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REGULATION OF FOREIGN INVESTMENT IN CANADA'S TELECOMMUNICATIONS SECTOR

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There has been considerable policy activity recently in the area of foreign investment in Canada's telecommunications sector.

EXISTING RULES

Any person wishing to own and operate transmission facilities in Canada for the purpose of providing telecommunications services to the public for compensation (a telecommunications common carrier or "TCC") is required to comply with certain restrictions on non-Canadian ownership that are set out in the *Telecommunications Act* (the "Act")¹ and the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* (the "Regulations").² These restrictions provide, among other things, for:

- **A Canadian ownership requirement:** at least 80% of the voting equity of a TCC must be held by Canadians;³
- **A Board composition requirement:** at least 80% of the board of directors of a TCC must be individual Canadians;⁴
- **An indirect Canadian ownership requirement:** at least 66⅔% of the voting equity of a parent corporation of a TCC must be held by Canadians;⁵ and
- **A "control in fact" test:** a TCC cannot be otherwise controlled in fact by non-Canadians.⁶

Taking into account the direct and indirect Canadian ownership requirements set out above, a non-Canadian is currently restricted to controlling a maximum of 46⅔% of the voting shares of a TCC.

RECENT DEVELOPMENTS

Government's Speech from the Throne and Federal Budget

On March 3, 2010, the minority Conservative Government of Canada signalled its desire to ease restrictions on foreign investment in the satellite and telecommunications industries.⁷ In the March 4, 2010, Federal Budget document, *Leading the Way in Jobs and Growth*, the Government stated that it would "be acting in Budget 2010 to remove the existing restrictions on foreign ownership of Canadian satellites."⁸

Action on Removal of Restrictions on the Ownership of Canadian Satellites

Legislation (as part of a budget bill) that would lift the existing restrictions on foreign ownership of Canadian satellites is currently before the Senate and is expected to pass into law in the next two weeks.

Report – Standing Committee on Industry, Science and Technology

On June 16, 2010, the Standing Committee on Industry, Science and Technology (the "Standing Committee") issued a report entitled *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector*, after a series of hearings on the issue that ran from March 25 to June 1, 2010. The Standing Committee made two principal recommendations in the report:

- (i) that the interpretation of the "control in fact" test be clarified; and

¹ S.C. 1993, c. 38.

² SOR/94-667.

³ The Act, s. 16(3)(a).

⁴ The Act, s. 16(3)(b).

⁵ Regulations, s. XX.

⁶ The Act, s. 16(3)(c).

⁷ Speech from the Throne, March 3, 2010, online at http://www.speech.gc.ca/grfx/docs/sft-ddt-2010_e.pdf

⁸ Budget Report 2010, *Leading the Way in Jobs and Growth*, March 4, 2010, online at <http://www.budget.gc.ca/2010/pdf/budget-planbudgetaire-eng.pdf>. at 96-97.

- (ii) that the restrictions upon foreign ownership and operation of satellites in Canada be removed.⁹

As mentioned above, legislation effecting this latter recommendation is currently before Parliament.

The first of these recommendations concerns the “control in fact” test found at paragraph 16(3)(c) of the Act, which requires that a TCC be “not otherwise controlled by persons that are not Canadians.” A determination of this question involves an evaluation of an applicant’s ownership and management structures, as well as of its creditors, in order to ascertain who actually controls the firm and is responsible for its day-to-day operations.

The application of the control in fact test has generated much debate since its inception in 1993 and has been the subject of recent controversy in the *Globalive* case. Some of this history was described in the Standing Committee’s Report. As a consequence, the Standing Committee has recommended that the Government “clarify the interpretation of the “Control in Fact” test.”

Given the limited nature of the Standing Committee’s recommendations and the minority status of the current Government, it is of some interest to consider the non-consensus opinions of the four major parties, which were annexed to the Standing Committee’s Report, and in particular, those of the three opposition parties (Liberal, Bloc Québécois and New Democratic Party (“NDP”)).

Not surprisingly, the reigning Conservatives’ position highlighted the benefits associated with attracting foreign investment, such as stimulating innovation in both technology and business models. Fostering competition was identified as a key goal, with a view to improving sector performance and lowering prices for consumers.

The Liberals took a more cautious approach by calling for further review of the implications of removing the current restrictions. Should it be demonstrated upon such further review that Canadian cultural sovereignty could effectively be preserved within a more foreign investor-friendly environment, the Liberal party indicated that it would be willing to accept a new 49% limit on the foreign ownership of the voting shares of TCCs’ broadcasting distribution undertakings and programming

undertakings alike, while keeping the control in fact test in place.

The Bloc called for the preservation of the current restrictions on foreign ownership, while also advocating for a study of new communications legislation that would effectively integrate the regulation of the telecommunications and broadcasting sectors. The Bloc also recommended that legislation be passed establishing a Quebec-specific broadcasting and telecommunications board to “regulate pursuant to the *Broadcasting Act* and to the *Telecommunications Act*.”

The NDP recommended that a study of the convergence of media, wireless and internet services and its impact upon Canadian cultural sovereignty be undertaken, pending which a two-year freeze on the current rules should be respected.

Public Consultation – Minister of Industry

On June 11, 2010, Canada’s Minister of Industry, the Hon. Tony Clement, released a Consultation Paper confirming the Government’s desire to move towards a less restrictive approach to foreign ownership in the telecommunications sector. The Consultation Paper outlined three potential options for loosening the current restrictions upon foreign ownership:

- Under Option 1, the mandatory Canadian ownership requirement in paragraph 16(3)(b) of the Act would be reduced from 80% to 51%. The implication of this change is that the foreign ownership limit would be increased to 49%. However, all other aspects of the current rules would remain unchanged.
- Under Option 2, investments by foreign entities in start-up telecommunications companies and existing small industry players would be exempt from the rules. Specifically, carriers with revenues of less than 10% of total market revenues would be relieved from the provisions of section 16 of the Act and the Regulations.
- Under Option 3, all restrictions on foreign ownership would be removed by way of the repeal of section 16 of the Act.¹⁰

⁹ Report of the Standing Committee on Industry, Science and Technology, *Canada’s Foreign Ownership Rules and Regulations in the Telecommunications Sector*, released June 16, 2010, online at <http://www2.parl.gc.ca/content/hoc/Committee/403/INDU/Reports/RP4618793/indurp05/indurp05-e.pdf> at 45.

¹⁰ Industry Canada, *Opening Canada’s Doors to Foreign Investment – Consultation Paper*, June 2010. Text available online at [http://www.ic.gc.ca/eic/site/ic1.nsf/vwapj/TelecomInvestment-eng.pdf/\\$file/TelecomInvestment-eng.pdf](http://www.ic.gc.ca/eic/site/ic1.nsf/vwapj/TelecomInvestment-eng.pdf/$file/TelecomInvestment-eng.pdf) at 9-10.

The Minister of Industry has invited comments on the issues and options presented in the Consultation Paper by July 30, 2010. The Minister has subsequently stated that his desire is to take legislative action, based on feedback received through the public consultation, in the fall of 2010.

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