improve transparency and information sharing to facilitate agreements between companies to slow the proliferation of new cellphone towers.
- A portion of the 700 MHz spectrum will be reserved for public safety users such as police and firefighters across Canada.

See March 14, 2012: Backgrounder

1. Policy objectives

The Harper Government is committed to ensuring the timely availability of world-class wireless services at low prices for Canadian families, including those in rural areas.

Wireless telecommunications, and the radio frequency spectrum that enables it, are fundamental to world-class digital infrastructure, a key pillar of Canada's digital economy.

In developing the measures announced today, the Harper Government was guided by three objectives:

- Sustained competition in wireless telecommunications services;
- Robust investment and innovation in this sector; and
- Availability of advanced services for all Canadians, including those in rural areas, in a timely manner.

Decisions have also been guided by the broad principle of reliance on market forces to the maximum extent possible.

March 14, 2012: Backgrounder (cont'd)

2. Context

- What is spectrum and what is up for auction?
- Developments since 2008
- Consultations and considerations

3. Summary of decisions

- Reform of foreign investment restrictions under the *Telecommunications Act (see next slide)*
- *Spectrum caps in upcoming 700 MHz and 2500 MHz auctions*

4. Conclusions

Additional technical documents for consultation at:

[Policy and Technical Framework: Mobile Broadband Services \(MBS\) — 700 MHz, Broadband Radio Service \(BRS\) — 2500 MHz Band](#)

Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing

Foreign Investment restrictions to be amended:

Reform of foreign investment restrictions under the *Telecommunications Act*

The government will amend the *Telecommunications Act* to exempt telecommunications companies with less than 10 percent of total telecommunications Canadian market revenue from foreign investment restrictions in that Act. This change will promote competition by improving access to capital. In order to encourage long-term investment in Canada's telecommunications industry, companies that are successful in growing their market shares in excess of 10 percent of total Canadian telecommunications market revenues other than by way of merger or acquisitions will continue to be exempt from the restrictions. Restrictions on foreign ownership under the *Broadcasting Act* would remain for all companies with broadcasting distribution activities. As is the case with any direct foreign investment, the provisions of the *Investment Canada Act* will continue to apply.

(Bill C-38, Division 41, section 595 et. seq.

http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-38/C-38_4/C-38_4.PDF

Royal Assent: June 19, 2012 Statutes of Canada: 2012, c. 19)

Liberalized Foreign Ownership Restrictions in the Telecom sector

How have rural broadband services fared?

- completed AWS auction provides a useful case study: new companies, including ones with more foreign backing such as Globalive, are distinctly interested in getting licenses in the more lucrative urban areas.
- The AWS auction was conducted using a mix of tier 2 and tier 3 license sizes. Tier sizes refer to the geographic area covered by spectrum licenses. There are a total of 14 Tier 2 regions and 59 smaller Tier 3 regions (see maps next slide)
- One of the three new entrants, Public Mobile purchased only four licenses total all of which were Tier 2 sized licenses.
- Public Mobile purchased licenses in the two most populous regions (Southern Ontario and Southern Quebec) and also in the third most densely populated service area (Eastern Ontario and Outaouais) The least densely populated service area for which Public Mobile purchased a license is Eastern Quebec, which has a population of over 1.5 million

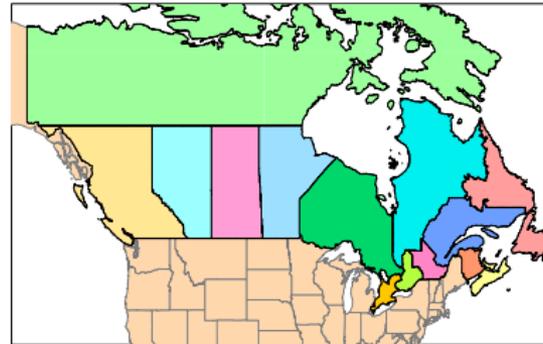
Tier Sizing

- One issue in the auction is how large geographically the lots of spectrum should be
- There are four tier sizing options

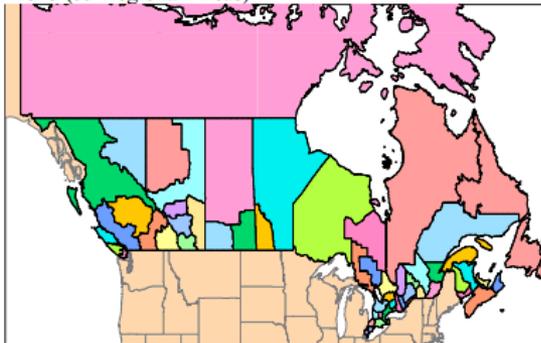
Tier 1 (1 National Licence)



