

Federal Court of Appeal



Cour d'appel fédérale

Date: 20110608

**Dockets: A-78-11
A-79-11**

Citation: 2011 FCA 194

**CORAM: SEXTON J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

**GLOBALIVE WIRELESS MANAGEMENT CORP. and
ATTORNEY GENERAL OF CANADA**

Appellants

and

**PUBLIC MOBILE INC.
and TELUS COMMUNICATIONS COMPANY**

Respondents

and

**ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS,
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, and
FRIENDS OF CANADIAN BROADCASTING**

Interveners

Heard at Ottawa, Ontario, on May 18, 2011.

Judgment delivered at Ottawa, Ontario, on June 8, 2011.

REASONS FOR JUDGMENT BY:

SEXTON J.A.

CONCURRED IN BY:

DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

[1] The *Telecommunications Act*, S.C. 1993, chapter 38 (the “Act”), requires that a company be Canadian-owned and controlled in order to be eligible to operate in Canada as a telecommunications common carrier. These appeals concern whether Globalive Wireless Management Corp. (“Globalive”) satisfies that requirement. The Governor in Council held that it does, and issued an Order in Council varying a decision of the Canadian Radio-television and Telecommunications Commission (the “CRTC”) that had concluded Globalive was controlled by a non-Canadian. On an application for judicial review in the Federal Court, the applications judge then quashed the Order in Council: 2011 FC 130. Both Globalive and the Attorney General appealed from that decision. By order of this court, the appeals have been consolidated. The style of cause is hereby amended to reflect the true appellants and respondents in the appeals.

[2] For the reasons that follow, the appeals will be allowed and the Order in Council restored.

Factual background

[3] The electromagnetic spectrum used for wireless telecommunications is owned and administered by the federal government. In order to operate, a telecommunications company requires a licence permitting it to use certain frequencies. In 2007 and 2008, the government held an auction for spectrum licences for advanced wireless services in the 2 gigahertz range. Though some frequencies were made available to all bidders, others were open only to new entrants. The winning bids totalled approximately \$4.25 billion.

[4] Globalive successfully bid on thirty licences at a price of more than \$442 million, covering a population of about 23 million people. Globalive is wholly owned by Globalive Investment Holdings Corporation (“Globalive Holdings”). 66.68 percent of voting shares in Globalive Holdings are owned by AAL Holdings Corporation (“AAL”), and 32.02 percent of the voting shares are owned by Orascom Telecom Holding (Canada) Limited (“Orascom”). Orascom is a subsidiary of Orascom Telecom Holding S.A.E. (Egypt). It is common ground that AAL qualifies as a Canadian corporation, and that Orascom does not. Because Orascom owns all non-voting shares in Globalive Holdings, it owns 65.08 percent of the company’s total equity, compared to 34.25 percent owned by AAL.

[5] On March 13, 2009, the Minister of Industry issued spectrum licences to Globalive and all other successful bidders. The CRTC then convened a hearing to address concerns about Globalive’s ownership structure. Globalive was a party to that proceeding, and other interested parties were invited to participate. Public Mobile Inc. (“Public Mobile”) did not participate in the CRTC proceedings by either written or oral submissions.

[6] On October 29, 2009, the CRTC issued Telecom Decision 2009-678 (later amended slightly by Telecom Decision 2009-678-1, issued November 4, 2009), in which it concluded that Globalive is controlled by a non-Canadian and is therefore not eligible to operate as a telecommunications common carrier. The next day, the Minister of Industry announced that he intended to review the CRTC decision. He invited submissions from those who had participated in the CRTC hearings, as

well as the provinces. The Minister also received comments from parties whose views were not directly solicited, including Public Mobile.

[7] On December 10, 2009, the Governor in Council issued the Order in Council, finding that Globalive is not controlled by a non-Canadian, and thus Globalive became eligible to operate in Canada.

Relevant legislation

[8] Section 7 of the Act sets out the objectives of Canadian telecommunications policy:

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;

b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

- | | |
|--|--|
| <p>(d) to promote the ownership and control of Canadian carriers by Canadians;</p> | <p>d) promouvoir l'accèsion à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;</p> |
| <p>(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;</p> | <p>e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;</p> |
| <p>(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;</p> | <p>f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;</p> |
| <p>(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;</p> | <p>g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;</p> |
| <p>(h) to respond to the economic and social requirements of users of telecommunications services; and</p> | <p>h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;</p> |
| <p>(i) to contribute to the protection of the privacy of persons.</p> | <p>i) contribuer à la protection de la vie privée des personnes.</p> |

[9] Subsection 16(1) of the Act lists the requirements for operating as a telecommunications common carrier (a broad term meaning “a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation”). The first requirement is that the carrier be Canadian-owned and controlled.

According to subsection 16(3), Canadian ownership and control is defined by three requirements:

(a) at least eighty percent of the corporation's board members must be individual Canadians; (b) individual Canadians must beneficially own at least eighty percent of the corporation's voting shares; and (c) the corporation must not otherwise be controlled by persons who are not Canadians (often referred to as the "control in fact" test):

16. (1) A Canadian carrier is eligible to operate as a telecommunications common carrier if

(a) it is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province; or

(b) it owns or operates only a transmission facility that is referred to in subsection (5).

