Federal Court  Cour fédérale

Date: 20110204

Docket: T-26-10

Citation: 2011 FC 130

Ottawa, Ontario, February 04, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

PUBLIC MOBILE INC.

Applicant

and

ATTORNEY GENERAL OF CANADA, GLOBALIVE WIRELESS MANAGEMENT CORP., BELL CANADA, ROGERS COMMUNICATIONS INC., SHAW COMMUNICATIONS 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

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought under the provisions of section 18.1 of the *Federal Courts Act*, R.S. 1985, c. F-7 of a Decision dated December 10, 2009, made by the Governor in Council pursuant to section 12(1) of the *Telecommunications Act*, S.C. 1993, c. 38. By that Decision, the Governor in Council varied a Decision of the Canadian Radio-television and Telecommunications Commission (CRTC), Telecom Decision CRTC 2009-678. The Governor in Council determined that the Respondent Globalive Wireless Management Corp. met the requirements of section 16 of the *Telecommunications Act* and is currently eligible to operate as a telecommunications common carrier in Canada.

[2] For the reasons that follow, I find that the Applicant Public Mobile Inc. has standing to bring this Application, that the Decision of the Governor in Council is quashed, that the Judgment will be stayed for forty-five days and that costs are to be spoken to.

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For convenience, these Reasons are indexed as follows:

THE PARTIES

[3] The Applicant Public Mobile Inc. successfully participated in 2008 in an auction of radio frequency spectrum conducted by the Minister of Industry. As a result it proposed to commence operation as a telecommunications common carrier and to introduce wireless services sometime in 2010. Public Mobile received a letter from the CRTC stating that Public Mobile was required to satisfy the CRTC as to whether it complied with the Canadian ownership requirements of the *Telecommunications Act*. The Record indicates that as of the date of filing of the Record, Public Mobile was engaged in hearings before the CRTC in this respect.

[4] The Respondent Attorney General of Canada represents the Governor in Council in these proceedings.

[5] The Respondent Globalive Wireless Managements Corp. also successfully participated in the auction of radio frequency spectrum in securing the right to use radio frequencies that would permit it to provide wireless telecommunications services to the public subject to compliance with the provisions of the *Telecommunications Act*. The CRTC held a hearing as to whether Globalive

complied with the Canadian ownership requirements of that *Act*. The CRTC, in its Decision, determined that Globalive did not meet the provisions of section 16(1) of that *Act* in that it was controlled by a non-Canadian. The Decision of the Governor in Council reversed that determination.

[6] The Respondents Bell Canada, Rogers Communications Inc., Shaw Communications and Telus Communications, like Public Mobile and Globalive, also successfully participated in the auction of radio frequency spectrum. They were not required to demonstrate to the CRTC that they met the requirements of the *Telecommunications Act*, presumably since they had already been offering and providing wireless communication services in Canada. Only Telus appeared in these proceedings. It made submissions at the hearing supportive of the positions taken by the Applicant Public Mobile.

[7] The Alliance of Canadian Cinema, Television and Radio Artists; the Communications, Energy and Paperworkers Union of Canada and; Friends of Canadian Broadcasting were each granted intervener status in these proceedings. They were commonly represented by the same Counsel who provided written submissions and addressed the Court at the hearing. Those submissions were supportive of the positions taken by the Applicant Public Mobile.

BACKGROUND FACTS

[8] Long-distance wireless telecommunication in Canada is governed by federal statues, including the *Telecommunications Act*, *supra*, and the *Radiocommunication Act*, R.S. 1985, c R-2 and its *Regulations* SOR/96-484. The *Telecommunications Act* has an unusual history. It can be

traced back to the *Railway Act* 1903, 3 Edw. VII, c. 58, although it has undergone several revisions, consolidations and new enactments since that time.

[9] Wireless telecommunication is enabled by electronic devices which make use of the electromagnetic spectrum. This spectrum encompasses a broad range of radio frequencies which are treated as a public resource owned and administered by the federal government. The government determines what frequencies may be used by what persons and for what purposes. Certain portions of the frequency spectrum may become available for commercial use, such as by those offering cell phone services, and have been sold by auction conducted by the federal government. The auction relevant to the issues here commenced in the latter part of 2007 when the federal government publicly announced the licensing framework for the issuance of spectrum licences in the Advanced Wireless Services (AWS) band. The auction was held in mid 2008 and several parties were successful in acquiring AWS spectrum licences. Among them were Globalive, Public Mobile, Bell, Rogers, Shaw and Telus. Sums ranging up to over $900 million dollars were paid by various of these parties for such licences. Globalive paid over $440 million for its licences.

[10] The successful bidders then had to obtain a licence from the Minister of Industry under the provision of the *Radiocommunication Act* and *Regulations, supra*. Among the matters upon which the Minister had to be satisfied was that the party was “Canadian owned and controlled” within the meaning of section 10 of those *Regulations.* This section uses wording identical to section 16(3) of the *Telecommunications Act*, which will be discussed later. The Minister did not hold hearings or deliver a reasoned decision under the *Radiocommunication Regulations*. A licence was simply

issued. All parties, including Public Mobile, Globalive, Telus and the other corporate Respondents, received such a licence.

[11] The second hurdle was for Public Mobile and Globalive to demonstrate to the CRTC that each of them met the eligibility requirements of the *Telecommunications Act* and, in particular, Canadian ownership and control. For this purpose, these parties had to provide information and make submissions to the CRTC. The CRTC also invited submissions from other interested persons. It conducted separate hearings for each of Globalive and Public Mobile Inc. in public and *in camera*. On October 29, 2009, the CRTC released its Decision CRTC 2009-678 respecting Globalive. It determined that Globalive was in fact controlled by a non-Canadian and, therefore, it did not meet the requirements of section 16 of the *Telecommunications Act*, and was not currently eligible to operate as a telecommunications common carrier.

[12] Section 12 of the *Telecommunications Act* provides that, within a stipulated period, the Governor in Council may, on petition presented to it, or on its own motion, by order, vary or rescind a CRTC Decision or send all or a portion of it back for reconsideration. In this case, the Governor in Council on its own motion undertook a review of the CRTC Decision. Section 13 of the *Act* requires that each province be given the opportunity to make submissions. This was done. The parties, including Globalive and Public Mobile, made further written submissions to the Governor in Council. Other submissions may have also been received. The Attorney General's Counsel was asked by the Applicant's Counsel to produce copies of the documents referred to by the Governor in Council in coming to its Decision. The Attorney General's Counsel refused to do so.

[13] On December 10, 2009, the Governor in Council released its Decision P.C. 2009-2008, the effect of which was to vary the CRTC Decision aforesaid, and to determine that Globalive was not controlled in fact by a non-Canadian, and thus was eligible to operate in Canada as a telecommunications common carrier. This is the Decision that is the subject of this judicial review.

CRTC DECISION 2009-678

[14] The CRTC released its Decision, 2009-678, respecting whether Globalive fell within the provisions of the *Telecommunications Act*, on 29 October 2009. The CRTC determined that Globalive did not meet the requirements set out in section 16 of the *Act* and was currently not eligible to operate as a telecommunications common carrier. It concluded at paragraph 119 of its Decision:

> *119. In light of the above, the Commission finds that Globalive is controlled in fact by Orascom, a non-Canadian. Therefore, the Commission concludes that Globalive does not meet the requirements set out in section 16 of the Act and is not currently eligible to operate as a telecommunications common carrier.*

[15] The evidence before the CRTC constituted documents and submissions from Globalive. It appears that during the course of the proceedings, Globalive made certain amendments to some of the documents, particularly those related to financing arrangements between it and an entity known as Orascom Telecom Holding (Canada) Limited.

[16] At paragraph 30 of its Decision, the CRTC determined that Orascom was a non-Canadian entity within the meaning of the Regulations. This finding was not challenged by the Governor in Council.

