

Telecoms and Media

An overview of regulation
in 48 jurisdictions worldwide

2011

Contributing editors: Laurent Garzaniti and Natasha Good



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Canada

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Communications policy

1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymaking procedure?

Telecommunications and broadcasting in Canada are regulated by three main statutes: the Broadcasting Act, for broadcasting and broadcasting distribution; the Telecommunications Act, for telecommunications; and the Radiocommunication Act, for the licensing of radio spectrum and the certification and authorisation of associated wireless equipment.

Both the Broadcasting Act and the Telecommunications Act are overseen by the Canadian Radio-television and Telecommunications Commission (CRTC), an administrative tribunal created by the Canadian Radio-television and Telecommunications Commission Act (the CRTC Act). Each of the broadcasting and telecommunications statutes set out broad policy objectives for the regulation of their sectors, affording the CRTC considerable authority in using its powers to establish more detailed policy initiatives and frameworks to fulfil these objectives.

The Broadcasting Act envisages the Canadian broadcasting system chiefly as an instrument of social and cultural policy. Central to the many objectives of the Broadcasting Act are the goals of ensuring Canadian ownership and control of the broadcasting system and of encouraging and promoting the creation and presentation of Canadian programming.

While the CRTC is the frontline regulator of broadcasting, other government entities retain residual discretion to shape broadcasting regulation and policy. The Department of Canadian Heritage may promulgate and amend the Broadcasting Act and related legislation, and it designs and administers programmes to support the policies set out therein. In addition, the federal cabinet may issue to the CRTC binding policy directions.

The telecommunications policy objectives found in the Telecommunications Act are both economic and social. These objectives include reliability, affordability, enhanced efficiency and competitiveness, privacy and Canadian ownership and control.

While the CRTC is the chief regulator of telecommunications in Canada, the government retains the power to set the broad policy framework for telecommunications, and to direct and review decisions of the Commission. In this case, it is the Department of Industry that may promulgate and amend the Telecommunications Act and related legislation, in addition to having the power to issue licences to operate international submarine cables. The federal cabinet may issue to the CRTC binding policy directions and may also make regulations.

The Radiocommunication Act sets out a licensing framework for the allocation and use of radio spectrum. No person may install, operate or possess radio apparatus except in accordance with a licence, certificate or authorisation issued by the minister of industry, with an explicit statutory exemption for radio apparatus capable

only of receiving broadcasting. In exercising his powers under the Act, the minister may have regard to the telecommunications policy objectives set out in the Telecommunications Act. The federal cabinet may make regulations.

2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

Neither the Broadcasting Act (1991) nor the Telecommunications Act (1993) has been amended expressly to take into account the convergence of telecommunications, media and IT; however, both statutes were explicitly drafted to be technology neutral, and have afforded the regulator some flexibility in dealing with new and converging business models and technologies, although there continues to be uncertainty as to the limits of the CRTC's jurisdiction in addressing issues of convergence. The attempted reconciliation of the very different sets of objectives for broadcasting and telecommunications regulation create a significant challenge to regulatory convergence in Canada.

There are distinct definitions of both 'telecommunications' and 'broadcasting' in the respective statutes; moreover, the Broadcasting Act explicitly states that it does not apply to any telecommunications common carrier (TCC), when acting solely in that capacity, and the Telecommunications Act states that it does not apply in respect of broadcasting by a broadcasting undertaking. However, these frameworks still allow some aspects of an enterprise to be regulated as broadcasting, and some as telecommunications (eg, cable companies providing internet access services are regulated as both broadcasters and telecommunications providers).

Less certain are issues such as whether internet service providers (ISPs) can be treated as broadcasting distribution undertakings (BDUs), to the extent that they provide access to broadcast programming. On a reference to the Federal Court of Appeal, initiated by the CRTC, the Court ruled that ISPs did not engage in 'broadcasting' to the extent that they merely provided content-neutral access to programming; however, the case is currently on appeal to the Supreme Court of Canada.

3 Broadcasting sector

Is broadcasting regulated separately from telecoms? If so, how?

See question 1.

Telecoms regulation – general

4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

Canada has committed to the Basic Telecommunications Agreement,

with exceptions for services regulated under the Broadcasting Act and telecommunications services supplied for the transmission of broadcasting services directly to the public.

In addition, Canada committed to allowing full foreign ownership of international submarine cables and fixed or mobile satellites. Ownership restrictions were removed in 1998 for international submarine cables and satellite earth stations used for telecommunications, and in 2010, for satellites.

5 Public/private ownership

What proportion of any telecoms operator is owned by the state or private enterprise?

All of the major incumbent TCCs are owned by publicly traded private companies, with the exception of Saskatchewan Telecommunications Holding Corporation (Sasktel), which remains a provincial Crown Corporation.

6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide telecoms services?

At present, Canadian ownership rules for telecom and radiocom carriers require that all carriers must be 'Canadian owned and controlled', and may be summarised as follows:

- at least 80 per cent of the members of the board of directors of the carrier must be Canadian;
- non-Canadians may not beneficially own, directly or indirectly, more than 20 per cent of the carrier's voting shares;
- non-Canadians may not beneficially own directly or indirectly more than 33¹/₃ per cent of the voting shares of the carrier's holding company; and
- the carrier or the holding company may not otherwise be controlled by non-Canadians (ie, 'control in fact').

Since the focus of these requirements is on voting shares, foreign investors often seek to maximise ownership through non-voting securities, debt and other arrangements. In such cases, regulators reviewing a carrier's proposed ownership structure will consider ownership compliance with regard to a 'control in fact' test, which considers whether minority or non-voting interests might nevertheless have significant influence over the strategic decision-making activities of a carrier, amounting to control.

