

A close-up photograph of several gold and silver coins. The top coin is gold and features a detailed maple leaf design. Below it, a silver coin is visible with the words "FINE SILVER" embossed on its edge. The coins are set against a dark red background with a diagonal split.

# Canada: Broadcasting and Telecommunications Law Overview





## Exemption Orders

The CRTC also has the power to issue exemption orders, thereby exempting persons from any or all of the requirements of Part II of the *Broadcasting Act* where compliance will not contribute in a material way to the implementation of broadcasting policy. 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, low power radio services and small cable systems. Undertakings that meet the conditions set out in the applicable order are authorized to operate, without further assessment or approval of the CRTC.

Perhaps the most discussed exemption order is that pertaining to digital media broadcasting undertakings, which provide broadcasting services that are delivered and accessed over the internet or delivered using point-to-point technology received by way of mobile devices. Such services, which were originally referred to as “new media broadcasting services”, have been exempted from licensing since 1999, and repeatedly renewed, although the conditions were revised in 2012 to introduce new conditions on the offering of digital media services to align with the CRTC’s regulatory framework for vertically integrated broadcasters, including, for example a prohibition on the offering of programming on exclusive or otherwise preferential basis where access to the programming is dependent on the subscription to a specific mobile or retail Internet access service.

## Restrictions on Foreign Ownership

Pursuant to section 26(1) of the *Broadcasting Act*, the Governor in Council has the discretionary power to issue binding directions to the CRTC. A Cabinet direction has been issued prohibiting the issuance and the granting of broadcasting licence renewals to governments other than the Government of Canada and to persons who are not Canadian citizens or “eligible Canadian corporations”.

For corporate licensees, the Direction provides that in order 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.
- the corporation must not otherwise be controlled by non-Canadians (i.e., “control in fact”).

In the case of a company that is a subsidiary of another, the parent must also be incorporated in Canada or a province and Canadians must own at least two-thirds of the parent company’s voting shares and at least two-thirds of the votes. Neither the



parent company nor its directors or similar officers may exercise control or influence over any programming decisions of the subsidiary.

There are no specific restrictions on the number of non-voting shares that may be owned by non-Canadians. There is an overriding control in fact test, however, whereby an applicant seeking to acquire, amend, or renew a broadcasting licence must not otherwise be controlled in fact by non-Canadians. This is a question of fact determined by the CRTC in its discretion.

The *Broadcasting Act* does not contemplate licences being issued to partnerships. As a result, when licensing partnerships, the CRTC takes the view that it must license each of the individual partners, which means that each such partner must meet the Canadian ownership requirements, regardless of the size or nature of the partnership interest.

### **Canadian Content**

Another key element of the broadcasting policy set out in section 3(1) of the *Broadcasting Act* is the “creation and presentation of Canadian programming” and the “maximum use and in no case less than predominant use, of Canadian creative and other resources”. This has led to CRTC regulations requiring that 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 55 per cent Canadian programming overall, with further requirements between 6am and 12am. 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 subsidize the production of Canadian programming. As the result of a new group-based licensing framework announced in March 2010, private English-language television services that are part of large ownership groups (groups with over \$100 million in annual broadcasting revenues, owning conventional television stations and at least one pay or specialty service) are able to flexibly allocate the aggregate of their required expenditure spending to any services within the ownership group. Overall Canadian programming expenditures for eligible ownership groups are required to amount to at least 30 per cent of the group’s gross broadcasting revenues.

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 authorized 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.

All licensed broadcast distribution undertakings (BDUs), such as cable companies, must carry certain Canadian 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 direct-to-home (DTH)), whether the undertaking serves a predominantly French-language or predominantly English-language market, and whether the services are distributed using analogue or digital technology. As the scarcity upon which traditional regulation has been based erodes, the CRTC increasingly favours competition among programming services. Accordingly, many recently authorized services do not enjoy the genre protection afforded to older licensees, nor do they benefit from must-carry obligations.

While ‘over-the-top’ (OTT) 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 OTT 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. The Commission, however, has so far resisted such reforms. The CRTC found in October 2011 that there was insufficient evidence to demonstrate that either the presence of OTT programme providers or the greater consumption of OTT content by consumers is having a negative impact on the ability of the Canadian broadcasting system to achieve the objectives of the Broadcasting Act, or that there are structural impediments to a competitive response by licensed undertakings to the activities of OTT providers.

### **Radio Frequency Spectrum Allocation**

In addition to CRTC licensing, legislative provisions governing the allocation of the radio frequency spectrum and technical or “hardware” issues are prescribed in the *Radiocommunication Act*. The Minister of Industry is granted discretionary power under the *Radiocommunication Act* to regulate these technical aspects of broadcasting undertakings. The CRTC requires applicants for broadcast licences to confirm they have filed technical documents with Industry Canada concerning transmitter/antenna and related information.

