

Blakes Bulletin

Communications

CRTC Denies Globalive's Entry into Wireless Market

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In a widely anticipated decision, Canada's national communications regulator, the Canadian Radio-television and Telecommunications Commission (the Commission), announced on October 29, 2009, that Globalive Wireless Management Corporation (Globalive) is controlled in fact by non-Canadians and that Globalive is not eligible to operate as a carrier in the Canadian wireless market, as currently structured. Despite the rejection, the decision leaves open the door for Globalive to return to the Commission with an amended governance and financial structure.

While the decision notes the numerous concessions made by Globalive during the course of the proceeding and several additional changes to the governance structure that the Commission proposed in its decision, the major stumbling block was the fact that Orascom Telecom, a strategic investor, held virtually all of the debt and 65% of the equity.

Globalive was a successful bidder in the Advanced Wireless Services Spectrum Auction. As a result of that auction, it and a number of other new entrants were granted spectrum licences by Industry Canada in 2009. However, in order to operate as a Canadian carrier, Globalive is also subject to an ownership and control review by the Commission under Canada's *Telecommunications Act*. In order to be Canadian owned and controlled, a corporation operating as a telecommunications common carrier in Canada must meet the following requirements:

- at least 80% of its board of directors must be individual Canadians;
- Canadians must own at least 80% of its voting shares; and
- the corporation must not be otherwise controlled in fact by non-Canadians
- in addition, at least two-thirds of the voting shares of a Canadian carrier's parent company must also be held by Canadians.

The test for control in fact is dependent on the particular facts of each situation and, therefore, the control in fact assessment is highly subjective and presents the greatest difficulties in practice. In addition, a wireless carrier must also meet the same foreign ownership requirements pursuant to Canada's *Radiocommunication Act* in order to be granted a spectrum licence by the Minister of Industry. In other words, a public mobile wireless carrier such as Globalive must undergo two separate foreign ownership assessments: one by the Minister of Industry and the other by the CRTC, to ensure that it is not controlled by non-Canadians.

Orascom Telecom is an international wireless telecommunications company, controlled by Weather Investments. In 2008, Orascom Telecom decided to invest in Globalive by partnering with AAL Telecom, a Canadian telecommunications service provider owned and controlled by Mr. Tony Lacavera, a Canadian entrepreneur.

Orascom Telecom and Weather Investments have over 100 million wireless customers in various countries around the world, including Greece, Italy, Algeria, Egypt, Pakistan, Tunisia and Bangladesh. Due to its size and influence, Orascom Telecom has asserted to be able to purchase telecom equipment from Alcatel-Lucent at prices that are 30% less than France Telecom can negotiate. The wireless revenues of Orascom and its affiliates in 2008 were \$5.3-billion. The wireline revenues of Globalive in 2008 were just over \$120-million.

The decision is by no means the final word in this saga. As the Commission notes in the decision, the changes that were made by Globalive during the hearing, coupled with the additional changes required by the Commission in the decision, would be sufficient to overcome the remaining concerns that the Commission had regarding:

- the fact that Orascom holds 65% of the equity;
- Orascom's influence over strategic decisions arising from the Technical Services Agreement; and
- the access to an established WIND trademark.

However, Globalive would need to be able to arrange either independent debt financing or additional Canadian equity financing before the Commission would accept the structure.

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