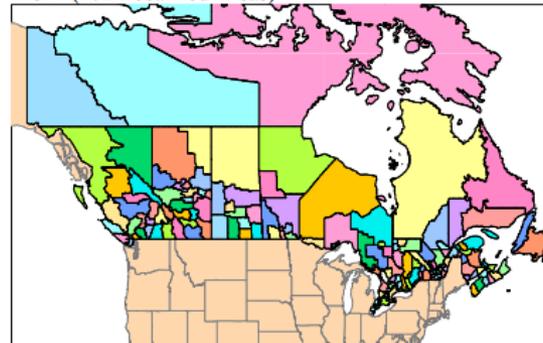
Tier 2 (14 Large Areas)



Tier 3 (59 Regional Areas)



Tier 4 (172 Localized Areas)



Liberalized Foreign Ownership Restrictions in the Telecom sector

How have rural broadband services fared?

- a second new entrant, Data & Audio-Visual Enterprises (DAVE) Inc., which now operates as Moblicity purchased 10 licenses.
- Like Public Mobile, DAVE/Moblicity concentrated its purchases in urban areas purchasing Tier 2 licenses in the most populous and most densely populated Tier 2 service area, Southern Ontario, and also the third most dense Tier 2 service area, Eastern Ontario & Outaouais
- With regard to the eight Tier 3 licenses purchased by DAVE Inc., five of the licenses purchased were in the top six most densely populated Tier 3 services areas
- The least densely populated Tier 3 service area that DAVE acquired, ranking 38th out of 59, was the Edmonton area, which although it possess a low ranking density, the area has a population of nearly 1.2 million

Liberalized Foreign Ownership Restrictions in the Telecom sector

How have rural broadband services fared?

- Of the three new entrants, Globalive not only purchased the most licenses, but also did purchase licenses in several low population and low density services areas.
- While Globalive acquired licenses in the heavily populated Tier 2 service areas of Southern Ontario, B.C. and Alberta, it also picked up licenses in the four least dense service areas including three blocks of spectrum in the Yukon, Northwest Territory (NWT) and Nunavut service area --it also purchased several low density Tier 3 services areas

Liberalized Foreign Ownership Restrictions in the Telecom sector

How have rural broadband services fared?

But before Globalive can be commended for purchasing licenses in more rural areas with low population densities, two factors need to be considered:

(1) licenses for low density/low population service areas are usually much cheaper than their populous counterparts -- of the total \$442 million spent by Globalive, more than 60% went to acquiring the Tier 2 Southern Ontario license.

(2) a look at Globalive's current coverage map reveals that four years after the AWS license there is no service in Canada's north, and most of the areas where service is offered are in more heavily populated regions (WIND, n.d.). Furthermore, service on the actual WIND network (as opposed to areas that are deemed roaming) is limited to a handful of cities in eastern and southern Ontario, Edmonton, Calgary, Vancouver and Whistler

Liberalized Foreign Ownership Restrictions in the Telecom sector

Rollout requirements are needed

- Industry Canada has included specific rollout requirements as part of the policy and technical framework for the upcoming 700MHz auction.
- owners of two or more paired blocks of spectrum in the 700MHz band will be required to provide 700 MHz services (or 4th generation (4G) service) to 90% of the population currently served by HSPA (3G) services in five years from the grant of the license, and to reach 97% of the population by seven years
- This approach is weakened by the fact that not all service providers will hold two paired blocks of spectrum, and Industry Canada notes that even after the rollout conditions are met, 6% of Canadians (or just over 2 million people) will not have access to 4G services

Liberalized Foreign Ownership Restrictions in the Telecom sector

Expand Radio Systems Policy 019 (RP-019)

- an even more useful policy is RP-019 *Policy for the Provision of Cellular Services by New Parties* -- a mechanism where interested providers can apply for authorization to provide cellular services in areas that are not served or where there is only a single service provider
- allows for potential providers to petition Industry Canada for license to provide service in areas where an existing provider has a license but fails to provide service
- only applies to specific bands of wireless frequencies (824-849 MHz and 869-894 MHz), but it stems from a policy goal of maximizing access to wireless service
- Industry Canada raised the issue of expanding RP-019 to cover new band frequencies as part of the consultation process for the upcoming 700MHz auction.
- RP-019 should be expanded to cover more frequencies

WHAT ARE OTHER POTENTIAL POLICY MECHANISMS?