[17] The matter of principal concern for the CRTC was whether Globalive met the requirements of subsection 16(3) of the *Telecommunications Act*, which states:

> *Canadian ownership and control*
>
> *16. (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 outstanding; and*
>
> *(*c*) the corporation is not otherwise controlled by persons that are not Canadians.*

[18] The first two of these provisions (a) and (b) are what are referred to as "legal control". The CRTC found that Globalive met these requirements. The Governor in Council did not vary that finding. That finding was not challenged at the hearing before me.

[19] The point of controversy as between the CRTC and the Governor in Council, and as argued before me at the hearing, was whether Globalive met the provision of subsection 16(3)(c) of the *Telecommunications Act*. This provision is referred to as "control in fact". The CRTC began its discussion as to this point at paragraphs 34 and 35 with reference to what has been called the *Canadian Airlines* decision. The Governor in Council acknowledged that this decision was pertinent

and no challenge in that respect was raised at the hearing before me. The CRTC wrote at paragraphs 34 and 35 of its Decision:

> ***Control in fact***
>
> *34. As noted in Broadcasting Decision 2007-429 (the CanWest[3] decision) and applied in Broadcasting Decision 2008-69 (the BCE[4] decision), the Commission considers that the appropriate test for assessing control in fact was set out in the Canadian Airlines decision[5] of the National Transportation Agency, now the Canadian Transportation Agency. In that decision, the National Transportation Agency found that:*
>
> > *…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.*
>
> *35. The National Transportation Agency went on to say that the determination of control in fact turns on the consideration of individual factors which, taken together, may result in a minority shareholder exerting control:*
>
> > *In all previous Canadian ownership reviews and enquiries, the Agency has not only looked at individual arrangements between the shareholders and the air carrier to determine where control in fact lies but has also examined all arrangements taken together to make the determination. Individual arrangements between the minority shareholder and the airline can each result in the minority shareholder exerting a degree of influence over the company.* ***Such influence, considered on an individual arrangement basis, may not be determining and may not result in the minority shareholder being able to exert control over the airline. All such influence taken together, however, may result in the minority shareholder being***

> ***able to exert a degree of influence which translates into control.*** *[emphasis added]*

[20] At paragraphs 36 and 37 of its Decision, the CRTC acknowledged that a careful consideration of the facts in a particular case was required, and enumerated four major matters that it would consider:

> *36. A determination of control in fact necessarily involves careful consideration of the facts in a particular case. Accordingly, past Commission decisions with respect to ownership and control are not binding or determinative. However, they are useful in providing guidance for the interpretation and application of the test for control in fact.*
>
> *37. Based on an analysis of all the information submitted in the course of this proceeding, the Commission considers that the following matters raise concerns relating to control in fact:*
>
> - *corporate governance;*
> - *shareholder rights;*
> - *commercial arrangements between Globalive and non-Canadians; and*
> - *economic participation of Globalive and non-Canadians.*

[21] As to the first of these four matters, corporate governance, the CRTC determined that consideration of three points was required: composition of boards of directors, quorum provisions, and the appointment of officers. At paragraph 38 of its Decision, it wrote:

> ***Corporate governance***
>
> *38. As noted in the BCE and CanWest decisions, specific corporate governance arrangements may have substantial implications for control in fact. In the present case, the relevant arrangements include those with respect to the composition of the boards of directors, quorum provisions, and the appointment of officers.*

[22] On the first point, composition of the boards of directors, the CRTC analyzed the facts and determined, at paragraph 45, that certain amendments were required to satisfy it on this point:

> *45. In the present case, the Commission considers that the revised board structure, including the role and composition of the selection committee, does not ensure that the nominees of the Canadian shareholder are sufficient in number to offset the influence of Orascom, a non-Canadian shareholder. In order to address this point, Globalive would have to amend its Shareholders' Agreement and corporate documents such that on each of the two boards, AAL nominates five directors, Orascom nominates four directors, and AAL and Orascom each nominate one Independent Director. There would be no further need for a selection committee.*

[23] On the second point, quorum provisions, the CRTC concluded at paragraph 49 that provided amendments were made as requested in paragraph 45, the quorum provisions could be satisfied:

> *Commission's analysis and determination*
>
> *49. Provided that the boards are reconstituted according to paragraph 45 above, the Commission considers that the revised quorum provisions ensure that the number of nominees of the Canadian shareholder is sufficient to offset the influence of Orascom.*

[24] On the third point, appointment of officers, the CRTC determined that it had no concern. At paragraph 53 it wrote:

> *53. The Commission has no concern with regard to the appointment of officers under the revised structure.*

[25] The second major matter addressed by the CRTC was shareholders' rights. In this regard, commencing at paragraph 54 of its Decision, the CRTC dealt with liquidity rights, eligible purchasers and veto rights. It concluded as to the first, liquidity rights, at paragraph 59 of its Decision that, even in their revised form, liquidity rights provided an indication of Orascom's influence over the venture:

> *Commission's analysis and determination*

> *59. The Commission considers that the liquidity rights in the revised documents are an improvement on the array of rights originally granted to Orascom as minority voting shareholder. Nevertheless, the liquidity rights, even in their revised form, provide an indication of Orascom's influence over the venture. The specification of a floor price and the imposition of a cap on the proceeds generated in the event that AAL sells its shares are inconsistent with the relative voting interests of the shareholders.*

[26] On the second point, eligible purchasers, the CRTC concluded at paragraph 64 of its Decision that certain amendments were required:

> *64. Accordingly, the Commission considers that Globalive should amend the definition of Strategic Competitor to include only entities which, taken together with their affiliates, hold more than a 10 percent share of the Canadian wireless market on a per-subscriber basis.*

[27] On the third point, veto rights, the CRTC concluded at paragraphs 71 and 72 of its Decision that further amendments were required:

> *Commission's analysis and determination*
>
> *71. The Commission notes that the modifications made to the veto rights are substantial. The addition of an ordinary course of business exception is an important step in allaying concerns that the veto rights grant Orascom influence over the operation of the wireless business. However, the Commission considers that the value of the spectrum is not an appropriate foundation on which to base the five percent veto threshold. The Commission considers that Globalive's enterprise value is a more appropriate measure.*
>
> *72. Accordingly, the monetary threshold for vetoes should be set at five percent of Globalive's enterprise value as determined by its board every two years, based on a third-party valuation.*

[28] The third major matter addressed by the CRTC was commercial arrangements between Globalive and non-Canadians. In that respect, the CRTC considered a Technical Services Agreement (TSA) and a Trademark Agreement.

[29] With respect to the Technical Services Agreement (TSA), the CRTC determined that such an agreement resulted in continued influence by Orascom over operating and strategic decisions related to Globalive's network. It wrote at paragraphs 82 to 84 of its Decision:

> *Commission's analysis and determination*
>
> *82. The Commission accepts that the TSA is a dual-purpose agreement in that it allows Globalive access to Orascom's considerable wireless operating expertise, including access to its global, preferred purchasing power, and it provides Orascom with certain financial benefits. The Commission notes that under the revised TSA, Globalive must pay a fixed fee to Orascom irrespective of whether services are rendered, and if it terminates the agreement, it must pay Orascom either an amount to be negotiated or $100 million less fees already paid, depending on the circumstances.*
>
> *83. Moreover, the Commission notes that the TSA provides Globalive with benefits that operate as key determinants of its success. It is this reliance by Globalive on Orascom that defines their relationship and allows Orascom the opportunity to influence a wide range of operating and strategic decisions.*
>
> *84. Given the significant benefits Globalive derives from the TSA, the Commission is of the view that Globalive will maintain the TSA for the foreseeable future. Consequently, the Commission considers that Orascom will continue to have influence over operating and strategic decisions related to Globalive's network.*

[30] With respect to the Trademark Agreement (WIND) the CRTC determined that it provided Orascom with influence over Globalive. It wrote at paragraph 89:

> *89. However, the Commission finds that Globalive's adoption and use of a trademark belonging to an Orascom affiliate do provide Orascom (or its controlling shareholder) with influence over Globalive because Orascom has the power to limit how the brand can be used.*

[31] The final major matter considered by the CRTC was economic participation of Globalive and non-Canadians. On this matter, the CRTC considered both equity participation and financing arrangements.

