Blake, Cassels & Graydon LLP June 2011

Blakes Bulletin

Communications

Wind Mobile's Ownership Structure Upheld

Wind Mobile has taken another step along what has become a long and difficult road, with many twists and turns. But whether the release of a Federal Court of Appeal decision, once again granting it the right to operate as a wireless carrier in Canada, is the end of this journey remains to be seen.

BACKGROUND

Globalive Wireless Management Corporation (Globalive), now operating as Wind Mobile, successfully bid for various blocks of radio spectrum in Industry Canada's Advanced Wireless Spectrum Auction in 2008. However, before Wind Mobile could begin operations in Canada, its ownership structure also had to be approved by Canada's national telecommunications regulator, the Canadian Radio-television and Telecommunications Commission (the CRTC).

As noted in our October 2009 *Blakes Bulletin*, the CRTC conducted a lengthy hearing into Wind Mobile's ownership structure and concluded that it was controlled by a non-Canadian and therefore ineligible to operate in Canada as a telecommunications common carrier. The Minister of Industry immediately announced his intention to review the CRTC's decision.

As discussed in our December 2009 *Blakes Bulletin*, the Governor in Council issued an order-in-council overturning the CRTC's decision, finding in essence that Wind Mobile was owned and operated by Canadians. Public Mobile, another new entrant in the Canadian wireless market, then applied to the Federal Court for judicial review of the order-in-council.

In February 2011, the Federal Court quashed the order-in-council, finding that the Governor in Council had committed an error of law in relying on a previously unknown policy objective, namely, that the *Telecommunications Act* "... should be interpreted in a way that ensures that access to foreign capital, technology and experience is encouraged in a manner that supports all of the Canadian telecommunications policy objectives."

FEDERAL COURT OF APPEAL'S DECISION

The attorney general and Wind Mobile appealed the Federal Court decision. In a unanimous judgment, issued on June 9, 2011, the Federal Court of Appeal allowed the appeal and restored the order-in-council, finding that policy considerations did not play a role in the Governor in Council's decision. Rather, the Governor in Council simply reached a different conclusion after considering the same facts and applying the same law as the CRTC. As succinctly noted in the Court's reasons for judgment: "It is clear that in reaching its decision on control in fact, the Governor in Council decided the issue without referring at all to any policy issues."

The Federal Court of Appeal went on to note that the Governor in Council can incorporate policy considerations and take into account the statutory context in deciding whether a company is in fact controlled by a non-Canadian, provided that any such policies operate within the limits of the policy objectives enunciated in the Act. In this case, the Federal Court of Appeal noted that the promotion of foreign investment advanced a number of other policy objectives set out in the Act.

NEXT STEPS

Preliminary indications are that Public Mobile will seek leave to appeal the decision to the Supreme Court of Canada. However, it is not at all certain that the Supreme Court would agree to hear the appeal. In any event, this current decision gives the federal government some time to consider its options before deciding whether to introduce legislation to further reduce foreign ownership restrictions for telecommunications common carriers in Canada – something the government has suggested it would do in both the 2010 and 2011 Throne Speeches.

CONT'D ON PAGE 2

©2011 Blake, Cassels & Graydon LLP

CONT'D FROM PAGE 1

If you have any questions on this or other regulatory issues in the area of communications policy and regulation in Canada, please contact:

Ottawa	Gary Jessop	613-788-2224
	David Kidd	613-788-2203
	David Peaker	613-788-2237
	Andrée Wylie	613-788-2200
Montréal	Sunny Handa	514-982-4008
	Tricia Kuhl	514-982-5020
	Joanna Myszka	514-982-5093
Toronto	Richard Corley	416-863-2183
	Mark Graham	416-863-3056
Calgary	Monica Sharma	403-260-9782
Vancouver	Francis Chang	604-631-3332

To learn more about Blakes Communications Group, click here.

Go to **blakes.com/english/subscribe.asp** to subscribe to other *Blakes Bulletins*.

MONTRÉAL OTTAWA TORONTO CALGARY VANCOUVER
NEW YORK CHICAGO LONDON BAHRAIN AL-KHOBAR* BEIJING SHANGHAI* **blakes.com**
* Associated Office

Blakes periodically provides materials on our services and developments in the law to interested persons. If you do not wish to receive further *Blakes Bulletins*, please click **here**. For additional information on our privacy practices, please contact us at **privacyofficer@blakes.com**. *Blakes Bulletin* is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. We would be pleased to provide additional details or advice about specific situations if desired. For permission to reprint articles, please contact Blakes Marketing Department at 416-863-2403 or **lynn.spencer@blakes.com**. ©2011 Blake, Cassels & Graydon LLP