...

(3) For the purposes of subsection (1), a corporation is Canadian-owned and controlled if

(a) not less than eighty per cent of the members of the board of directors of the corporation are individual Canadians;

(b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than eighty per cent of the corporation's voting shares issued and

16. (1) Est admise à opérer comme entreprise de télécommunication l'entreprise canadienne qui :

a) soit est une personne morale constituée ou prorogée sous le régime des lois fédérales ou provinciales et est la propriété de Canadiens et sous contrôle canadien;

b) soit n'est propriétaire ou exploitante que d'une installation de transmission visée au paragraphe (5).

[...]

(3) Pour l'application du paragraphe (1), est la propriété de Canadiens et est contrôlée par ceux-ci la personne morale :

a) dont au moins quatre-vingts pour cent des administrateurs sont des Canadiens;

b) dont au moins quatre-vingts pour cent des actions avec droit de vote émises et en circulation sont la propriété effective, directe ou indirecte, de Canadiens, à l'exception de celles qui sont détenues à titre de sûreté

outstanding; and

(c) the corporation is not otherwise controlled by persons that are not Canadians.

(4) No Canadian carrier shall operate as a telecommunications common carrier unless it is eligible under this section to operate as such.

...

uniquement;

c) qui n'est pas par ailleurs contrôlée par des non-Canadiens.

(4) Il est interdit à l'entreprise canadienne d'opérer comme entreprise de télécommunication si elle n'y est pas admise aux termes du présent article.

[...]

[10] Subsection 12(1) of the Act allows the Governor in Council to vary or rescind a decision of the CRTC within one year of the CRTC's decision:

12. (1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.

12. (1) Dans l'année qui suit la prise d'une décision par le Conseil, le gouverneur en conseil peut, par décret, soit de sa propre initiative, soit sur demande écrite présentée dans les quatre-vingt-dix jours de cette prise, modifier ou annuler la décision ou la renvoyer au Conseil pour réexamen de tout ou partie de celle-ci et nouvelle audience.

Decisions below

CRTC decision

[11] The CRTC began by considering the first two branches of the ownership and control test in subsection 16(3) of the Act: the requirements that eighty percent of the board members be

individual Canadians, and that Canadians beneficially own at least eighty percent of the voting shares. It held that both of these were satisfied on the uncontested facts.

[12] On the issue of composition of the board, nine of Globalive's eleven directors must be individual Canadians pursuant to its shareholders' agreements, and so the CRTC held that company satisfied paragraph 16(3)(a).

[13] The ownership requirement comes from paragraph 16(3)(b). The term "Canadian" is defined for the purposes of section 16 of the Act by subsection 2(2) of the *Telecommunications Common Carrier Ownership and Control Regulations*, SOR/94-667 (the "Regulations"). That provision defines Canadian as, among other things, a "qualified corporation." The latter term is itself defined in subsection 2(1) of the Regulations as a corporation in which at least two-thirds of voting shares are owned by Canadians, and which is not otherwise controlled by non-Canadians. Globalive is wholly owned by Globalive Holdings. Because 66.68 percent of its voting shares are owned by AAL, the CRTC held that Globalive Holdings in turn qualifies as Canadian under the Regulations.

[14] The CRTC turned next to the requirement under paragraph 16(3)(c) that Globalive not otherwise be controlled by non-Canadians. The CRTC held that Globalive does not meet this requirement. The CRTC applied the test set out by the National Transportation Agency in its *Canadian Airlines* decision, (1993), 297-A-1993:

There is no one standard definition of control in fact but generally, it can be viewed as the ongoing power or ability, whether exercised or not, to determine or decide the

strategic decision-making activities of an enterprise. It can also be viewed as the ability to manage and run the day-to-day operations of an enterprise. Minority shareholders and their designated directors normally have the ability to influence a company as do others such as bankers and employees. The influence, which can be exercised either positively or negatively by way of veto rights, needs to be dominant or determining, however, for it to translate into control in fact.

[15] The CRTC expressed concerns that a number of aspects of Globalive's corporate organization would give Orascom influence, including (a) Orascom's rights to appoint board members; (b) limitations on AAL's rights to dispose of its equity in Globalive Holdings; (c) the extent of Orascom's veto rights over corporate decisions; and (d) agreements between Globalive and Orascom under which Orascom provided Globalive with technical services and the right to use Orascom's WIND trademark. However, the CRTC noted that the combination of these factors would not have established that Orascom exercised "dominant and determining" control over Globalive (CRTC decision at paragraph 117).