[32] As to equity participation, the CRTC determined that while there was an avenue of influence, it was not sufficient to convert that influence to control. It wrote at paragraphs 90 and 94:

> ***Economic participation of Globalive and non-Canadians***
>
> ***A. Equity participation***
>
> *90. The overall equity positions of the shareholders are the same under both the pre-hearing and the revised structures. The combination of Orascom's voting and non-voting shares in GIHC translates into 65.1 percent of Globalive's total equity.*
>
> . . .
>
> *94. Orascom's equity participation is 65.1 percent, which is consistent with levels of non-Canadian investment previously approved by the Commission.[9] The Commission is of the view that, while in the circumstances of this case the level of equity participation provides an avenue for influence, it is not sufficient on its own to convert that influence into control.*

[33] As to the financing arrangements, the CRTC devoted much attention to this matter in its Decision and determined, at paragraph 112, that the high level of debt in the hands of a non-Canadian was unacceptable. The CRTC began its discussion at paragraphs 95 and 96 of its Decision:

> ***B. Financing arrangements***
>
> *95. Orascom is the source of the vast majority of Globalive's debt, having advanced $442.4 million by way of a Spectrum Loan Agreement dated 31 July 2008 and committed a further $66 million under an Operating Loan Agreement dated 23 March 2008, for a total commitment of $508.4 million (collectively, the Orascom loan agreements). In addition to the Orascom loans, GCC, a wholly-*

> *owned subsidiary of GIHC, committed $400,000 to Globalive by way of a Loan Agreement dated 14 April 2008.*
>
> *96. According to the pre-hearing loan documents, the loans were to be due in full in August 2011, including an initial term and extensions. Interest was set at a rate of LIBOR[10] plus 12 percent for the initial term, LIBOR plus 15 percent for the first extension, and LIBOR plus 18 percent for the subsequent extension.*

[34] The CRTC's determination as to the financing arrangements led it to conclude that they were unacceptable. It wrote at paragraphs 104 to 112:

> *Commission's analysis and determination*
>
> *104. The Commission recognizes that there are no statutory restrictions on the amount of debt that a non-Canadian can provide to a telecommunications common carrier. However, debt levels and debt financing arrangements can be important indicia of where influence lies. As stated in the CanWest decision, the concentration of debt and equity in the hands of a single foreign entity can create an opportunity for undue influence over the venture by that non-Canadian entity:*
>
> > *The Commission was concerned that if a Goldman, Sachs & Co. entity was the lead syndicator with respect to the debt, or if it were the major debt holder under any of the lending agreements, this together with GSCP's equity interest could result in undue influence over the venture by a non-Canadian.[12]*
>
> *105. In the case of the CanWest decision, the non-Canadian shareholder holding 65 percent of the equity was also providing a significant amount of the debt. Prior to the oral phase of that proceeding, the Commission expressed concern regarding the proposed level of debt, and during the oral phase, CanWest confirmed that the percentage of the debt held by the non-Canadian investor had been reduced to less than 20 percent and that Goldman, Sachs & Co. would not be lead syndicator.*
>
> *106. In the present case, Orascom, the significant non-Canadian equity holder, has provided approximately 99 percent of Globalive's current debt, excluding some third-party vendor financing, which represents the vast majority of Globalive's total financing.*

107. The concentration of debt and equity in the hands of a single entity can create an opportunity for influence. In circumstances such as the present, where a company is heavily debt financed, this opportunity can translate into significant influence over the venture by the debt holder.

108. The magnitude of the debt 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 the Commission concern with the loans as a source of Orascom influence. The modifications to the covenants and terms of the loans do little to reduce this concern. Furthermore, the Commission notes that covenants similar to those deleted from the Orascom loan agreements are still contained in Schedule A to the Shareholders' Agreement.

109. In addition to the above-noted concerns, the Commission considers that a company's inability to obtain financing from third-party sources may also be relevant to the issue of control in fact. As noted in the Unitel decision, "In certain circumstances it may be possible to conclude that a non-Canadian shareholder or lender may have a considerable amount of leverage, and even control, over a cash-strapped telecommunications common carrier."[13]

110. 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 AWS auction, Globalive's efforts to obtain external financing to replace Orascom's loans 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. However, at this time, Orascom remains the major source of financing for Globalive in the near term.

111. Globalive stated during the oral phase of the public hearing that the capital investment required for a national wireless start-up is well over $1 billion. Having raised approximately $600 million, Globalive will require significant further capital in order to complete its network rollout. The Commission considers that Globalive's dependence upon Orascom for financing may well increase in the near term, given its inability to date to attract substantial third-party financing.

112. It is the Commission's view that such a significant concentration of debt in the hands of Orascom, representing the vast majority of Globalive's enterprise value, serves to provide Orascom

> *with leverage over Globalive. Given Orascom's equity interest in Globalive, such a high level of debt in the hands of a non-Canadian is unacceptable.*

[35] The conclusion reached by the CRTC was set out at paragraphs 113 to 119 of its Decision. It determined that each of the factors considered may lead to an avenue for influence, when combined they translated into the ability to control in fact (see section 16(3)(c) of the *Telecommunications Act, supra*). It wrote:

> ***Conclusion***
>
> *113. The Commission considers that each of the factors addressed above provides Orascom, a non-Canadian, with an avenue for influence over Globalive. While disparate points of influence may not individually result in control, when combined they can translate into the ability to control in fact.*
>
> *114. As noted above, control in fact is only established where influence is dominant or determining. In particular, the issue is whether or not there is an ongoing power or ability, whether exercised or not, to determine the strategic decision-making activities of a corporation or to dominate the ability to manage and run its day-to-day operations.*
>
> *115. Globalive has made numerous significant changes to its corporate structure and documents in order to address many of the Commission's concerns. In this decision, the Commission has identified additional changes that are necessary to address certain remaining concerns with respect to Orascom's influence over Globalive. These changes relate to the composition of the boards of directors, liquidity rights, and the threshold for veto rights.*
>
> *116. Notwithstanding these additional changes, significant concerns remain with respect to the control in fact of Globalive by Orascom. In the present case, the record shows that Orascom, a non-Canadian*
>
> - *holds two-thirds of Globalive's equity;*
> - *is the principal source of technical expertise; and*
> - *provides Globalive with access to an established wireless trademark.*

> *117. Given the changes that were made during the public hearing and presuming that the additional changes that have been identified in this decision are made, these elements taken together, while significant, would not cause the Commission, in the circumstances of this case, to reach a decision that Orascom is in a position of influence that is both dominant and determining.*
>
> *118. However, when these levers are considered in concert with Orascom's provision of the vast majority of Globalive's debt financing, the Commission finds that it cannot conclude that Globalive is not controlled in fact by a non-Canadian, to wit Orascom. In other words, the Commission finds that Orascom has the ongoing ability to determine Globalive's strategic decision-making activities.*
>
> *119. In light of all the above, the Commission finds that Globalive is controlled in fact by Orascom, a non-Canadian. Therefore, the Commission concludes that Globalive does not meet the requirements set out in section 16 of the Act and is not currently eligible to operate as a telecommunications common carrier.*

[36] As to paragraph 115 above, the CRTC issued an erratum on 4 November 2009, in which the words “liquidity rights” near the end of that paragraph, were replaced with the words “Eligible Purchasers” so as to read:

> *115. Globalive has made numerous significant changes to its corporate structure and documents in order to address many of the Commission's concerns. In this decision, the Commission has identified additional changes that are necessary to address certain remaining concerns with respect to Orascom's influence over Globalive. These changes relate to the composition of the boards of directors, **Eligible Purchasers**, and the threshold for veto rights.*

[37] It was this Decision that the Governor in Council, on its own motion, undertook to review.