Compliance with Canadian ownership rules is assessed by the CRTC, with respect to telecommunications carriers, and the minister of industry, with respect to radiocommunication carriers, although both apply the same regulations and approach.

7 Fixed, mobile and satellite services

Comparatively, how are fixed, mobile and satellite services regulated? Under what conditions may public telephone services be provided?

Fixed, mobile and satellite services are all regulated pursuant to the Telecommunications Act; however, in practice, the CRTC has applied a lighter hand to regulating wireless and satellite technologies. Mobile and satellite services are also licensed by the minister of industry to use radio spectrum under the Radiocommunication Act.

Under the scheme of the Telecommunications Act the Commission is empowered to refrain, in whole or in part, from regulating certain telecommunications services, where the services in question are or will be subject to competition sufficient to protect the interest of users. The CRTC has refrained from regulating pricing and most terms relating to the provision of wireless services, retaining certain requirements generally aimed at consumer protection. Forbearance has also been granted for a range of satellite services.

Only certain wireline services remain subject to more traditional

price regulation, with the vast majority of retail services in urban residential exchanges being deregulated. Deregulated services are generally still subject to certain conditions respecting consumer protection and enabling competition. Many wholesale services continue to be regulated with respect to both pricing and terms of access.

The services of incumbent carriers that continue to be regulated are subject to both rate regulation and price cap regimes, which vary slightly by carrier. Affected services may only be offered in accordance with tariffs approved in advance by the CRTC, following a public process.

As noted, wireless and satellite providers must be granted spectrum licences, with conditions, by the minister of industry, which in some cases are granted upon application, but more frequently are assigned through a competitive bid process or auction.

Providers of basic international telecommunications services must obtain a pro-forma licence from the CRTC.

8 Satellite facilities and submarine cables

In addition to the requirements under question 7, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

The operation of satellite earth station facilities requires radio or spectrum licences issued by the minister of industry under the Radiocommunication Act, although holders of licences for earth stations for fixed and mobile satellite services are not subject to Canadian ownership restrictions.

The construction or operation of international submarine cables, which include both cables that connect Canada and a place outside Canada and cables that connect other countries by transiting through Canada, requires a licence from the minister of industry, issued under the Telecommunications Act, unless the line is situated entirely under fresh water.

9 Universal service obligations and financing

Are there any universal service obligations? How is provision of these services financed?

All incumbent local exchange carriers (ILECs) have a basic service obligation to provide basic wireline telephony services and dial-up internet access to anyone in areas in which the carrier has facilities, unless the carrier would have to incur unusual expenses to extend service.

All telecommunications service providers (TSPs) with annual telecommunications revenues over C\$10 million have been required to pay fees, fixed at a percentage of annual telecommunications revenues (with certain exclusions), into a fund created to subsidise the cost of providing local telephone service in high-cost rural and remote service areas. Any local exchange carrier (LEC) can access the fund to subsidise the cost of providing local service in high-cost serving areas.

In 2010, the Commission initiated a major policy proceeding to review issues associated with access to basic telecommunications services, including the obligation to serve, the basic service objective and the local service subsidy. Included in the issues considered was whether high-speed internet access should be included as part of the basic service. The CRTC has yet to issue a decision on this proceeding.

10 Operator exclusivity and limits on licence numbers

Are there any services granted exclusively to one operator or for which there are only a limited number of licences? If so, how long do such entitlements last?

Generally, TSPs may offer services anywhere in Canada, with the exception of wireless service providers, whose spectrum licences are sometimes limited to defined geographic service areas.

11 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is no structural separation of network and service activities in Canada, although a type of 'virtual' separation exists between the wholesale and retail divisions of incumbent carriers. In this regard, incumbents are required to create a customer/carrier services group (CSG), a functionally separate group within the company, whose role is to liaise and coordinate with competing service providers when conducting a variety of inter-carrier activities, primarily with respect to customer transfers. The CSG structure is intended to isolate and safeguard competitively sensitive information respecting competitor activities from the retail sales and marketing arms of the incumbent carrier. Some vertically integrated broadcasting enterprises are also subject to virtual separation requirements.

12 Number portability

Is number portability across networks possible? If so, is it obligatory?

Full number portability is mandated in Canada for both wireline and wireless service providers, such that existing telephone numbers assigned to either wireline and wireless carriers may generally be transferred and reassigned to another carrier, whether wireless or wireline, within the same local exchange area.

13 Authorisation timescale

Are licences or other authorisations required? How long does the licensing authority take to grant such licences or authorisations?

The most recent service objectives published by the CRTC, in April 2011, greatly simplify and shorten the time frames for approval: for many proceedings, the objective is to publish all decisions within four months of the close of the record, although longer time frames would apply to major policy framework proceedings. The length of the proceeding itself can vary considerably, however, depending on the formality of the process and whether an oral hearing is scheduled.

The Telecommunications Act requires that all tariff applications be processed within 45 business days of filing, although this period can be extended by the CRTC, providing reasons for the extension. Basic International Telecommunications Services licences are generally issued within 21 days of being placed on the public record, provided that the application is satisfactory and no adverse comments are received.

Approval times for spectrum licences vary greatly, according to the nature of the licence sought and whether a competitive or auction process is followed. Simple radio licences may take only a few weeks, whereas wireless spectrum obtained through an auction process may take many months – even longer if the proposed ownership structure raises concerns with compliance with Canadian ownership requirements.

14 Licence duration

What is the normal duration of licences?

Basic International Telecommunications Services licences and International Submarine Cable licences are typically issued for terms of 10 years, the maximum allowed under the Telecommunications Act.