[16] What tipped the balance for the CRTC was the fact that Orascom had provided approximately 99 percent of Globalive's debt financing, totalling approximately \$508.4 million. According to the CRTC, "debt levels and debt financing arrangements can be important indicia of where influence lies" (CRTC decision at paragraph 104). Globalive's reliance on Orascom – which the CRTC found may well increase in the future – combined with Globalive's apparent inability to find other financing created a situation where Orascom could exercise a great deal of continuing influence over Globalive. The combination of this debt with the CRTC's other concerns led the CRTC to conclude that Globalive was controlled in fact by Orascom, a non-Canadian (CRTC

decision at paragraphs 104-112, 118). The CRTC therefore held that Globalive is not currently eligible to operate as a telecommunications common carrier.

The Order in Council

[17] The Order in Council contains twenty-four unnumbered recital clauses, followed by a schedule analyzing the same elements of Globalive's corporate organization that the CRTC considered.

[18] The Governor in Council began by describing the CRTC's conclusions respecting control of Globalive. For ease of reference, I have numbered the recitals in the order in which they appear in the Order in Council:

[2] Whereas, in the Decision, the Commission determined that Globalive Wireless Management Corp. ("Globalive") has not met the Canadian ownership and control requirements set out in section 16 of the Telecommunications Act ("the Act") and is therefore not currently eligible to operate as a Canadian telecommunications common carrier;

[3] Whereas, in the Decision, the Commission identified four areas of concern relating to control in fact, namely, corporate governance, shareholder rights, commercial arrangements and economic participation of non-Canadians;

[4] Whereas, in the Decision, the Commission identified changes required to Globalive's corporate structure and documents, namely, the composition of the boards of directors, the definition of "Eligible Purchaser" and the threshold for veto rights, in order to address the Commission's concerns;

[5] Whereas, in the Decision, the Commission concluded that, despite the changes made to Globalive's corporate structure and documents and provided the additional required changes are made, the remaining levers of influence by a non-Canadian, namely, the fact that it holds 65% of the equity financing, is the principal source of technical expertise and provides access to an established wireless trademark, would not have caused it to conclude that Globalive did not meet the

Canadian ownership and control requirements if it was not for the fact that the same non-Canadian entity is providing the vast majority of Globalive's debt financing;

[19] The Governor in Council agreed with the CRTC that the *Canadian Airlines* test applied, and that "multiple levers of influence can, when combined, amount to control" (recitals 15 and 17). In this case, however, the Governor in Council concluded that Orascom's influence on Globalive did not amount to dominant or determining control (recital 18). Having reached this conclusion, the Governor in Council observed:

[22] Whereas the Governor in Council considers that the Decision deprives Canadians of the possibility for a more competitive wireless telecommunication market by preventing the roll-out of service to the public by a Canadian-owned and controlled company;

[23] And whereas the Governor in Council considers that this Order is based on the facts of this particular case and has a significant direct impact only on Globalive;

[20] The Governor in Council did refer in the recitals to some policy considerations:

[7] Whereas Canadian telecommunications policy objectives include rendering reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada, promoting the ownership and control of Canadian carriers by Canadians and enhancing the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

[8] Whereas the Minister of Industry took measures in the context of the Advanced Wireless Spectrum auction in 2007-2008 to encourage the emergence and participation of new entrants in order to foster greater competition in the Canadian wireless telecommunication market and further innovation in the industry and to respond to the requirements of Canadian users of telecommunication services with a goal of lower prices, better service and more choice for consumers and business;

...

[10] Whereas the Governor in Council considers that, when possible, the Canadian ownership and control requirements should be applied in support of the Canadian telecommunications policy objectives set out in the Act, including enhancing competition in the telecommunications market;

[11] Whereas the Canadian ownership and control requirements of the Act restrict the ownership of voting shares by non-Canadians, but the Act does not impose limits on foreign investment in telecommunication common carriers and 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 telecommunication policy objectives;

[21] The Governor in Council ordered that the CRTC decision be varied “as set out in the annexed schedule.”

[22] The schedule sets out additional reasons for the Governor in Council’s decision with respect to control in fact. The most significant difference between the reasoning of the CRTC and the Governor in Council relates to Orascom’s role providing the vast majority of Globalive’s financing.

It is worth setting out the Governor in Council’s reasoning in the schedule on this point in full:

15. There are no statutory restrictions on the amount of debt that a non-Canadian entity can provide to a telecommunications common carrier. However, debt levels and debt financing arrangements can be an indicator of where influence lies under the control in fact test.

16. In the present case, Orascom, the significant non-Canadian shareholder, has provided the bulk of Globalive’s current debt, which represents the vast majority of Globalive’s total financing, though it has been able to secure substantial third-party vendor financing.

17. The concentration of debt and equity in the hands of a single entity is not determinative of control in and of itself. However, it can create an opportunity for influence. In cases such as this one, where a company is heavily debt financed, this opportunity can translate into significant influence over the venture by the debt holder. The terms and conditions attached to this equity and debt financing are of

utmost relevance when assessing whether the level of influence associated with the financing, on balance, amounts to control in the hands of the non-Canadian, on its own or in combination with other levers of influence.

