

## Canada to liberalize telecom sector foreign ownership restrictions

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In June 2008, the blue-ribbon Competition Policy Review Panel appointed by the federal government issued its report, *Compete to Win*, on how to raise Canada's standard of living through greater competition and productivity. A number of the report's recommendations to amend the federal *Competition Act* and the *Investment Canada Act* were implemented as part of the *Budget Implementation Act, 2009*. Now, it appears the government is ready to turn its attention to a recommendation to liberalize Canada's foreign ownership restrictions in certain economic sectors.

In the Speech to the Throne delivered on March 3, the Governor General revealed the government's intention to "open Canada's doors further to venture capital and to foreign investment in key sectors, including the satellite and telecommunications industries, giving Canadian firms access to the funds and expertise they need." Precisely how, and to what degree, the government intends to liberalize these restrictions is unknown, however "open[ing] Canada's doors further" to foreign investment will require statutory amendments and changes to applicable regulations.

At present, foreign ownership rules for telecom carriers may be summarized as follows:

- > at least 80% of the members of the board of directors of the carrier are Canadian;
- > non-Canadians may not beneficially own, directly or indirectly, more than 20% of the carrier's voting shares;
- > non-Canadians may not beneficially own directly or indirectly more than 33 1/3% 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 (*i.e.*, "control in fact").

Since the focus of these requirements is voting shares, foreign investors often seek to maximize ownership through non-voting securities. So long as the 20% limit at the carrier level and 33 1/3% limit at the holding company level for Canadian ownership of voting shares is respected, the question of compliance shifts to whether the carrier's ownership structure satisfies the highly fact-specific (and, as the recent case involving Globalive showed, potentially controversial) "control in fact" test.

Keeping in mind that it remains to be seen precisely how, and to what degree, the government will liberalize these restrictions, it will be interesting to see if the government follows the recommendation in the *Compete to Win* report to "adopt a two-phased approach" to liberalization, and, moreover, whether, as

we would expect, it will restrict liberalization to the telecom sector and not, as the report recommended, extend it to the broadcasting sector. In this regard, the *Compete to Win* report recommended i) amending the *Telecommunications Act* “to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada,” followed by ii) “a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions [and then liberalization] in a manner that is competitively neutral for telecommunications and broadcasting companies.”

With the government having made clear its intention to liberalize telecom sector foreign ownership restrictions, we now await details about the government’s specific plans for liberalization. Some details could come as early as March 4, when the Minister of Finance tables the government’s 2010 budget. Using the budget for this purpose could set the stage for implementation of the liberalization as part of the ensuing budget implementation legislation, as was done in 2009 for the previously noted *Competition Act* and *Investment Canada Act* amendments. Of course, it also could be left to Industry Minister Tony Clement to reveal details about the government’s plans, and to introduce legislation implementing the government’s liberalization of the telecom sector foreign ownership restrictions.

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