Broadcasting licence terms vary among licensees. Licences may be issued for terms of up to seven years, but shorter terms are often issued for administrative reasons or in cases of non-compliance by a licensee with key regulatory obligations.

Radio licence (site-specific installation and operation of radio apparatus) and spectrum licence (use of spectrum over defined geographic area) terms are at the discretion of the minister of industry

and can vary greatly, from temporary authorisations of a few days or weeks to terms up to 20 years.

15 Fees

What fees are payable for each type of authorisation?

There are no direct fees payable for basic international telecommunications licences or reseller registration with the CRTC, although the CRTC collects an annual fee from all TSPs with telecommunications services revenue over C\$10 million, intended to recover the costs attributable to the Commission's responsibilities and regulatory activities under the Telecommunications Act. These fees vary by provider, as they comprise a pro rata share, based on total industry telecommunications revenues, of the Commission's regulatory costs for a given fiscal year.

Radio and spectrum licence fees vary considerably, depending on the type and scope of licence granted and the process involved in granting the licence. Fees may be based on the amount of spectrum used, or a combination of spectrum used and population served. Where spectrum licences are granted based on an auction process, the fees payable will be determined by the bids of the successful bidders in each licence category, and have ranged in the tens of millions of dollars.

16 Modification and assignment of licence

How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

Basic international telecommunications services licences may be amended at any time upon approval of the CRTC, whether by application or on the Commission's own motion. Licences are not transferable without approval of the CRTC.

Broadcasting licences may be amended at any time upon application by a licensee and approval by the CRTC. The CRTC may also amend broadcasting licences of its own motion, but only where five years have expired since the issuance or renewal of the licence.

Radio and spectrum licences may be amended at any time upon approval of the minister of industry. Licences are not transferable without the minister's approval.

The pledging of licences as security for financing purposes occurs sometimes, but such security cannot be realised without the requisite approval of the CRTC or the minister. In the cases of broadcasting and spectrum licences, any creditor would also be required to comply with Canadian ownership restrictions.

17 Retail tariffs

Are national retail tariffs regulated? If so, which operators' tariffs are regulated and how?

See question 7.

18 Customer terms and conditions

Must customer terms and conditions be filed with, or approved by, the regulator or other body? Are customer terms and conditions subject to specific rules?

As noted in the response to question 7, the vast majority of retail services in urban telephone exchanges have been deregulated, so are no longer subject to comprehensive terms of service that are mandated by the regulator; however, the offering of these services is subject to some conditions of service, respecting issues such as confidentiality of customer information and the offering of a free toll restrict service. Those services that continue to be regulated are subject to comprehensive terms of service that have been imposed by the CRTC.

The CRTC has recently initiated a process to develop a mandatory industry code for all TSPs operating in deregulated markets respecting carrier-initiated suspension or termination of service and

deposit requirements. This code is to be administered by the commissioner for complaints for telecommunications services (CCTS), an independent telecommunications consumer agency with a mandate to resolve complaints from individual and small business retail customers with respect to unregulated telecommunications services. A voluntary Code of Conduct for the wireless industry is currently administered by the CCTS.

19 Next-generation networks

How are next-generation networks (NGN) regulated?

Retail NGNs provided by incumbent wireline carriers are deregulated in the majority of local exchanges in Canada; however, wholesale NGN services, consisting of various wholesale internet access arrangements, are required to be provided to competing service providers at tariffed rates and on tariffed terms.

20 Changes to telecoms law

Are any major changes planned to the telecoms laws?

In June, 2010, the Canadian government initiated a public consultation to consider reforming the Canadian ownership rules in the communications sector, proposing the following three options: increasing the limit for direct foreign investment to 49 per cent, removing ownership restrictions for TCCs with a market share of 10 per cent or less, or removing Canadian ownership requirements in their entirety for TCCs. A decision on these reform proposals is anticipated before a planned auction of 700MHz spectrum in 2012.

In addition, in response to a parliamentary committee report recommending clarification of the 'control in fact' test, the government indicated that it would be examining whether, and in what ways, it might address the concerns raised by the committee.

In March 2006, a Telecommunications Policy Review Panel issued a report recommending many reforms to the Telecommunications Act, including enhanced market-forces objectives, a presumption of forbearance unless a service provider has significant market power, and new powers and jurisdiction for the CRTC. There have been no government initiatives to date to implement any of these proposed revisions.

Telecoms regulation – mobile

21 Radio frequency (RF) requirements

For wireless services, are radio frequency (RF) licences required in addition to telecoms services authorisations and are they available on a competitive or non-competitive basis? How are RF licences allocated? Do RF licences restrict the use of the licensed spectrum?

Spectrum licences are required to offer wireless services, and licences tend to be assigned on a competitive basis. In recent years, the government ministry Industry Canada has employed competitive licensing processes and spectrum auctions for frequency bands used by most wireless service providers. In some of these processes, such as the 2008 auction of advance wireless services spectrum in the 2GHz range, some blocks of the spectrum to be auctioned were allocated exclusively to new entrants. The new entrants were required to bid against each other for these blocks, but incumbent operators were not permitted to bid.

Licences generally restrict the use of licensed spectrum to a particular service or application.

22 Radio spectrum

Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

Industry Canada maintains utilisation policies, which set out the particular use to be made of licensed spectrum within an allocated frequency band. These policies are based on the type of use of spectrum rather than the type of user.

There is an established process and framework for the destandardisation of radio systems, providing minimum notice periods to affected licence holders. Returned spectrum is generally made available for assignment and relicensing.

23 Spectrum trading

Is licensed RF spectrum tradable?