18. While the magnitude of the debt financing provided by Orascom, the relative debt to equity financing and the fact that the debt is concentrated in the hands of a single entity cause concern with the loans as a source of Orascom influence, the elimination of the positive and negative covenants, the lack of conversion rights, the lengthening of the term of the loan and renewal rights (thereby providing stability to Globalive), the right of Globalive to retire or replace the debt without penalty and the modifications to the default provisions of the loan go a long way toward minimizing this concern. The ability of Orascom to use the existing loans, or the terms attached to those loans, as levers of influence is sufficiently diminished.

19. The reliance on non-Canadians for future financing is not determinative of control in and of itself, but it can create an opportunity for influence. During the oral phase of the public hearing, Globalive noted that Orascom and AAL had planned to rely heavily on external financing to capitalize Globalive. However, following completion of the Advanced Wireless Spectrum auction, Globalive's efforts to obtain external financing to replace Orascom's coincided with a major downturn in the credit markets. Orascom indicated that it is not interested in remaining Globalive's major lender and is committed to transferring its loans to an outside party. While, at this time, Orascom remains the major source of debt financing for Globalive in the near term, it is expected that Globalive will be in a position to secure financing from third parties in the future.

20. In summary, such a significant concentration of debt in the hands of Orascom provides Orascom with influence over Globalive. However, given the exceptional terms and conditions of the lending instruments which severely restrict the protection afforded to the lender and the rights of Globalive to renew the debt for up to six years or to retire it at its entire discretion without penalty (so that the existence of those loans is not precarious), the debt financing provided by Orascom does not enable it to control in fact either the strategic or operational decisions of Globalive.

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.

Federal Court decision

[23] The applications judge began by holding that Public Mobile had standing to challenge the Order in Council. He also held that the standard of review applicable to the Order in Council was correctness.

[24] According to the applications judge, the Order in Council contained two reviewable errors. First, by stating in recital 11 that the Act should be interpreted in a way that encourages access to foreign capital, technology, and experience, the Governor in Council inserted a “previously unknown” policy objective into the Act and therefore considered an irrelevant factor (see reasons, paragraph 107). Second, the Governor in Council “acted outside the legal parameters of the Act” by stating in recital 23 that its decision impacted only on Globalive (see reasons, paragraph 118). The applications judge held that the Governor in Council cannot restrict its interpretation of the Act to one individual.

[25] The applications judge therefore quashed the Order in Council.

Analysis

Standard of review

[26] To begin with, the Governor in Council “has the power to do what the Courts cannot do which is to substitute his views as to the public interest for that of the Commission” (*CSP Foods v. Canada (Canadian Transport Commission)*, [1979] 1 F.C. 3 at 9-10 (C.A.) [*CSP Foods*]; see also *Re Davisville Investment Co. and City of Toronto* (1977), 15 O.R. (2d) 553 at 555-56 (C.A.)). A

decision of the CRTC may be reviewed in two ways. It may be appealed directly to this court with leave pursuant to section 64 of the Act, where both factual and legal issues will likely be reviewed on a reasonableness standard (see *Telus Communications v. Canada (CRTC)*, 2010 FCA 191 at paragraphs 33-34). The decision may also be reviewed by the Governor in Council pursuant to section 12. This procedure is very different than the section 64 appeal, and the Governor in Council reviews the CRTC's decision *de novo*. This Court is therefore reviewing the Order in Council. All aspects of the Order in Council are subject to judicial review.

[27] Counsel for the Attorney General argued that Orders in Council are immune from review, except for "jurisdictional error," and only in "egregious circumstances." He relied in this respect on the Supreme Court's decision in *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 [*Inuit Tapirisat*]. That case concerned an Order in Council made under section 64 of the *National Transportation Act*, R.S.C. 1970, chapter N-17, the predecessor of section 12 the Act. Writing for a unanimous court, Justice Estey held at page 756 that "the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of section 64(1)." Counsel also referred to *Thorne's Hardware v. The Queen*, [1983] 1 S.C.R. 106 at 111, where Justice Dickson (as he then was) wrote that "although, as I have indicated, the possibility of striking down an Order in Council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action."

[28] When the Court in *Inuit Tapirisat* spoke of reviewing orders in council on jurisdictional grounds, it was invoking a concept used in administrative law as it existed at that time.

“Jurisdictional question” then had a much wider meaning, encompassing what would today be considered mere errors of law or other reviewable defects. As Justice Stratas noted in *Canada (Canada Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, 400 N.R. 367 at paragraphs 41-42:

Long ago, courts interfered with preliminary or interlocutory rulings by administrative agencies, tribunals and officials by labelling the rulings as “preliminary questions” that went to “jurisdiction”: see, e.g., *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. By labelling tribunal rulings as “jurisdictional,” courts freely substituted their view of the matter for that of the tribunal, even in the face of clear legislation instructing them not to do so.

...

Quite simply, the use of the label “jurisdiction” to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.

[29] In *Inuit Tapirisat*, the Supreme Court was using the term jurisdictional in the broad sense that has since been rejected. Indeed, the Court in that case clearly acknowledged that the Governor in Council is constrained by statute and that its decision is invalid if it goes beyond the limits of that statute:

However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute (*Inuit Tapirisat* at 752)

That is exactly the sort of error alleged against the Governor in Council in the present case.