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

## Telecommunications

### General

The *Telecommunications Act* responds in part to the Supreme Court of Canada's determination that jurisdiction over telecommunications common carriers rests exclusively with the federal government. For many years the question of jurisdiction had been unsettled, leading to an awkward mix of federal, provincial and even municipal regulation. In 2000, Saskatchewan Telecommunications (SaskTel), owned by the Saskatchewan Government, became the last of Canada's telephone companies to be brought under CRTC jurisdiction.

The *Telecommunications Act* is administered by the CRTC and requires the Commission to promote certain policy objectives, including the maintenance of Canada's identity and sovereignty, Canadian ownership and control of telecommunications carriers operating or providing services in Canada, the efficiency and competitiveness of Canadian telecommunications, the stimulation of Canadian research and development, and the provision of services at reasonable rates in light of market forces.

### Ownership

The *Telecommunications Act* and its associated regulations were amended in 2012 to require that only telecommunications common carriers (i.e. the entities that own or operate facilities) with greater than a 10% share of national telecommunications revenues must be Canadian owned and controlled. This requirement is satisfied if:

- a carrier is incorporated in Canada (either federally or provincially);
- 80% or more of the members of the carrier's board of directors are Canadian;
- not less than 80% of the carrier's voting shares are beneficially owned by Canadians; and
- the carrier corporation is not otherwise controlled by non-Canadians (i.e., "control in fact").

Regulations enacted under the *Telecommunications Act* have established a holding company arrangement with the effect of permitting foreign investment up to a level of 46.7% based upon 20% direct investment plus 33 1/3% indirect investment.

Since the focus of the Canadian ownership requirements is on voting shares, foreign investors often seek to maximize 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.

There can be 100% foreign ownership of telecommunications entities that do not own facilities (e.g. resellers of telecommunications services), as well as of telecommunications carriers whose revenues account for less than 10% of total Canadian telecommunications revenues.

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.

## Tariffs

Unless otherwise exempted or forborne, the provision of telecommunications services by a carrier will be subject to conditions included in a tariff approved by the CRTC. Such tariffs will specify the terms and conditions for the service as well as the rates to be charged. The CRTC will approve rates if it determines that they are just, reasonable and non-discriminatory.

The *Telecommunications Act* allows the CRTC to refrain from exercising its normal regulatory powers (forbearance) where it is of the view that the forces of competition will suffice to ensure reasonable rates and prevent discriminatory practices with respect to a class of telecommunications services. Traditionally, forbearance was treated as only one policy option of many available to the CRTC, though in recent years, the CRTC has forborne substantially from the regulation of wireless, long distance, satellite, international and retail Internet services, as well as many local telephone services in larger markets.

In December 2006, forbearance became the CRTC's default option, when the Government of Canada issued a policy directive stating that the CRTC should use market forces instead of regulation whenever possible. In April 2007, an Order-in-Council was passed establishing a presence-based test to be used by the CRTC to determine whether certain markets should be deregulated. The CRTC also has the power to exempt a class of carrier from the application of the *Telecommunications Act* if it is satisfied that the exemption is consistent with Canadian telecommunications policy objectives. The CRTC preference has been to issue conditional forbearance orders rather than exemption orders and to maintain a power to review alleged discriminatory practices.

Tariffs remain for many wholesale services offered by incumbent carriers to competing telephone and internet service providers. The Commission is also increasingly exploring the addition of additional conditions on some previously forborne services: for example, it began consideration in 2012 of the imposition on wireless service providers of a condition requiring compliance with a new uniform national consumer code respecting a range of terms and conditions of wireless service, other than price.



The CRTC is also given broad inspection, investigation and enforcement powers. Contravention of the *Telecommunications Act* can result in civil and criminal liability carrying fines of up to \$1 million. However, the CRTC itself does not have the power to fine telecommunications carriers or service providers for a breach of the *Telecommunications Act* or of the Commission's decisions or orders, although it does have the power to levy administrative monetary penalties on those that violate the Unsolicited Telecommunications Rules, and will have similar powers under Canada's Anti-Spam Law.

### **Unsolicited Telecommunications**

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 organizations. 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, as well as consumer protection legislation and regulations imposing restrictions on the activities of telemarketers, including, in some jurisdictions, the requirement that telemarketers be licensed in order to be eligible to operate.

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 2014, following the finalization of regulations enacted under that law. 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 certain existing business relationships, conspicuous publication of an electronic address and responses to requests for estimates or quotations.

### **Effect of Free Trade Agreements**

The primary effect of the FTA and NAFTA on the communications industry has been in the area of "enhanced" or "value-added" telecommunications. Neither the FTA nor

NAFTA applies generally to basic point-to-point telecommunications or to broadcasting, although NAFTA does restrict certain activities of national basic telecommunications service monopolies as a means of ensuring that they do not engage in anti-competitive behaviour.