In line with standard conditions of licence, spectrum licences can generally be transferred in whole or in part, in both bandwidth and geographic dimensions; however, in all cases, transfers of spectrum licences require the approval of the minister of industry. In approving transfers, the minister will ensure that potential transferees meet Canadian ownership requirements, and may be influenced by other policy considerations, such as market concentration. Some licences, such as the licence blocks made available to new entrants in the 2008 AWS auction, are prohibited by condition of licence from being transferred to an incumbent licensee for five years after licensing.

24 Mobile virtual network operator (MVNO) and national roaming traffic

Are any mobile network operators expressly obliged to carry MVNO or national roaming traffic?

It is a standard condition of licence for wireless licensees to comply with mandatory roaming requirements for all licensed carriers; accordingly, as an MVNO would, by definition, use the underlying network of a licensed wireless carrier, it would also benefit from these mandatory roaming arrangements. Roaming agreements do not generally distinguish between traffic originated by a carrier and traffic originated by an MVNO.

25 Mobile call termination

Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Is call termination regulated, and, if so, how?

In Canada, the receiving party pays when a call is terminated on a mobile network. As noted in response to question 7, wireless services have been largely deregulated, and are subject to only a few CRTC-imposed conditions, which do not currently include call termination. Industry Canada spectrum licence conditions are also silent with respect to call termination.

26 International mobile roaming

Are wholesale and retail charges for international mobile roaming regulated?

These charges are not regulated in Canada.

27 Next-generation mobile services

Is there any regulation for the roll-out of 3G, 3.5G or 4G mobile services?

There is no regulation with respect to the implementation of wireless standards per se, although the underlying frequency bands used to provide these services are licensed by Industry Canada. These licences do include restrictions on geographic coverage and include standard

conditions for mandatory roaming and tower sharing with other licensed providers.

Telecoms regulation – fixed infrastructure

28 Cable networks

Is ownership of cable networks, in particular by telecoms operators, restricted?

There are no legislative restrictions on the ownership of cable networks by telecoms operators, per se; however, the licensing of a new cable network or the transfer of an existing cable licence would require the prior approval of the CRTC.

Moreover, a 2008 media ownership policy states that the CRTC will not approve a transaction that would result in one person effectively controlling the delivery of programming services in a single market.

Cable licences are currently held by some incumbent telephone companies, although these have tended to be either new entrant licensees or undertakings in remote serving areas, such as the far north of Canada. Several incumbent telecoms operators operate IPTV BDUs, and one owns the largest satellite broadcasting distributor in Canada.

29 Local loop

Is there any specific rule regarding access to the local loop or local loop unbundling? What type of local loop is covered?

CRTC rules require ILECs to unbundle and make available a number of ‘essential’ services, which include local loops in small urban and non-urban areas, and ‘near essential’ services, which include local loops in urban areas. Originally, the latter was only required to be made available for a five-year transition period, but that period has been extended indefinitely, until such time as functionally equivalent wholesale alternatives are sufficiently present in the market, such that withdrawal of mandated loop access would be unlikely to result in a substantial lessening of competition in the local exchange market in question. A variety of analogue and digital facilities are available.

30 Interconnection and access

How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? Are wholesale access services regulated, and, if so, how?

The Telecommunications Act provides that interconnection agreements between carriers require CRTC approval to be effective with respect to terms relating to the interchange of traffic, the management or operations of interconnected facilities or the apportionment of rates or revenues between the carriers; however, most such interconnection arrangements are now deregulated. As noted previously, wholesale wireline services and pricing, including terms of access and interconnection, are heavily regulated by the CRTC.

The CRTC has the authority to order carrier interconnection on conditions that it thinks necessary to ensure just and reasonable rates and non-discriminatory treatment.

Wireless providers are subject to conditions mandating roaming and tower sharing and prohibiting undue discrimination. Industry Canada has issued guidelines for the industry that it will use in assessing complaints of non-compliance with these conditions.

Telecoms regulation – internet services

31 Internet services

How are internet services, including voice over the internet, regulated?

Retail internet services are deregulated in Canada, but wholesale internet access is mandated for ILECs and cable companies, and the rates and terms are approved by the CRTC.

Local VOIP services (those providing universal access to or from the PSTN) provided by ILECs are regulated in the same manner as wireline local exchange services; however, like wireline telephony, such services are now deregulated in the vast majority of local exchanges.

Even deregulated voice services must comply with certain conditions, including requirements relating to the provision of emergency ‘911’ service, privacy safeguards, registration with the CRTC and payment of contribution charges.

Peer-to-peer VOIP services with no PSTN connection are unregulated.

32 Internet service provision

Are there limits on an internet service provider’s freedom to control or prioritise the type or source of data that it delivers?

The CRTC has issued guidelines respecting the use of internet traffic management practices by ISPs, favouring economic over technical approaches and requiring competitive neutrality and disclosure to customers of traffic management practices. The ITMP framework would be applied to determine whether a particular ISP was in compliance with the provision in the Telecommunications Act prohibiting unjust discrimination or undue preference.

Outright blocking of access to content, and practices that result in the noticeable degradation of time-sensitive traffic (such as VOIP services) are prohibited without the prior approval of the Commission.

33 Financing of broadband and NGA networks

Is there a government financial scheme to promote broadband penetration?

In 2009, the federal government allocated C\$225 million over three years to strategies to extend broadband coverage in Canada, the largest component of which was directed to funding up to 50 per cent of the project costs to extend service to remote and underserved communities.

A number of provincial governments have also put in place programmes to help underwrite the cost of extending broadband service to targeted rural communities. The March 2010 budget plan for the Province of Quebec announced infrastructure investments totalling C\$900 million by 2020, to provide very high speed internet service in every region of the province.