[30] In addition, the Supreme Court made clear in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], that the rule of law requires that all exercises of public authority be subject to scrutiny by courts. This principle is not limited to exercises of authority by recognized administrative tribunals. Though some decision-making is entitled to be reviewed on the standard of reasonableness, none is completely immunized from judicial review:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation...

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes (*Dunsmuir* at paragraphs 27-28) [emphasis added].

[31] In *League for Human Rights of B'nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 [*Odynsky*], this Court reviewed an Order in Council using the reasonableness standard. In my view, that standard also applies here. It is acknowledged by the parties that the Governor in Council applied the correct legal test. The Governor in Council's application of the control in fact test and its references to telecommunications policy objectives were decisions of mixed fact, policy, and law to which the reasonableness standard applies (*Dunsmuir* at paragraph 51; *Smith v. Alliance Pipeline*, 2011 SCC 7, 328 D.L.R. (4th) 1 at paragraph 26 [*Smith*]). The need for deference is underscored by the nature of the section 12 review process. Rather than giving this Court the exclusive right to review CRTC decisions, Parliament chose to vest concurrent review in the Governor in Council.

This tells us that the nature of the decision is not just a narrow matter of corporate law, but rather one with significant policy import. In *Odynsky*, this Court thoroughly considered the nature of the Governor in Council's authority. Justice Stratas said:

[76] In assessing the scope of a decision-maker's discretion, sometimes it is helpful to consider the nature of the body that is exercising the discretion. In subsection 10(1), Parliament has nominated the Governor in Council as the body to receive the report.

...

[78] In practical terms, then, a statute that vests decision-making in the Governor in Council implicates the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government.

[79] Did Parliament really intend in subsection 10(1) to restrict this body to a narrow date-setting function? Or did Parliament intend this body to review the entirety of the situation, as reflected in the Minister's report, and make a final substantive decision on whether citizenship should be revoked? In my view, the latter seems more plausible given the nature of this legislative scheme and the vesting of final authority in the Governor in Council.

...

[85] Under the standard of reasonableness, our task is not to find facts, reweigh them, or substitute our decision for the Governor in Council. Rather, our task is to ask ourselves whether the decision of the Governor in Council fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[86] ...Subsection 10(1) does not provide any specific criteria or formula for the Governor in Council to follow in carrying out this task. It leaves the Governor in Council free to act on the basis of policy, but those policies cannot conflict with the Act or its purposes.

[32] I adopt Justice Stratas' statements. However, I cannot accept the submission of Globalive and the Attorney General that the standard of review should be reasonableness "with a high degree of deference." This does not constitute a distinct standard of review under the *Dunsmuir* framework (*Almon Equipment v. Canada (A.G.)*, 2010 FCA 193, 405 N.R. 91 at paragraph 32; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at paragraph 18 [*Mills*]). *Dunsmuir* eliminated the patent unreasonableness standard (essentially reasonableness with extra deference) and made clear that there are now only two standards of review.

[33] However, the Court must apply the reasonableness standard with appropriate regard to the factual and legal context, particularly the identity of the decision-maker and the nature of the decision under review (*Canada (Canada Revenue Agency) v. Telfer*, 2009 FCA 23, 386 N.R. 212 at paragraph 29; *Mills* at paragraph 22). Because of the Governor in Council's policy function and expertise and the nature of the Order in Council, a broad range of decisions will fall within the range of reasonable outcomes (*Mills* at paragraph 22).

[34] Although the court in *Inuit Tapirisat* used jurisdictional language to describe such an error, I do not believe it constitutes a true question of jurisdiction or *vires* in the *Dunsmuir* sense of the term. While Public Mobile and Telus question whether the Governor in Council correctly applied paragraph 16(3)(c) of the Act, the error they allege is really just one of statutory interpretation (see *P.S.A.C. v. Canadian Federal Pilots' Assn.*, 2009 FCA 223, [2010] 3 F.C.R. 219 at paragraphs 39 and 49-50). They do not dispute that the Governor in Council has the authority to vary the CRTC's decision in appropriate cases.

[35] Public Mobile and Telus suggest that the standard of review concerning the Governor in Council's consideration of the section 7 policy objectives when applying the control in fact test is correctness. They say that this is a legal determination that warrants correctness review. In support of that, it could be argued that the Act is not a "home statute" for the Governor in Council, since the Governor in Council deals with issues arising from a variety of very different statutes. It arguably cannot be said that every one of those is a home statute. In support of the imposition of a reasonableness standard is the fact that the Governor in Council does deal with these statutes and is a broad policy body, and policies can come to bear in the interpretation of statutes. In light of *Dunsmuir* (see paragraphs 51-64) and *Smith* (see paragraph 26), it is not clear whether the standard of reasonableness or correctness applies when reviewing the Governor in Council's interpretation of the Act. However, I need not resolve this issue definitively in this appeal. I conclude below that the Governor in Council did not consider the section 7 policy objectives in applying the control in fact test. However, I also conclude that even if it had considered the policy objectives at that stage of its analysis, the Governor in Council would have been correct to do so.