THE GOVERNOR IN COUNCIL’S DECISION

[38] On December 10, 2009 the Privy Council released the Decision of the Governor in Council, P.C. 2009-2008. This Decision comprised two parts. The first four pages set out a series of

"Whereases" with a concluding "Therefore". Attached as a Schedule were twenty-four paragraphs which amended several paragraphs of the CRTC Decision in various respects. The result was, as set out in paragraph 23 of the Schedule, to vary the CRTC Decision and to determine that Globalive was not controlled in fact by Orascom, a non-Canadian, and that Globalive was eligible to operate as a telecommunications common carrier. Paragraph 23 states:

> *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.*

[39] Section 12(8) of the *Telecommunications Act* stipulates that when the Governor in Council makes an order such as this, reasons shall be set out. Mr. Heintzman, Counsel for Globalive, described the structure of the Governor in Council's document as being one in which the section 12 Order is set out in the "Whereas" pages and the decision under section 16 as to whether Globalive is in fact not controlled by non-Canadians is set out in the Schedule. Mr. MacKinnon, for the Attorney General, argued that both the "Whereas" portion and the Schedule can be said to constitute the Order and the Reasons. Counsel for the Applicant and those supporting the Applicant were puzzled as to what portion of these documents can be said to be the Reasons.

[40] I prefer to consider the first four "Whereas" pages as being akin to what is sometimes referred to in this Court as a "speaking Order", such that the "Whereas" paragraphs can be considered to be "reasons". These Reasons may be considered to be supplemented by the Schedule.

[41] On the first page of the “Whereas” portion, the Governor in Council acknowledged that the CRTC had identified four areas of concern with respect to control in fact:

> *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.*

[42] The final paragraph of the first page stated that the debt financing was the main reason that the CRTC found that Globalive did not meet the Canadian ownership and control requirements:

> *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 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;*

[43] At the top of the second page, the Governor in Council stated what it considered to be a number of Canadian telecommunications policy objectives:

> *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;*

[44] This appears to reflect that which is set out in subsections 7(b), (c) and (d) of the *Telecommunications Act*:

> *Objectives*
>
> ***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*
>
> . . .
>
> *(*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;*
>
> *(*d*) to promote the ownership and control of Canadian carriers by Canadians;*

[45] The Governor in Council then referred to the bidding process for spectrum, and that Globalive was a successful bidder. In the fourth paragraph on the second page, the Governor in Council acknowledged that Globalive must satisfy the Canadian ownership and control requirements set out in the *Act*:

> *Whereas, in order to operate as a telecommunications common carrier in Canada, Globalive must satisfy the Canadian ownership and control requirements set out in the Act;*

[46] These requirements are set out in subsection 16(3) of the *Act* previously referred to. They are the "legal" and "control in fact" requirements.

[47] The next paragraph of the Governor in Council's "Whereas" provisions contains a puzzling use of the words "when possible", suggesting that the policy objectives requiring Canadian

ownership and control as set out in section 7(d) of the *Telecommunications Act* is somehow to be considered as flexible and possibly subordinate to other considerations, such as that set out in section 7(c), the enhancement of efficiency and competitiveness. One policy objective cannot be subordinate to another:

> *Whereas the Governor in Council considers that, <u>when possible</u>, 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 (emphasis added);*

[48] The next "Whereas" is critical, as it appears to insert a policy objective not found in section 7 or anywhere else in the *Telecommunications Act*; namely, that access to foreign capital technology and expertise should be encouraged and ensured:

> *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 <u>should be interpreted in a way that ensures that access to foreign capital, technology and experience is encouraged</u> in a manner that supports all of the Canadian telecommunication policy objectives (emphasis added);*

[49] The Governor in Council's Decision next acknowledged that the test respecting control was both legal and factual and, as found by the CRTC, the legal requirements had been met. No party challenged this finding.

[50] The Governor in Council next considered "control in fact" and noted that the test, as set out in section 16(3)(c) of the *Telecommunications Act,* was expressed in the form of a double negative (i.e.) not controlled by persons who are not Canadian:

> *Whereas the Governor in Council considers that, as a matter of construction, it is significant that, when assessing control in fact, the Act does not require the Commission to determine that a telecommunications common carrier is controlled by Canadians but rather that it not be controlled by persons that are not Canadian;*

[51] When asked whether this use of a double negative was purely a semantical exercise, Counsel for Globalive said no. This position was supported by Counsel for the Attorney General. They argued that this wording made room for a situation where a broadly held multi-national entity may have control. In this respect, they argued, control could be in the hands of an entity that was "not a non-Canadian".

[52] At the fifth "Whereas" at page 3 of the Decision the Governor in Council stated that it did not agree with the CRTC's finding as to multiple levers of influence. The sixth paragraph refers to "Reasons" (not otherwise described or indicated as to where they could be found) which are said to show why Globalive is not considered to be owned and controlled by non-Canadians:

> *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;*
>
> *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;*

[53] The first two “Whereas” paragraphs on page 4 state that submissions have been sought from provincial governments and that the submissions made by Globalive and others at the CRTC hearing have been of benefit to the Governor in Council. Reference is also made to “additional submissions” by others. The Applicant sought disclosure of these submissions and the Attorney General refused. While the refusal was argued in the Applicant’s written material as affording a basis for setting the Governor in Council’s Decision aside, or drawing adverse inferences, the point was not pursued with any vigour by Applicant’s Counsel at the hearing.

[54] The third paragraph of the fourth page sets out a criterion used by the Governor in Council in coming to its Decision; namely, whether Canadians would be deprived of a more competitive wireless telecommunication market. This criterion reflects the wording set out in section 7(c) of the *Telecommunications Act*:

> *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.*

[55] The penultimate paragraph of the Decision appears to open the door for Globalive to enter the Canadian market, but shut it for others:

> *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;*

[56] The final paragraph of the Governor in Council’s Decision is a “Therefore” paragraph that leads the reader to the attached Schedule:

> *Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to subsection 12(1) of the Telecommunications Act, varies Telecom*

Decision CRTC 2009-678, amended by Telecom Decision CRTC 2009-678-1, as set out in the annexed schedule to this Order.

[57] The Schedule in many respects tracks the language of the CRTC Decision, but makes several changes which affect the resulting determination as it was made by the CRTC. These include findings as to whether the structure of the board of directors ensured that non-Canadian nominees could be elected, whether the debt financing structure could result in undue influence by a non-Canadian, the effect of liquidity rights, the definition of eligible purchasers of shares, the effect of the Technical Service Agreement and the Trademark Agreement; all of which led the CRTC to conclude that Globalive was "controlled in fact" by non-Canadians. The changes made by the Governor in Council led it to conclude the opposite.

[58] I accept the summary reflecting several of these differences between the CRTC Decision and the Governor in Council's Decision, as presented in the Applicant's written submissions:

CRTC Findings (per Decision 2009-678)	*Governor in Council Findings (per Schedule to Order in Council)*
Composition of the Board of Directors	
45. In the present case, the Commission considers that the revised board structure, including the role and composition of the selection committee, does not ensure that the nominees of the Canadian shareholder are sufficient in number to offset the influence of Orascom, a non-Canadian shareholder.	*1. In the present case, the revised board structure, including the role and composition of the selection committee, ensures that the nominees of Orascom Telecom Holding S.A.E. ("Orascom"), a non-Canadian shareholder, are insufficient in number to control the strategic or operational decisions of Globalive. Indeed, the board members nominated by the Canadian shareholder*