In 2008, the CRTC approved the use of deferral account funds (funds collected in excess of rates authorised by applicable price cap formulae) for, among other things, initiatives for the expansion of broadband services to certain rural and remote communities. The funds currently approved for underwriting broadband amount to over C\$420 million; however, implementation of deferral account broadband expansion proposals has been delayed several times by various appeals.

Media regulation

34 Ownership restrictions

Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?

The Direction to the CRTC (Ineligibility of Non-Canadians) provides that no broadcasting licence may be issued, and no amendments thereof may be granted to a non-Canadian.

For corporate licensees, the Direction provides that to be eligible for a licence:

- the corporation must be incorporated or continued under Canadian law;
- the CEO or equivalent and not less than 80 per cent of the Directors must be Canadian; and

- at least 80 per cent of the voting shares, and 80 per cent of the votes must be owned and controlled by Canadians.

There are additional requirements for a holding company of a licensee:

- they must be incorporated or continued under Canadian law;
- not less than 66²/₃ per cent of the directors must be Canadian;
- at least 66²/₃ per cent of the voting shares, and 66²/₃ per cent of the votes must be owned and controlled by Canadians;
- control or influence over any programming decisions of the subsidiary corporation may not be exercised, unless the holding corporation meets the higher 80 per cent threshold for directors, voting shares and votes required to be met by the subsidiary

The CRTC is also prohibited from issuing a licence to an applicant who, while meeting the above de jure requirements, is controlled in fact by a non-Canadian. In assessing de facto control, the Commission applies much the same approach as discussed in the response to question 6, also paying particular attention to potential signs of influence or control over programming.

35 Cross-ownership

Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers? Is there any suggestion of change to regulation of such cross-ownership given the emergence of 'new media' platforms?

CRTC broadcasting policy has historically discouraged cross-ownership of media companies, in part out of concerns of the lack of programming diversity that may result from concentration of ownership, and in part out of concerns respecting undue preference and competition in the broadcasting market. That said, over time there has been increasing consolidation in the industry, and the CRTC has permitted transfers of broadcasting licences resulting in ownership by companies of a mix of programming and distribution undertakings, in addition to ownership of newspapers and magazines.

The CRTC's Diversity Policy states that the Commission will generally not approve transactions that would result in common ownership of a specified numbers of television and radio stations in the same language in the same market, based on market size. In addition, the policy states that the Commission will not be inclined to approve transactions that result in a single party controlling more than 45 per cent of the total television audience share in a market, taking into account both conventional and specialty services. Similarly, the Commission will generally not approve a transaction that would result in common ownership of a local radio station, a local television station and a local newspaper in the same market, or a transaction that would result in a single party controlling all BDUs in a market.

Following several recent transactions that saw substantial programming and distribution operations being consolidated under common ownership groups, the CRTC initiated, in October 2010 a policy hearing to review issues relating to the vertical integration of programming and distribution undertakings, particularly those related to possible preferential treatment for affiliated programming and distribution undertakings, relative to unaffiliated undertakings. A decision has yet to be issued.

There is no restriction on cross ownership of conventional broadcasting undertakings and new media undertakings.

The CRTC's jurisdiction does not extend to print media.

36 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The Broadcasting Act requires that all broadcasting undertakings (both programming and distribution) be either licensed or exempted

by the CRTC. Undertakings using radio spectrum also require broadcasting certificates from Industry Canada.

Public hearings are required for the issuance, amendment or renewal of a licence by the CRTC, although amendments and renewals are sometimes processed by a written process only. New licences are typically processed in a period ranging from 8 to 18 months from filing, depending on Commission workload, hearing schedules and whether the application is part of a competitive process or raises any novel policy issues.

A number of exemption orders have been issued, with certain conditions, with respect to a variety of broadcasting undertakings, including, for example, third-language television services, small cable systems and new media broadcasting undertakings (broadcast programmes accessible via the internet). Undertakings that meet the conditions set out in the applicable order are authorised to operate.

Broadcasting certificates are obtained through a written application process to Industry Canada.

Broadcasting licensees are required to pay two annual licence fees, unless their broadcasting revenues fall below specified sector-specific thresholds. The first fee is the licensee's pro rata share of the CRTC's annual costs of regulating and supervising broadcasting matters. The amount to be recovered varies annually, according to the CRTC's workload and budget. The second fee is a general payment to the government of Canada, theoretically to cover the cost of managing the broadcast spectrum. Licensees currently pay annually a pro rata share of C\$100 million.

37 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media are outside of this regime?

All radio and television broadcasters must exhibit prescribed minimum percentages of Canadian content. A certification system is used to determine which programmes or musical selections will be considered to be 'Canadian'. Generally, private radio stations must ensure that 35 per cent of the musical selections they play are Canadian. Conventional television stations must air at least 60 per cent Canadian programming overall (falling to 55 per cent, as of 1 September 2011), with further requirements between 6 a.m. and 12 a.m. Canadian content requirements for pay-TV and specialty services vary depending on the nature of the service. Conventional television stations typically have requirements to provide a designated amount of local content.

In addition to requirements respecting the exhibition of Canadian programming, the CRTC also requires a variety of licences to make expenditures directed at supporting the production of Canadian programming, either through a direct spending requirement or through the required contribution to funds used to subsidise the production of Canadian programming. As the result of a new group-based licensing framework announced in March 2010, conventional television services that are part of large ownership groups will be able to flexibly allocate the aggregate of their required expenditure spending to any services within the ownership group.

Provided that the various minimum exhibition requirements for Canadian content are met, foreign programming may be carried on Canadian services. In addition, foreign services may be authorised for distribution in Canada through Canadian distribution undertakings if approved by the CRTC and placed on the Eligible Satellite Services List. Such services may generally not be competitive with a licensed Canadian pay-TV or specialty service.