The decision of the Governor in Council

[36] Public Mobile and Telus concede that Globalive satisfies the requirements of paragraphs 16(1)(a) and 16(1)(b) of the Act. The matter therefore turns on whether or not Globalive is in fact controlled by a non-Canadian.

[37] A significant point of contention between the parties relates to the structure of the Order in Council, and the role that recital 11 played in the Governor in Council's analysis. Globalive and the Attorney General submit that the Governor in Council applied the control in fact test without reference to policy considerations. The policy considerations came into play only when the Governor in Council decided to vary the CRTC decision after concluding that Globalive was not controlled in fact by a non-Canadian. According to Public Mobile and Telus, however, the reference in recital 11 to policy considerations informed the Governor in Council's application of the control in fact test. They argue that this was improper and constitutes a reviewable error.

[38] I agree with the Globalive and the Attorney General on this point. The Governor in Council began by discussing control. Even though the recitals 7, 8, 10, and 11 contained statements of policy, they did not specify what role those policy considerations played in the overall decision. The substantive analysis in the Order in Council began with recital 15, which contained the Governor in Council's legal decision to apply the *Canadian Airlines* test:

[15] Whereas the Governor in Council agrees with the Commission that the correct test for assessing control in fact was set out in the *Canadian Airlines* decision of the National Transportation Agency, as cited in paragraphs 34 and 35 of the Decision;

[16] Whereas the Governor in Council recognizes that the Commission came to its conclusion on Globalive's non-compliance with the ownership and control requirements based on an assessment of various factors that provide influence to the non-Canadian shareholder which in its view, when taken together, amount to control;

[17] Whereas the Governor in Council recognizes that multiple levers of influence can, when combined, amount to control, but considers that that is not the case with Globalive;

[18] Whereas the Governor in Council considers that, on the basis of a careful examination of the facts and submissions before the Commission, it is reasonable to conclude, for the reasons set out in this Order, that Globalive is not in fact controlled by persons that are not Canadian and therefore meets the Canadian ownership and control requirements under the Act and is eligible to operate as a telecommunications common carrier in Canada;

[39] Recital 18 contained the results of applying the *Canadian Airlines* test to the facts. The reference to the “reasons set out in this Order” must be understood as a reference to the schedule, which provided detailed reasons for the Governor in Council’s conclusion that Globalive was not controlled by a non-Canadian. There was no reference to policy objectives either in recitals 15 through 18 or in the comprehensive reasons set out in the schedule, nor was there any other indication that policy played a role in this part of the Governor in Council’s decision. It considered the same facts and the same law as the CRTC, and simply reached different conclusions. This is also supported by the Governor in Council’s statement in recital 12 that the test for Canadian ownership and control under the Act was comprised of “legal and factual” requirements. There was no mention of a policy element.

[40] After deciding that Globalive was not controlled by a non-Canadian, the Governor in Council went on to consider whether to vary the CRTC’s decision:

[19] Whereas subsection 12(1) of the Act provides that, within one year after a decision by the Commission, the Governor in Council may vary the decision on its own motion;

At this point, the policy considerations raised in recitals 7, 8, 10, and 11 became relevant.

[41] In my view, recital 22 provides the clearest indication that policy considerations played a role only at this stage of the Governor in Council's analysis, and that the Governor in Council, prior to taking into account policy considerations, had already decided that Globalive was not controlled by a non-Canadian. To be specific, the Governor in Council in effect was saying that Canadians are entitled to a more competitive wireless telecommunications market, and that this would be frustrated by Globalive, a Canadian owned and controlled company, being prevented from operating:

[22] Whereas the Governor in Council considers that the Decision deprives Canadians of the possibility for a more competitive wireless telecommunication market by preventing the roll-out of service to the public by a Canadian-owned and controlled company; [emphasis added]

[42] The Governor in Council clearly based its decision to vary at least in part on the policy concern that the CRTC's decision undermined competition in the wireless telecommunications market. This is essentially the application of the policy goals set out in recitals 7, 8, 10, and 11. As recital 22 stated, however, this policy decision was premised on the determination already made by the Governor in Council that Globalive was "a Canadian-owned and controlled company."

[43] Furthermore, reference to paragraphs 22-24 of the schedule also makes it abundantly clear that the Governor in Council decided the issue of control without reference to any issues of policy:

22. Despite these changes, certain avenues for influence by Orascom over Globalive remain. However, given the current Globalive structure and shareholder arrangements, including the terms and conditions of the shareholders' and financing agreements, it is reasonable to conclude that, in the circumstances of this case, these

elements taken together do not amount to influence that is either dominant or determining in Orascom's hands. In other words, Orascom does not have the ongoing ability to determine Globalive's strategic decision-making activities or to manage day-to-day operations.

23. In light of the above, Globalive is not controlled in fact by Orascom, a non-Canadian. Therefore, Globalive meets the requirements set out in section 16 of the Act and is currently eligible to operate as a telecommunications common carrier.