[The CRTC required that the arrangements be amended so that AAL would nominate five GIHC directors, Orascom would nominate four directors, and that they would together nominate one Independent Director.]	*and the independent directors, as defined in the shareholders' agreement and corporate documents, (Independent Directors") are sufficient in number to offset the influence of Orascom. As a result, no changes are required to the composition of the boards of directors I this case.*
AAL's Liquidity Rights	
59. The Commission considers that the liquidity rights in the revised documents are an improvement on the array of rights originally granted to Orascom as minority voting shareholder. Nevertheless, the liquidity rights, even in their revised form, provide an indication of Orascom's influence over the venture. The specification of a floor price and the imposition of a cap on the proceeds generated in the event that AAL sells its shares are inconsistent with the relative voting interests of the shareholders.	*5. The liquidity rights in the revised corporate documents of Globalive are an improvement on the array of rights originally granted to Orascom as a minority voting shareholder.* *6. <u>In this particular case, the liquidity provisions operate in a balanced way in regards to both AAL and Orascom, with the exception of the specified floor price and the cap on the proceeds generated in the event that AAL sells its shares. The cap on proceeds is consistent with the relative equity investment of the shareholders. The specified floor price reflects the investment of an established business in a high-risk venture and has little bearing on control.</u>*
Definition of Eligible Purchasers	
63. The Commission considers that a significant issue with regard to liquidity is the ability of the existing investor to find a suitable purchaser. <u>The Commission is</u>	*8. A significant issue with regard to liquidity is the ability of the existing investor to find a suitable purchaser. <u>While the "Eligible Purchase" definition in the shareholders' agreement</u>*

concerned that the Eligible Purchaser definition limits the pool of potential purchasers to financial investors and restricts the ability of the majority voting shareholder [AAL] to sell all or some of its shares … *64. Accordingly, the Commission considers that Globalive should amend the definition of Strategic Competitor to include only entities which, taken together with their affiliates, hold more than a 10 percent share of the Canadian wireless market on a per-subscriber basis.*	*restricts the pool of potential purchasers, this restriction does not provide Orascom with an avenue for influence over the day-to-day operations or strategic decision-making activities of Globalive. This is an acceptable means of protecting the remaining shareholders from being forced into a relationship with a competitor. Not only do shareholders have the discretion to waive this restriction, but the eligible purchaser provisions apply equally to all shareholders and all sale provisions are subject to extensive rights of first refusal in favour of the non-selling shareholder. No changes to the definition of "Eligible Purchaser" in the shareholders' agreement are required.*
Technical Services Agreement	
84. Given the significant benefits Globalive derives from the TSA, the Commission is of the view that Globalive will maintain the TSA for the foreseeable future. Consequently, the Commission considers that Orascom will continue to have influence over operating and strategic decisions related to Globalive's network.	*13. Given the significant benefits Globalive derives from the TSA, valid commercial reasons may exist for Globalive to maintain the TSA for the foreseeable future. Consequently, it is likely that the TSA will continue to provide Orascom with an avenue for influence over Globalive, however such influence is not dominant and determining in itself.*

WIND brand	
89. However, the Commission finds that Globalive's adoption and use of a trademark belonging to an Orascom affiliate do provide Orascom (or its controlling shareholder) with influence over Globalive because Orascom has the power to limit how the brand can be used.	*14. The Trademark Agreement does not provide Orascom with a significant avenue for influence over Globalive. The term of and the termination rights set out in the agreement are not of concern. Furthermore, the terms and conditions of it do not allow Orascom to materially limit how the mark can be used.*
Debt Financing	
108. The magnitude of the debt 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 the Commission concern with the loans as a source of Orascom influence. The modifications to the covenants and terms of the loans do little to reduce this concern.	*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.*

Conclusion	
118. …In other words, the Commission finds that Orascom has the ongoing ability to determine Globalive's strategic decision-making activities.	*22. …In other words, Orascom does not have the ongoing ability to determine Globalive's strategic decision-making activities.*

[59] Those two documents, the "Whereases" and Schedule, comprise the Decision of the Governor in Council which is now under judicial review.

ISSUES

[60] I accept the succinct statement of issues as set out in the Attorney General's Memorandum:

1. Whether Public Mobile has standing, and whether it has an effective remedy under the *Telecommunications Act*, which it has not exhausted;
2. Whether the Governor in Council acted within the statutory mandate in varying the CRTC Decision concerning Globalive.

[61] There will be sub-issues considered as well. I will begin with general comments as to judicial review and section 18.1 of the *Federal Courts Act*.

COURT'S SUPERVISORY FUNCTION – SECTION 18.1

[62] The general supervisory function of the Courts over administrative powers exercised by government decision-makers was considered by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. All public authority exercises of decision-making powers must

find their source in law, whether derived from the enabling statute or the pertinent common law, or civil law. This principle recognizes that even the Governor in Council must adhere to the rule of law and to the statutory enactments of Parliament. Bastarache and LeBel JJ wrote at paragraphs 27 to 29 of *Dunsmuir*:

> *III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination*
>
> *A. Judicial Review*
>
> ***27*** *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. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.*
>
> ***28*** *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.*
>
> ***29*** *Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, [page212] the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done*

> *within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220, at p. 234; also Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.*

[63] Section 18.1 of the *Federal Courts Act* gives to the Federal Court the power of judicial review in respect of a decision of a federal board, commission or other tribunal, and the power to grant relief where it has been determined that any one of a number of grounds as set out in subsection 18.1(4) have been established:

> *Application for judicial review*
>
> ***18.1***
>
> *(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.*
>
> . . .
>
> *Powers of Federal Court*
>
> *(3) On an application for judicial review, the Federal Court may*
>
> *(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or*
>
> *(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.*
> *Grounds of review*
>
> *(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal*
>
> *(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;*
>
> *(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*

> *(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;*
>
> *(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;*
>
> *(e) acted, or failed to act, by reason of fraud or perjured evidence; or*
>
> *(f) acted in any other way that was contrary to law.*

[64] The Supreme Court of Canada has recently considered the nature of judicial review under the provisions of section 18.1 in its unanimous decision in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62. It wrote that judicial review is directed at the legality, reasonableness and fairness of the procedures employed and actions taken by government decision-makers; it is designed to enforce the rule of law and adherence to the Constitution (paragraph 24). It also wrote that the enactment of the *Federal Courts Act*, as amended, was designed to enhance government accountability as well as to promote access to justice (paragraph 32).

[65] In the present case, this judicial review is to be undertaken with a view of determining accountability of government decision-makers including the Governor in Council. The function of the Courts is to enforce the rule of law, to determine whether there has been adherence to the Constitution with respect to the procedures employed and actions taken and to determine the legality, reasonableness and fairness of the decision made.

ISSUE 1: **Whether Public Mobile has standing, and whether it has an effective remedy under the *Telecommunications Act* which it has not exhausted.**

a) Standing

[66] Public Mobile, just as Globalive, was a successful bidder in the auction of radio frequency spectrum. It has received a licence from the Minister of Industry to offer wireless communication services in Canada using that spectrum. It was required by the CRTC to demonstrate that it was Canadian owned and controlled.

[67] The remaining Respondents, other than the Attorney General, have also been successful bidders and received licences. They were not required to demonstrate to the CRTC that they were Canadian owned and controlled, presumably since they were already active in the Canadian marketplace.

[68] Only Globalive had experienced a change in its position. It was a successful bidder at the auction; it received a licence from the Minister of Industry. The CRTC determined that it could not operate in Canada, as it was not Canadian owned and controlled. That decision was reversed by the Governor in Council.

[69] Much has been written as to who has standing to challenge a decision of a federal board or tribunal. I reviewed some of this jurisprudence recently in *Air Canada v. Toronto Port Authority*, 2010 FC 774, particularly at paragraphs 58 to 66, paying attention, among other cases, to the recent decision of the Federal Court of Appeal in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 DLR (4th) 430 and to *Ferring Inc. v. Canada (Minister of Health)*, 2007 FCA

276, 370 N.R. 263. I concluded at paragraph 65 of *Air Canada* that there was no simple formula whereby a person having a commercial interest can be said to have or to lack standing. The context of the situation and the basis for judicial review must be considered.