Unlike the FTA, which left the issue of what qualifies as an “enhanced” service to be determined by the regulatory body of each country, NAFTA specifically defines “enhanced or value-added services” as telecommunications services that use computer processing applications that:

- act upon the format, content, code, protocol or similar aspect of a customer’s transmitted information;
- provide a customer with additional, different or restructured information; or
- involve customer interaction with stored information.

Thus, enhanced services include most services beyond basic and long-distance telephone services — for example, electronic mail, on-line information and data retrieval or processing, and even alarm systems.

Each NAFTA country is required to give other NAFTA countries’ carriers and providers of “enhanced or value-added services” the better of national treatment (no less favourable than treatment granted carriers of its own country) and most-favoured-nation treatment (no less favourable than treatment granted carriers of any other country). However, NAFTA countries may nonetheless maintain licensing schemes in respect of such services on reasonable and non-discriminatory terms. NAFTA also requires equal access to public telecommunications networks. Notably, NAFTA countries are not allowed to restrain trade by imposing discriminatory rules regarding the attachment of terminal equipment (or any other equipment) to public telecommunications transport networks.

Telecommunications covered by NAFTA are also subject to the general NAFTA rules respecting investment. Canada, like Mexico and the United States, has taken reservations that permit the retention and application of the Canadian ownership and control requirements described above.

### **General Agreement on Trade in Services (GATS)**

Canada has signed the GATS agreement that brought basic telecommunications services under the authority of the World Trade Organization (WTO). This agreement establishes multilateral rules for trade and investment in basic telecommunications services and makes any breach of the agreement subject to the WTO dispute settlement process.

Under its GATS commitments, Canada maintained its existing open regulatory regime as well as its foreign ownership rules for common carriers. Canada also adopted a reference paper on regulatory principles that was consistent with its existing regulatory system. While broadcasting services and the transport of DTH

and DBS satellite signals were excluded, Canada liberalized regulation relating to the provision of international services and domestic satellite services.

Canada has progressively removed traffic-routing rules for all international services and all satellite services. The last such rule ceased to apply as of March 1, 2000. The *Telecommunications Act* and the *Teleglobe Canada Reorganization and Divestiture Act* were amended in 1998 to provide for the licensing of submarine cables as well as to authorize the CRTC to put in place, for the first time, a licensing regime for international services.

The *Telecommunications Act* empowers the CRTC to require those falling into specified classes of basic telecommunications service providers to obtain licences to provide international telecommunications services. The new licensing power extends to resellers. The CRTC's licensing regime for Basic International Telecommunications Service (BITS) providers came into force on January 1, 1999. BITS licensees are not subject to foreign ownership restrictions.

## Radio Spectrum Management

Through powers conferred on the Minister of Industry (that can be and are delegated) pursuant to the *Radiocommunication Act*, Industry Canada is responsible for managing and allocating radio frequencies used in broadcasting and telecommunications as well as licensing and regulating radio apparatus. Relative to spectrum management, Industry Canada had historically employed a traditional first-come, first-served (FCFS) licensing practice, complimented by a comparative selection and licensing process, auctions in appropriate circumstances as well as international and domestic frequency allocation processes.

The FCFS approach is generally used where there is sufficient spectrum to meet the demand in a given frequency band, while a competitive licensing process has been used in the cases of radio frequencies for which demand is likely to exceed supply (as well as occasionally for policy reasons).

Increasingly, Industry Canada has assigned spectrum licences through public auctions. 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. For the 700 MHz auction, to be held late in 2013, there will be no set-aside of designated blocks solely for new entrants. There will be caps, however, on the maximum amount of spectrum any single operator can acquire within certain spectrum blocks. Moreover, large incumbents will be subject to more restrictive caps with respect to the most desired spectrum blocks in each licence area.

Licences generally restrict the use of licensed spectrum to a particular service or application, in line with government spectrum utilization policy.

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. Similarly, transfers of the 700 MHz spectrum that will be auctioned in 2013 will not be permitted during the first five years of the licence term, if such a transfer would allow the licensee in question to exceed the spectrum caps that are to govern the auction process.

# About the Firm

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When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

In fact, they made it their mission to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

Stikeman Elliott's leadership, prominence and recognition have continued to grow both in Canada and around the globe. However, we have remained true to our core values.

These values are what guide us every day and they include:

- Partnering with clients – mutual goals ensure mutual success.
- Finding original solutions where others can't – but they must also be grounded in business realities.
- Providing clients with a deep bench of legal expertise – for clear, proactive counsel.
- Remaining passionate about what we do – we relish the process and the performance that results from teamwork.

A commitment to the pursuit of excellence – today, tomorrow and in the decades to come – is what distinguishes Stikeman Elliott when it comes to forging a workable path through complex issues. Our duty and dedication never waver.

This is what makes Stikeman Elliott the firm the world comes to when it counts the most.

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