24. Any provisions in the Decision that are inconsistent with this Order shall be interpreted in accordance with this Order to the extent of the inconsistency.

[44] Public Mobile and Telus do not argue that Governor in Council's application of the control in fact test, which is primarily set out in the schedule, was unreasonable if it were not influenced by policy considerations. In my view, this part of the Governor in Council's analysis was clearly reasonable. The divergence between the CRTC and Governor in Council comes in the factual inferences, or conclusions, the Governor in Council drew from the evidence. The Governor in Council simply had a different appreciation of things, and that appreciation was rational and defensible.

[45] The question then becomes whether, having concluded without regard to policy that Globalive was not controlled in fact by a non-Canadian, it was proper for the Governor in Council to base its decision to vary the CRTC decision on policy considerations. Public Mobile and Telus did not argue that it was improper. In my view, it clearly was open to the Governor in Council, in deciding to vary the CRTC decision, to refer to policy considerations. By giving the variance power to a polycentric body such as the Governor in Council, Parliament signalled its intent that the

decision to vary could incorporate broader policy concerns. As this Court has noted, again about the predecessor to section 12:¹

It provides a means whereby the executive branch of government may exercise some degree of control over the Canadian Transport Commission to ensure that the views of the government as to the public interest in a given case...can be expressed by the executive and such views are implemented by means of directions which it may see fit to give the tribunal, through the Governor in Council. It is a supervisory role, as I see it, not an appellate role. The Governor in Council does not concern himself with questions of law or jurisdiction which is the ambit of judicial responsibility. But he has the power to do what the Courts cannot do which is to substitute his views as to the public interest for that of the Commission (*CSP Foods* at 9-10).

[46] Exercise of the variance power is meant to be informed by the telecommunications policy objectives set out in section 7 of the Act. In this case, the Governor in Council referred to a number of the enumerated objectives, including rendering reliable and affordable telecommunications services of high quality to both urban and rural Canadians (paragraph 7(b)), enhancing the efficiency and competitiveness of Canadian telecommunications, at the national and international levels (paragraph 7(c)), as well as promoting the ownership and control of Canadian carriers by Canadians (paragraph 7(d)).

[47] The applications judge held (at paragraphs 115-117) that the Governor in Council made a reviewable error by also relying on an objective not enumerated in section 7, stating in recital 11 that “the 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

¹ Until passage of the *Telecommunications Act* in 1993, the CRTC was regulated under the *National Transportation Act*. The Governor in Council’s review power under that legislation applied both to decisions of the Canadian Transportation Commission and the CRTC.

policy objectives.” I respectfully disagree with the applications judge’s conclusion that this was improper. Like any decision-maker, the Governor in Council must exercise its power in accordance with the purpose of the relevant statute (*Odynsky* at paragraph 86). However, the promotion of access to foreign capital, technology, and experience can further a number of the policy objectives enumerated in section 7, including the provision of reliable, affordable, and accessible telecommunications services (paragraph 7(b)), enhancing efficiency and competitiveness (paragraph 7(c)), fostering increased reliance on market forces (paragraph 7(f)), stimulating research and development (paragraph 7(g)), and responding to the economic and social requirements of telecommunications users (paragraph 7(h)).

[48] It also bears mentioning that the Governor in Council clearly recognized that any policies not enumerated in the Act have to operate within the limits of the objectives identified in section 7. It never purported to attach independent significance to the promotion of foreign investment. This is seen in recital 11, which states that access to foreign investment was to be encouraged “in a manner that supports all of the Canadian telecommunications policy objectives.”

[49] This is sufficient to justify allowing the appeal. I would add, further, as explained below, that it would not constitute a reviewable error for the Governor in Council in this particular case to consider appropriate policy considerations when applying the control in fact test. The position of Public Mobile and Telus is that the test set out in subsection 16(3) of the Act constitutes a self-contained statutory “recipe” for determining whether a telecommunications carrier is Canadian-owned and controlled. When applying this test, Public Mobile and Telus submit that there is no

room for the Governor in Council to consider the section 7 policy objectives. As I noted above, I assumed, without deciding, that the standard of review on this issue would be correctness.

[50] In my view, the Governor in Council is not restricted to assessing control in fact only as a corporate lawyer would. Once again, the fact Parliament chose to grant the Governor in Council the right to review the CRTC's application of the control in fact test implies the decision was intended to incorporate policy concerns when appropriate. The control in fact test is also necessarily contextual and somewhat imprecise. Determining where control in fact lies may require weighing a number of competing factors. The Governor in Council may legitimately consider the statutory context in deciding how to strike this balance.

[51] More broadly, paragraph 16(3)(c) is actually closely related to the objectives set out in section 7. It is intended to address concerns that a company controlled by a non-Canadian might be less committed than a Canadian-controlled company to the attainment of the telecommunications policy objectives. In other words, Parliament has decided that Canadian-controlled companies are more likely to further the section 7 purposes by, for instance, investing in Canadian telecommunications infrastructure or providing reliable telecommunications services to rural Canadians. Hence, reference to section 7 policies could be relevant to deciding whether a company was in fact Canadian-controlled.