[70] I drew the attention of the parties at this hearing to the very recent decision of the Federal Court of Appeal in *League for Human Rights of B'Nai Brith Canada v. Canada*, 2010 FCA 307 where Stratas JA for the Court considered both direct standing and public interest standing at paragraphs 57 to 59:

> ***C. Analysis***
>
> ***(1) Did the appellant have standing to bring the applications for judicial review?***
>
> ***(a) Direct standing***
>
> ***57*** *The appellant submits that it has direct standing to bring the application for judicial review against the decisions of the Governor in Council because it is "directly affected" within the meaning of subsection 18.1(1) of the Federal Courts Act, R.S.C. 1985, c. F-7. That subsection provides that those who are "directly affected" may bring an application for judicial review.*
>
> ***58*** *The appellant is not "directly affected." In order for it to be "directly affected" by the decisions of the Governor in Council, the decisions must have affected its legal rights, imposed legal obligations upon it, or prejudicially affected it in some way: Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.), [1976] 2 F.C. 500 (C.A.); Irving Shipbuilding Inc. v. Canada (A.G.), 2009 FCA 116. There is no evidence before this Court suggesting that the appellant is affected in this way. I adopt the words of the motions judge (2008 FC 732 at paragraph 26):*
> *Without doubt, the [appellant] and the family members it says it represents deeply care, and are genuinely concerned, about Mr. Odynsky's citizenship revocation process and his past service as a perimeter guard of the Seidlung at the Poniatowa labour camp in German-occupied Poland. However, that interest does not mean that the legal rights of the applicant, or those it represents, are legally impacted or prejudiced by the decision not to revoke Mr. Odynsky's*

> *citizenship. Rather, their interest exists in the sense of seeking to right a perceived wrong arising from, or to uphold a principle in respect of, the non-revocation of Mr. Odynsky's citizenship.*
>
> ***(b) Public interest standing***
>
> ***59*** *In the alternative, the appellant submits that it has standing as a public interest litigant to challenge the decisions of the Governor in Council. It says that it meets the three fold test for public interest standing set out in the Supreme Court of Canada's reasons for judgment in Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, namely, that:*
>
> *(a) a serious issue has been raised;*
>
> *(b) the party seeking public interest standing 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.*

[71] This discussion in *B'Nai Brith* should not be taken to mean that the only persons who have standing to challenge a decision are those whose own interests were immediately affected or those who find themselves representing a public interest within certain enumerated criteria. As Evans JA wrote in *Irving Shipbuilding*, *supra*, the question of standing cannot be answered in the abstract. Standing must be considered in the context in which the review arises. He wrote at paragraphs 28, 32 and 33:

> ***28*** *In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded to CSMG violated their procedural rights. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be "directly affected" by the impugned decision. If they*

> *do not have a right to procedural fairness, that should normally conclude the matter. While I do not find it necessary to conduct an independent standing analysis, I shall briefly address two issues that arose from the parties' submissions.*
>
> . . .
>
> ***32*** *To attach the significance urged by the respondents to Parliament's choice of the words "directly affected", rather than any of the common law standing requirements ("person aggrieved" or "specially affected", for example) would, in my view, ignore the context and purpose of the statutory language of subsection 18.1(1). As the Supreme Court of Canada said recently in Khosa (at para. 19):*
>
> > *... most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them ... can only sensibly be interpreted in the common law context ...*
> >
> > . . .
> >
> > ***33*** *Moreover, since all these terms are somewhat indeterminate, Parliament's choice of one rather than another should be regarded as of relatively little importance. See also Thomas A Cromwell, Locus Standi: A Commentary on the Law of Standing in Canada (Toronto: Carswell, 1986) at 163-64* ("*Locus Standi*"), *especially his apt description (at 163) of the "semantic wasteland" to be traversed by a court in attempting to apply the various "tests" for standing, both statutory and common law. Although directed at differences between the French and English texts of subsection 18.1(4) of the Federal Courts Act, the following statement in Khosa (at para. 39) seems equally apt in the interpretation of the words "directly affected" in subsection 18.1(1):*
> >
> > > *A blinkered focus on the textual variations might lead to an interpretation at odds with the modern rule [of statutory interpretation] because, standing alone, linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme.*

[72] The approach of the Courts as to the standing of those seeking judicial review should tend to be inclusive rather than exclusory. By way of analogy, the Supreme Court of Canada, recently wrote

a unanimous decision in *Canada (Attorney General) v. McArthur*, 2010 SCC 63, saying at paragraphs 11 and 12, that one should not exaggerate the exclusive nature of section 18 of the *Federal Courts Act*; a person should not be put through unnecessary and unproductive procedural hoops.

[73] Referring, for instance, to *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138, one can understand the attitude of the Courts in exercising judicial discretion, particularly the majority decision at pages 161 and 162 where it allowed a member of the Canadian public (albeit a former President of the Exchequer Court) with no particular or unique interest, to challenge the constitutionality of certain federal legislation.

[74] One can even go much further back in history in referring to the Roman/Jewish historian Flavius Josephus in Book II of his dissertation "Against Apion" written toward the end of the first century of the Common Era, where he considered the writings of the Phonecians, Chaldeans and Egyptians in respect of the laws of the Jewish nation and wrote at verse 28 (I refer to the latter portion):

> *"If any judge takes bribes, his punishment is death; he that overlooks one that offers him a petition, and this when he is able to relieve him, is a guilty person."*

[75] It all comes to the same thing. If there is merit to the issue raised, the Court should be lenient in permitting standing.

[76] In the present case, Public Mobile, Globalive and the other corporate Respondents, were all in the same commercial situation. They all bid at the spectrum auction. All were successful. All got

licences. The CRTC said that one of them, Globalive, was not eligible, particularly on the CRTC's view of foreign control and the debt structure of Globalive. The Governor in Council reversed that decision saying that the reversal was applicable only in this instance.

[77] Public Mobile was involved in the whole process. It made submissions to the Governor in Council. The impact was clearly stated by Mr. Alex Krstajic, chief executive officer of Public Mobile in his cross-examination in these proceedings conducted April 6, 2010, where he said in answer to questions 181 and 182, notwithstanding the objection of his own Counsel:

> *BY MR. HUBBARD:*
>
> *181. Q. Sir, you would agree with me that Public Mobile has no direct interest in this Governor in Council decision?*
>
> *MR. LASKIN: That's…*
>
> *MR. HUBBARD: What's the basis for the refusal, Counsel?*
>
> *MR. LASKIN: He started answering, so I'll let it go.*
>
> *THE DEPONENT: Let me answer this. Yes, we do have a direct interest in this. If the order in council had said we've changed the laws and anybody who is a new entrant like Globalive, can have the same kind of structure as Globalive and can get foreign capital, I can tell you right now, this application would not have been brought forward, full stop. But the fact that they tried to say…this isn't in a change in the law, so look the other way, this thing isn't really a change in the law, and it only applies to Globalive, made it a direct impact on me because it directly impacts my ability to get more money and grow. And they're not having a level playing field, they're allowing Globalive to have access to foreign capital that I don't have. So, is that a direct impact on me? Let's go back to your economics lesson on what allows a company to grow. It's not just something as simple as market share. How do you get more markets? You get more capital that allows you to build very expensive networks and open more markets and therefore get more revenue. So, does it directly impact me when one competitor can have*

> *foreign capital and another can't? Yes, yes, it directly impacts me.*

[78] Counsel for the Attorney General argued that the Applicant did not "plead" the nature of the standing which it claimed in order to secure judicial relief. This is an application, not an action. The requirements under the *Federal Courts Rules* for "pleading" are vague or even non-existent. I reviewed this situation in my decision in *Air Canada*, *supra*, at paragraphs 77 to 85. Even if there were requirements for pleadings, to "plead" standing in the Notice of Application would be to anticipate a defence. There is no requirement to plead in anticipation of a defence. In the present application, the Respondents provided no "pleading" of any kind. At the hearing, the parties were well aware of the arguments raised as to standing. Nobody was taken by surprise. Each party argued the matter fully. I reject any argument as to lack of "pleading".