There are currently no Canadian content requirements for online and mobile platforms, which are governed by an exemption order for new media broadcasting undertakings.

38 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast advertising is subject to compliance with a variety of advertising codes, including codes relating to advertising directed at children, gender portrayal in advertising and advertising of alcoholic beverages. Other laws of general application to advertising, such as the misleading advertising provisions of the Competition Act, or relating to the advertising and promotion of pharmaceuticals, also apply to broadcast advertising.

Restrictions also exist for some services with respect to the amount of advertising that may be carried. Pay-TV is generally prohibited from carrying advertising, other than promotions for upcoming programmes. Specialty services, which also receive subscription revenues, are restricted to a specified number of advertising minutes per hour, with the limit varying by service. There are no such restrictions for radio or conventional television licensees.

Online advertising is not subject to regulation by the CRTC, but is still subject to laws of general application that may affect advertising.

39 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

All licensed broadcast distribution undertakings (BDUs) must carry certain services specified by the CRTC. These rules are both detailed and complex, with the obligations varying according to the type of distribution undertaking (ie, cable or DTH) and whether the services are distributed using analogue or digital technology. The must-carry obligations are particularly complex at the moment, as BDUs move from limited capacity analogue to higher bandwidth digital distribution and, as the scarcity upon much of traditional regulation has been based erodes, the CRTC increasingly favours competition among programming services.

There are no mechanisms to fund the costs of carriage by distributors of mandated programming services; however retail rates are deregulated and may be set at the discretion of cable and DTH companies to recover any associated costs.

40 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific rules for those services?

While the Standing Committee on Canadian Heritage conducted a comprehensive review of the Broadcasting Act, issuing a report in 2003 that recommended a single communications statute to replace the Broadcasting Act, the Telecommunications Act and the CRTC Act, these recommendations have not been acted on. There have been no major amendments to the Broadcasting Act since its 1991 enactment.

As noted in response to question 2, the scheme of the Broadcasting Act is technology neutral, and the CRTC has therefore found that broadcasting to mobile devices is captured by the terms of the law. However, the Commission has issued a broad exemption order for such services, which are accordingly free from the Canadian content and must-carry rules applicable to more traditional operators.

41 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

As noted in the response to question 36, 'broadcasting' programming

made available over the internet is subject to a broad exemption order.

While 'over-the-top' internet-based programming and distribution undertakings are exempt from regulation, IP-based distribution undertakings using proprietary networks or leased local facilities continue to be subject to the rules applicable to conventional cable systems.

As over-the-top programming services that offer on-demand programming become more popular, there is increasing pressure on the CRTC and the government to regulate such services – or to decrease or eliminate the regulatory obligations on the traditional licensees with which such services increasingly compete.

42 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Canadian television is in the process of converting its over-the-air transmitters from analogue to digital. The CRTC has established a baseline group of mandatory markets for transition to digital by 31 August 2011, including all capital cities and markets with populations greater than 300,000. The spectrum currently assigned for analogue television broadcasting will be reassigned for public safety uses and greater wireless competition and innovation.

Digital radio in Canada has been in existence for a number of years; however, the services have not proved popular. There is no mandated date for a full transition to digital radio. It is expected that at the time of any such switchover, the spectrum will be reassigned to other, as yet undetermined, uses.

43 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multichannelling, high definition, data services)?

Like all spectrum licences, broadcasting spectrum licences are awarded for particular uses, and use of the allotted frequencies are subject to detailed standards respecting the insertion of data services, the use of subcarriers, etc. CRTC rules allow for data transmission, provided that it does not affect the quality or quantity of DTV and HDTV programming broadcast to viewers. CRTC decisions also govern such matters as required aspect ratios and minimum resolution levels for high-definition formats.

Regulatory agencies**44 Regulatory agencies**

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

See question 1.

45 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

The CRTC is an independent administrative agency created by statute. Its members are appointed by the federal cabinet for up to five years, and may not hold direct or indirect interests or directorships in the broadcasting or telecommunications industries. The Commission reports to Parliament through the minister of Canadian Heritage.

The CRTC enjoys a fair degree of autonomy in regulating and supervising broadcasting and telecommunications in Canada, within the frameworks of its enabling legislation; however, there continue to be a number of government levers of control over the CRTC, including the power to make directions on broad policy matters, the

power to require the Commission to make a report on matters within its jurisdiction and powers to vary CRTC decisions.

Industry Canada, the spectrum regulator, is a department of the federal government.

46 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

Telecommunications decisions of the CRTC may be challenged via one of the following three avenues:

- the CRTC may review and vary its own decisions. Applicants must generally seek review within 90 days and demonstrate substantial doubt as to the correctness of the original decision;
- appeals of CRTC decisions may be brought within 30 days on questions of law or jurisdiction to the Federal Court of Appeal, with the leave of that Court;
- decisions may be reviewed, varied, rescinded or sent back to the CRTC for reconsideration by the federal cabinet, within a year of the original decision, on its own motion, or on petition filed within 30 days of the impugned decision.

For broadcasting matters, two appeal avenues are available:

- appeals of CRTC decisions or orders may be brought within one month on questions of law or jurisdiction to the Federal Court of Appeal, with the leave of that Court;
- decisions respecting the issuance, amendment or renewal of a licence may be reviewed, varied, rescinded or sent back to the CRTC for reconsideration by the federal cabinet, within 90 days of the original decision, on its own motion, or on petition filed within 45 days of the impugned decision.

47 Interception and data protection

Do any special rules require operators to assist government in certain conditions to intercept telecommunications messages? Explain the interaction between interception and data protection and privacy laws.