[52] The applications judge also held that the Governor in Council made a reviewable error by suggesting in recital 23 that its decision applied to Globalive and not other similarly-situated

companies. Although the Globalive and the Attorney General argued that the applications judge erred by relying on recital 23, neither Public Mobile nor Telus disputed this. In any event, I am unable to see how this recital would affect the end result in this case.

Standing of Public Mobile

[53] While I respectfully disagree with the reasons of the applications judge on this issue, I do think he made the correct decision in granting Public Mobile standing to seek judicial review of the Order in Council.

[54] I believe Public Mobile is entitled to public interest standing. The test for this was set out by the Supreme Court in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 [*Canadian Council of Churches*]. Though *Canadian Council of Churches* was a *Charter* case dealing with an intervener, the same test applies in applications for judicial review and to parties seeking public interest standing (see *Odynsky* at paragraph 59). An applicant for public interest standing must satisfy the court that:

- a. a serious issue has been raised;
- b. it has a genuine or direct interest in the outcome of the litigation; and
- c. there is no other reasonable and effective way to bring the issue before the court.

[55] In seeking to challenge the Order in Council, Public Mobile has clearly raised serious issues relating to the interpretation of the Act as well as the application of the control in fact test in this case. There is also no reasonable and effective way to bring this issue before a court without resort

to public interest standing. Neither Globalive nor the Attorney General could reasonably be expected to challenge the Order in Council. Only Public Mobile did challenge it.

[56] Unless public interest standing is granted, the Order in Council would therefore effectively be immune from judicial review. Ensuring that no government action is beyond the reach of the courts is fundamental to the rule of law. Indeed, in *Canadian Council of Churches*, the Supreme Court wrote that “the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge” (at page 256; see also *Hy and Zel’s Inc. v. Ontario (A.G.)*, [1993] 3 S.C.R. 675 at 692). It is important that the requirements for public interest standing not be applied mechanistically (*Corporation of the Canadian Civil Liberties Assn. v. Canada (A.G.)* (1998), 40 O.R. (3d) 489 at 497 and 519 (per Charron J.A.), leave to appeal denied, S.C.C. Bulletin, 1999, p. 422). Instead, the court’s application of the test should be informed by the factual context and policy issues at play, including the spectre of immunizing government action from review by the courts and the public importance of the issue raised by the applicant (see *Odynsky* at paragraph 61; *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.); *Downtown Eastside Sex Workers United Against Violence Society v. Canada (A.G.)*, 2010 BCCA 439, 10 B.C.L.R. (5th) 33 at paragraph 41 [*Downtown Eastside Sex Workers*]).

[57] It is certainly true that courts must balance this consideration against the importance of preserving judicial economy and preventing commercial rivals from using judicial review as a tool of competitive warfare. However, where as in this case the interests of all Canadians are involved to an unusual degree, concerns about immunization become paramount. Though these concerns do not

give the court licence to ignore the *Canadian Council of Churches* test, I believe it is appropriate in this context to recognize that Public Mobile has sufficient interest in the outcome of this litigation to be granted public interest standing. *Canwest Global v. Canada (A.G.)*, 2008 FCA 207, 382 N.R. 365, in which this court held that an indirect commercial interest did not constitute a genuine interest in the outcome of the litigation for the purpose of public interest standing, is therefore distinguishable from this case. There were no concerns in *Canwest Global* about government action being immunized from judicial review.

[58] Counsel also briefly referred to the residual discretion to grant standing recognized by the Supreme Court in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 400 [*Professional Institute*], and *Canadian Egg Marketing Board v. Richardson*, [1998] 3 S.C.R. 157 at paragraph 33 [*Richardson*]. However, the nature and scope of this discretion remain unclear (see *Morgentaler v. New Brunswick*, 2009 NBCA 26, 344 N.B.R. (3d) 39 at paragraph 34; *Downtown Eastside Sex Workers* at paragraph 98 (per Groberman J.A., dissenting on other grounds)). Because I have concluded that Public Mobile is entitled to public interest standing, it is not necessary to consider whether it would also have been entitled to discretionary standing as set out by the Supreme Court in the *Professional Institute* and *Richardson* cases.

Conclusion

[59] The appeals will therefore be allowed, and the Order in Council will be restored. Globalive and the Attorney General are entitled to their costs throughout. No costs will be assessed for or against the interveners.

"J. Edgar Sexton"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-78-11 and A-79-11

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGHES
DATED FEBRUARY 4, 2011, NO. T-26-10**

STYLE OF CAUSE: Globalive Wireless Management Corp., and Attorney General of Canada v. Public Mobile Inc., and Telus Communications Company and Alliance of Canadian Cinema, Television and Radio Artists, Communications, Energy and Paperworkers Union of Canada, and Friends of Canadian Broadcasting

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 18, 2011

REASONS FOR JUDGMENT BY: Sexton J.A.

CONCURRED IN BY: Dawson J.A.
Stratas J.A.

DATED: June 8, 2011

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