[79] I find that Public Mobile has sufficient interest in the matters at issue so as to be a person entitled to seek judicial review in these proceedings.

b) <u>Alternative Remedy</u>

[80] The Attorney General's Counsel argued that Public Mobile should not be allowed standing because it has an effective alternate remedy. This point was not vigorously pursued at the hearing. The argument is not based on any provision in the *Telecommunications Act* or other relevant statute; rather, it relies on a suggestion that certain legal tactics may be pursued by Public Mobile that may result in providing it with some relief that it may see as favourable. I repeat those tactics as suggested in the factum of the Attorney General at paragraph 66:

> *66. The only means by which Public Mobile can achieve legal certainty for its expressed concern is for the company to request a*

> *Canadian ownership and control review by the CRTC on the facts of its situation. If Public Mobile raises more foreign capital, and, as a result, the CRTC can no longer conclude that Public Mobile is not controlled in fact by a non-Canadian, Public Mobile can either ask the CRTC to reconsider its decision under section 62 of the Act, petition the Governor in Council to vary the decision under section 12, or appeal to the Federal Court of Appeal.*

[81] The Attorney General cited the decision of the Federal Court of Appeal in *Canada (Border Services Agency) v. C.B. Powell Ltd.*, 2010 FCA 61 for the proposition that a party can proceed to the court system only after all adequate remedial resources in the administrative process have been exhausted.

[82] I agree that where the applicable statute or regulations provide for appeals, reviews and other such remedies in respect of decisions, it is appropriate that such avenues be exhausted before recourse to the courts. This does not mean that an opposing party who can offer legal strategies that may or may not work can, by suggesting such strategies, frustrate access to the courts. That is all that the Attorney General in paragraph 66, above, is suggesting.

[83] In the present situation, access to the court system is appropriate.

ISSUE 2: **Whether the Governor in Council acted within its statutory mandate in varying the CRTC Decision concerning Globalive**

a) The Telecommunications Act

[84] It is common ground that the *Telecommunications Act*, S.C. 1993, c. 38 is the relevant statute under which both the CRTC and the Governor in Council made their decisions. Sections 4 and 5 of that *Act* provide any person, other than a broadcasting undertaking, who operates any transmission facility of a Canadian carrier, is subject to the *Act*. Each of these terms is a defined term and, for purposes of these Reasons, it can be accepted that each of Public Mobile, Globalive and the corporate Respondents is a person who is subject to the *Act*.

[85] Section 7 of the *Act* sets out the objectives of Canadian telecommunications policy. It says:

> *Objectives*
>
> ***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;*
>
> *(d) to promote the ownership and control of Canadian carriers by Canadians;*
>
> *(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;*

> *(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;*
>
> *(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;*
>
> *(h) to respond to the economic and social requirements of users of telecommunications services; and*
>
> *(i) to contribute to the protection of the privacy of persons.*

[86] Sections 8, 10 and 11 of the *Act* permit the Governor in Council, by order, to issue directions to the CRTC on broad policy matters with respect to Canadian telecommunications policy objectives. No such order has been issued in this case.

[87] Section 12(1) of the *Act* permits the Governor in Council, on its own motion or on petition from another, by order, to vary or rescind or send back to the CRTC any CRTC decision. Section 12(8) requires reasons to be given. Section 13 requires consultation with the provincial government.

> *Variation, rescission or referral*
>
> ***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.*
>
> …
>
> *Reasons*
>
> *(8) In an order made under subsection (1) or (7), the Governor in Council shall set out the reasons for making the order.*
>
> …

Provincial consultation

13. *The Minister, before making a recommendation to the Governor in Council for the purposes of any order under section 8 or 12, or before making any order under section 15, shall notify a minister designated by the government of each province of the Minister's intention to make the recommendation or the order and shall provide an opportunity for each of them to consult with the Minister.*

[88] Section 72.15 exempts from a review by the Governor in Council decisions of the CRTC as to violation of its orders and imposition of a penalty. This is not relevant here.

[89] Section 16(1) of the *Act* provides that a Canadian carrier is eligible to operate as a telecommunications common carrier if it is a Canadian owned and controlled corporation incorporated under Canadian or provincial laws.

Eligibility

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).

[90] Subsection 16(3) of the *Act* which is pertinent here, defines what is Canadian-owned and controlled for the purposes of subsection 16(1):

Canadian ownership and control

(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 outstanding; and*
>
> *(c) the corporation is not otherwise controlled by persons that are not Canadians.*

[91] It is agreed that the 'legal control" requirements of subsections 16(3) (a) and (b) have been met by Globalive. The CRTC and Governor in Council decisions differed as to whether the "control in fact" provision of subsection 16(3)(c) had been met.

[92] Section 47 of the *Act* provides that the CRTC shall exercise its powers with a view to implementing Canadian telecommunications policy objectives.

> *Commission subject to orders and standards*
>
> ***47.*** *The Commission shall exercise its powers and perform its duties under this Act and any special Act*
>
> *(a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and*
>
> *(b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.*

[93] Section 52 of the *Act* is directed at findings of fact by the CRTC. Subsection 52(1) provides that the CRTC's determination on a question of fact is binding and conclusive:

> *Questions of law and fact*
>
> ***52.*** *(1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.*

> *Factual findings of court*
>
> *(2) In determining a question of fact, the Commission is not bound by the finding or judgment of any court, but the finding or judgment of a court is admissible in proceedings of the Commission.*
>
> *Pending proceedings*
>
> *(3) The power of the Commission to hear and determine a question of fact is not affected by proceedings pending before any court in which the question is in issue.*

[94] Sections 60 through 63 of the *Act* deal with decisions of the CRTC. Section 64(1) provides for an appeal to the Federal Court of Appeal on any question of law or of jurisdiction:

> *Appeal to Federal Court of Appeal*
>
> ***64.*** *(1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.*

[95] The constant theme of the *Act* is adherence to Canadian telecommunications policy objectives. Those objectives are set out in section 7 of the *Act.* The opening paragraph of section 7 emphasizes that telecommunications plays an *essential* role in the maintenance of *Canada's identity and sovereignty*.

b) <u>Findings of Fact</u>

[96] Subsection 52(1) of the *Telecommunications Act* as reproduced above, provides that a determination by the CRTC on a question of fact is binding and conclusive.

[97] Counsel for Globalive traced this provision back to section 59 of the *National Transportation Act*, R.S. 1985, c. N-20 and right back to the *Railway Act*, 3 Edw. VII, c. 58, section 42, which provided that findings of fact were binding "on all courts". Thus, Globalive argued, subsection 52(1) must be read contextually so that the CRTC's findings of fact are binding on courts but not on the Governor in Council.

[98] On the other hand, Public Mobile's Counsel argues that subsection 52(1) is to be read without restriction and applies equally to any body dealing with the CRTC's decisions, including the Governor in Council. They argue that the *Railway Act* of 1903 should not reach "beyond the grave" so as to constrain the modern *Telecommunications Act*.

[99] To determine whether the question as to the reach of subsection 52(1) of the *Act* applies to the Governor in Council's Decision, the Court must first consider whether the Governor in Council disturbed a "finding of fact" by the CRTC.

[100] The Supreme Court of Canada provided useful guidance on this issue in *Housen v. Nikolaisen* [2002] 2 S.C.R. 235. The majority decision written by Iacobucci and Major JJ noted the important distinction between findings of fact and conclusions drawn from those findings, which conclusions are sometimes, somewhat carelessly, also called findings of fact. If a Court finds that a person committed acts A and B and failed to commit act C, these are findings of fact. If the Court then concludes that as a result, the person was negligent, that is a conclusion drawn from the findings of fact. The result is termed a question of mixed fact and law. The majority wrote at paragraph 26:

> *D. Standard of Review for Questions of Mixed Fact and Law*
>
> ***26*** *At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal [page257] or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:*
>
> > *The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."*
>
> *In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.*

[101] Once it is determined that a finding is one of mixed fact and law, the Court must consider whether the alleged error is purely one of law that is subject to review on the correctness standard. The majority in *Housen* wrote at paragraph 27:

> ***27*** *Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate*

> *standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:*
>
> > *... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the [page258] decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.*
>
> *Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.*

[102] The Decision of the Governor in Council did not disagree with the CRTC on its factual determinations. It disagreed with the CRTC as to the conclusions to be drawn from those facts. This is quite apparent, for instance, with reference to the following "Whereas" clauses at page 3:

> *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;*
>
> *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;*
>
> *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;*

[103] This is also apparent in reading the Schedule, much of which has been set out earlier in these Reasons. I repeat paragraph 20:

> *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 as 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.*

[104] I conclude, therefore, that the Governor in Council has not made any different findings of fact than those found by the CRTC. However, the Governor in Council has drawn different conclusions from those findings. It has made a legal determination drawn from those facts. As such, the findings of the Governor in Council based on a legal determination are to be judicially reviewed on a standard of correctness. (*Dunsmuir, supra.* at paragraph 50.)

c) <u>Legal Findings</u>

[105] As determined above, the Decision of the Governor in Council involves legal findings and is to be determined on a standard of correctness. The governing legal provisions are those of the *Telecommunications Act*.