The Criminal Code and the Canadian Security Intelligence Act provide for the issuance of judicial warrants authorising the interception of private communications and assistance orders requiring the assistance of TCCs in affecting such orders. At the same time, these statutes prohibit the interception of private communications without such authorisation.

Federal private sector privacy legislation, which applies to TSPs, generally prohibits disclosure of personal information without consent, but includes an explicit exemption for disclosures made in compliance with a court order.

Wireless service providers are also required, by condition of their spectrum licences, to maintain lawful intercept capabilities in compliance with a set of enforcement standards developed by Public Safety and Emergency Preparedness Canada, a federal government department.

Several unsuccessful lawful access bills have been introduced, which would have obliged TSPs to ensure that all of their services and equipment were capable of intercepting private communications, and would have imposed minimum capability requirements for simultaneous interception and obligations to providing assistance to law enforcement.

48 Data retention and disclosure obligations

What are the obligations for operators and service providers to retain customer data? What are the corresponding disclosure obligations? Will they be compensated for their efforts?

There are currently no general mandated data retention requirements in Canada. Instead, Canada has followed a more targeted approach to preserving evidence, enacting investigative tools to require TSPs to

preserve specific data respecting particular subscribers under investigation. Canada's new anti-spam legislation and federal child pornography reporting law are examples of laws requiring the targeted preservation of data.

Beyond such mandated preservation of targeted data, federal privacy law generally requires organisations to retain personal information for only so long as is reasonable necessary to fulfil the purpose for which it was collected, destroying the information thereafter.

49 Unsolicited communications

Does regulation prohibit unsolicited communications? Are there exceptions to the prohibition?

The CRTC has created unsolicited telecommunications rules respecting unsolicited voice, fax and automatic dialling-announcing device (ADAD) communications. Only the use of ADADs for commercial solicitation is prohibited; other methods of telemarketing are regulated, and subject to restrictions relating to such matters as permitted calling hours, caller identification and contact requirements and the maintenance of telemarketer-specific do-not-call lists.

Telemarketers are also subject to a national do-not-call list, and are prohibited from making calls to consumers included on the list. Exemptions exist for calls made to a consumer with which the telemarketer has an existing business relationship, as well as to calls made by registered charities, newspapers, political parties and market research and survey organisations. The rules do not apply to business-to-business calling.

A number of provinces have also enacted legislation respecting collection agencies that place restrictions on unsolicited calls made for debt collection purposes.

With respect to other types of electronic messages, Canada enacted anti-spam legislation at the end of 2010, which is expected to come into force in the fall of 2011. The new law generally prohibits the sending of commercial electronic messages (broadly defined to include SMS, e-mail and social networking messages) without the explicit consent of the recipient. Permitted messages must be in a prescribed form, including sender identification and contact details and a no cost, easy unsubscribe mechanism. A number of exemptions exist, including, for example, exemptions for existing business relationships, conspicuous publication of an electronic address and responses to requests for estimates or quotations.

Competition and merger control

50 Competition and telecoms and broadcasting regulation

What is the scope of the general competition authority and the sectoral regulators in the telecoms, broadcasting and new media sectors? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation? Are there special rules for this sector and how do competition regulators handle the interaction of old and new media?

The commissioner of competition is the general competition authority in Canada. All mergers (including telecoms and broadcasting) are subject to review by the commissioner pursuant to the Competition Act, with the objective of ensuring that no such transaction will be likely to prevent or lessen competition substantially. The Competition Act also sets out a wide range of criminal offences and civilly reviewable matters respecting anti-competitive practices.

Sectoral regulations enacted under the Broadcasting Act require the prior approval of the CRTC to transfers of ownership and control respecting licensed broadcasting undertakings (no such approval is required for exempted undertakings, such as New Media undertakings). The Commission has regard to variety of broadcasting policy objectives in approving such transactions, including competition in the sector. The CRTC also makes regulations and imposes condi-

tions of licence intended to preclude anti-competitive conduct in the sector.

There is no explicit requirement in the Telecommunications Act that the CRTC give prior approval to mergers or acquisitions of telecommunications undertakings; however, the Act contains a number of objectives relevant to competition and includes broad requirements for just and reasonable rates and a prohibition on undue preference or unjust discrimination. The CRTC has imposed a number of conditions on the offering and interconnection of services which are intended to promote or preserve competition.

The minister of industry must approve transfers of ownership of radiocommunication licences, and may take into account factors relating to competition.

In order to attempt to address issues raised by the overlapping jurisdiction of the CRTC and the commissioner of competition, in 1999, the two agencies jointly issued a document entitled CRTC/Competition Bureau Interface, which delineated the respective authority of these regulators, and attempted to provide some clarity to interested stakeholders respecting the overlapping regulatory frameworks. However, both regimes continue to apply, and transactions must often obtain approvals from both regulators, leading to occasional conflicts.

51 Competition law in the telecoms and broadcasting sectors

Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator controls these practices?

There is some overlap between the CRTC, Industry Canada and the commissioner of competition with respect to what might broadly be considered to be anti-competitive practices.

Prime authority rests with the commissioner of competition. The Competition Act sets out a wide range of criminal offences and civilly reviewable matters respecting anti-competitive practices, including such matters as predatory pricing, bid rigging, price maintenance, exclusive dealing, market restriction and abuse of dominance.

At the same time, the CRTC continues to exercise its broad, objective-based authority under both the Broadcasting Act and the Telecommunications Act with respect to anti-competitive practices, sometimes in a preventative, ex ante fashion and sometimes in an ex post, remedial fashion. For example, for both broadcast licences and telecommunications carriers, the Commission has required virtual separation of some undertakings in order to avoid potential anti-competitive conduct that might flow from vertically integrated enterprises, or from service providers that provide both wholesale and retail services. Prohibitions on undue preference and unjust discrimination apply by statute to TCCs and by regulation to broadcasting undertakings, and these provisions have been applied to such matters as network access by competitors and terms and conditions of signal carriage, including pricing.

Even Industry Canada delves somewhat into regulating anti-competitive behaviour, through such mechanisms as conditions of licence on wireless carriers that mandate roaming and tower sharing with other licensed providers

52 Jurisdictional thresholds for review

What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting and new media sectors?

For broadcasting matters, the CRTC must be notified, within 30 days following any act, agreement or transaction that results, directly or indirectly, in a person or persons:

- who held less than 20 per cent of the voting interests in the licensee or its parent corporation, having control of 20 per cent or more, but less than 30 per cent of those interests; or
- who held less than 40 per cent of the voting interests in the licen-

see or its parent corporation, having control of 40 per cent or more, but less than 50 per cent of those interests

Prior Commission approval is required for any act, agreement or transaction that would result, directly or indirectly, in a change of the effective control of the undertaking, or in a person or persons:

- who held less than 30 per cent of the voting interests in the licensee or its parent corporation, having control of 30 per cent or more of those interests; or
- who held less than 50 per cent of the voting interests in the licensee or its parent corporation, having control of 50 per cent or more of those interests

In approving transfers of control for broadcasting matters, the Commission has regard to a wide variety of factors, including ensuring that the transaction complies with Canadian ownership and control requirements, will not result in a material loss in diversity of editorial voices and contributes in a material way to the fulfilment of the objectives of the Broadcasting Act, including tangible financial and non-financial contributions to Canadian talent development or the creation and promotion of Canadian programming.

There is no explicit requirement in the Telecommunications Act that the CRTC give prior approval to transfers of ownership and control of telecommunications undertakings, although the Commission often reviews proposed transactions to ensure compliance with Canadian ownership requirements.

The commissioner of competition has general jurisdiction to review mergers in Canada. The Competition Act, through filing thresholds, establishes a regime for mandatory merger notification of transactions that exceed certain monetary and, where applicable, shareholding levels. The commissioner of competition, however, can challenge a merger under the Competition Act (by way of application to the Competition Tribunal) whether or not it is notifiable.

Determination of whether a transaction exceeds the thresholds for merger notification under the Competition Act depends on the specific structure of a given transaction. Generally, however, a proposed transaction is notifiable if it exceeds:

- a 'size of the parties' threshold (book value of assets in Canada or revenues in, from or into Canada of the parties and their affiliates greater than C\$400 million), and
- a 'size of the transaction' threshold (C\$73 million – based on the book value of the subject assets or company in Canada, or gross revenues from sales in or from Canada generated from those assets or by the company).

In the case of share acquisitions, an additional 'shareholding threshold' must be exceeded (ie, acquisition of more than 20 per cent of the voting shares of a public corporation or more than 35 per cent of the voting shares of a private corporation, or, if these shareholding levels are already exceeded, acquisition of an additional interest resulting in a more than 50 per cent shareholding in either a public or private corporation).

53 Merger control authorities

Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms, broadcasting and new media sectors?

See question 50.

54 Procedure and timescale

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

For broadcasting matters, applications for prior approval must be filed with the CRTC if the ownership thresholds set out in the

Update and trends

Anticipated emerging trends and hot topics for 2011 would include the following:

- foreign ownership reform for telecommunications;
- rules and safeguards respecting vertical integration of programming undertakings and BDUs;
- Canadian content and broadcasting regulation in an era of increasing availability of high-quality 'broadcasting' content over the internet, through services such as Netflix;
- issues respecting the wholesale provision of internet access service, bandwidth caps, usage-based billing and internet traffic management practices;
- the treatment of ISPs as BDUs under the Broadcasting Act, to the extent that they make available 'broadcast' programming (case to be heard by the Supreme Court of Canada);
- revisions to the Basic Service Obligation, universal service and funding, particularly with respect to universal broadband;
- the digital transition for over-the-air television broadcasters.

response to question 52 are engaged. Processing time can vary according to the size and significance of the transaction, as larger and more controversial transactions are often dealt with in a full public process, sometimes including a hearing; whereas less material or controversial transactions may be dealt with through a shorter administrative process. More complex processes are generally concluded within six to nine months of filing; administrative processes may result in decisions in as little as two months. In November 2008, the CRTC published an information bulletin offering guidance on how it determines the appropriate process for dealing with applications for transfers of control.

Although there is no prior approval requirement for transfers of control of TCCs, the Commission will conduct a process to ensure compliance with Canadian ownership rules, where there appears to be a material foreign interest in the acquiring company. In the past, many of these reviews were conducted on a confidential bilateral basis; however, in July 2009, the Commission published a new framework for considering Canadian ownership reviews, setting out four possible paths for review, ranging from a confidential bilateral process to an open multi-party public hearing. Factors to be considered in determining the appropriate process will include the complexity and novelty of the transaction and structure, the potential precedential value, and whether the record would be improved by third party submissions and a full hearing. Depending on the nature of the transaction and the route selected by the Commission, applications may be processed in as little as three months, and as much as 12 months.

Pre-merger notification to the commissioner of competition is required, commencing an initial 30-day waiting period, during which the parties cannot close the transaction. If the commissioner requests additional information from the parties during that period, the waiting period is extended to 30 days after the additional information is filed. The commissioner may also apply to the Competition Tribunal to extend the period in which the transaction may not close. Although not required to make a final decision, within the waiting period, as to whether to challenge all or part of the proposed transaction, the commissioner has established non-binding service standards for completion of the commissioner's review: up to 14 days for non-complex mergers; up to 10 weeks for complex mergers; and up to five months for very complex mergers.

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