[106] The legal basis upon which the Governor in Council has stated that its Decision was made has been set out at page 2 of the "Whereas" recitals:

> *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;*
>
> *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;*
>
> *Whereas Globalive, as a new entrant, was a successful bidder in the Advances Wireless Spectrum licensing process and was issued spectrum licences by the Minister of Industry;*
>
> *Whereas, in order to operate as a telecommunications common carrier in Canada, Globalive must satisfy the Canadian ownership and control requirements set out in the Act;*
>
> *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;*
>
> *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;*

[107] The Governor in Council has in many respects adhered to and acknowledged the Canadian telecommunication policy objectives as set out in section 7 of the *Act*. However, the Governor in Council has stepped outside those provisions by inserting a previously unknown policy objective into section 7; namely, that of ensuring access to foreign capital, technology and experience. Secondly it erred by limiting its Decision to Globalive only. What is the effect of so doing?

[108] There is no doubt that the Governor in Council is bound by the *Act* and that the Courts may, by way of judicial review, determine whether the Governor in Council has acted within or outside the provisions of the *Act*. The Supreme Court of Canada has recently followed such a practice in *Montreal (city) v. Montreal Port Authority*, 2010 SCC 14. LeBel J for the Court wrote at paragraphs 33 and 47:

> ***33*** *However, in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy. In the instant cases, an administrative authority applies regulations that have been made under an enabling statute. The statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.*
>
> …
>
> ***47*** *The respondents' decisions were consistent neither with the principles governing the application of the PILT Act and the* Regulations *nor with Parliament's intention. The way they exercised their discretion led to an unreasonable outcome that justified the exercise of the Federal Court's power of judicial review.*

[109] The Supreme Court of Canada in dealing with a decision of the Governor in Council in reviewing a decision of the CRTC in *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 stated the same principles. Estey J for the Court wrote at page 748:

> *Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity.*

[110] He wrote further at page 752:

> *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.*

[111] The issues in the *Inuit Tapirisat* case are different from the issues in the present case in that *Inuit Tapirisat* was dealing with the procedural aspects concerning a decision of the Governor in Council. In the present case, we are dealing with the legal basis for such a decision.

[112] The Federal Court of Appeal in *Canada (Canadian Wheat Board) v. Canada (Attorney General)*, 2009 FCA 214, 392 N.R. 149 had stated that it is settled law that the Governor in Council must stay within its boundaries of the enabling statute. Noël JA for the Court wrote at paragraph 37:

> ***37*** *It is well settled law that when exercising a legislative power given to it by statute, the Governor in Council must stay within the boundary of the enabling statute, both as to empowerment and purpose. The Governor in Council is otherwise free to exercise its statutory power without interference by the Court, except in an egregious case or where there is proof of an absence of good faith* (*Thorne's Hardware Ltd. v. The Queen, [1983] 1 S.C.R. 106, p. 111; Attorney General of Canada* v. *Inuit Tapirisat et al., [1980] 2 S.C.R. 735*

[113] A decision-maker such as the Governor in Council is not only required to take into consideration the relevant statutory criteria, but also to exclude irrelevant criteria. Binnie J for the

majority of the Supreme Court of Canada in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 wrote at paragraph 172:

> *The principle that a statutory decision-maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous occasions.*

[114] The same proposition was stated by Cory J (as he then was) in delivering the judgment of the Ontario Divisional Court in *Doctors' Hospital and Minister of Health*, (1976), 12 O.R. (2d) 164 at page 174:

> *It has been held that even if made in good faith and with the best of intentions, a departure by a decision-making body from the objects and purposes of a statute pursuant to which it acts is objectionable and subject to review by the Courts.*

[115] The Governor in Council in this case misdirected itself in law, particularly as expressed in the "reasons" as set out in the following "Whereas" clauses:

> *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 <u>should be interpreted in a way that ensures that access to foreign capital, technology and experience is encouraged</u> in a manner that supports all of the Canadian telecommunication policy objectives; (emphasis added)*
>
> …
>
> *And whereas the Governor in Council considers that this Order is <u>based on the facts of this particular case and has a significant direct impact only on Globalive</u>; (emphasis added)*

[116] In the present case, the *Telecommunications Act* makes it clear in the opening portion of section 7 that telecommunications has an *essential* role in the maintenance of Canada's identity and

sovereignty. Subsection 7(d) states as a policy objective the *promotion* of ownership and control of Canadian carriers by Canadians. Section 16 of the *Act* requires legal control and control in fact to be Canadian.

[117] In the first of the above "Whereas" clauses, the Governor in Council misdirected itself in law by interpreting the Canadian ownership and control requirements of the *Telecommunications Act* ,to use its words, *"in a way that ensures access to foreign capital, technology and experience is encouraged"*. While the Governor in Council is correct in saying in the same clause that *"the Act does not impose limits on foreign investment"* it must be kept in mind that the *Act* does not refer anywhere to *"foreign investment"* or to *"foreign capital, technology and experience"*. What the *Act* does say is that telecommunications has an essential role in the maintenance of Canada's identity and sovereignty and provides a policy objective which requires Canadian ownership and control to be promoted. There is no policy objective in the Act that encourages foreign investment. The *Act* provides tests as to Canadian ownership and control including in subsection 16(3)(c) that a corporation not be *otherwise controlled* by a non-Canadian. The intent of the *Act* is clear that a situation such as this is to be determined in a manner so as to ensure that there is Canadian control. Where there is a concern that foreign investment and other factors may put Canadian control at risk then it is the promotion of Canadian control that is to be the essential criterion upon which the matter is to be determined. It is for Parliament not the Governor in Council to rewrite the *Act.*

[118] In the second of the above "Whereas" clauses, the Governor in Council acted outside the legal parameters of the *Act* in stating that its Decision impacts only on Globalive. The

Governor in Council cannot restrict its interpretation to one individual and not to others who may find themselves in a similar circumstance.

[119] These improper considerations were fundamental to the determination of the Governor in Council to reverse the Decision of the CRTC. Therefore, the Decision of the Governor in Council must be quashed.

CONCLUSIONS

[120] For the reasons provided, I have determined that the Applicant Public Mobile has standing to seek judicial review of the Decision of the Governor in Council dated 10 December 2009. That Decision was based on errors of law and must be quashed.

[121] Counsel for Globalive submitted that, in the event that I made such a determination, it would be reasonable to stay the determination for a period of time so as to permit Globalive and any other relevant person to pursue such appeals and other remedies as may be available. I will stay my Judgment for a period of forty-five (45) days.

COSTS

[122] I invited Counsel for the parties to make submissions as to costs of the hearing. After discussion, it was determined that those submissions could be made after the release of these Reasons. I invite Counsel, therefore, to provide written submissions as to costs, both allocation and quantum, not to exceed three (3) pages, within thirty (30) days of the date of release of these Reasons.

[123] No costs will be awarded for or against any of the Interveners.

JUDGMENT

FOR THE REASONS PROVIDED, THIS COURT ADJUDGES that:

1. The application is allowed;
2. It is declared that the Decision of the Governor in Council P.C. 2009-2008 dated December 10, 2009 is null and void in that it was determined on a basis in law not provided for in the *Telecommunications Act*, S.C. 1993, c. 38;
3. The Decision of the Governor in Council aforesaid is quashed;
4. The provisions of paragraphs 2 and 3 of this Judgment are stayed for a period of forty-five (45) days from the date of the release of the Reasons and Judgment herein;
5. No costs shall be awarded for or against any of the Interveners;
6. Counsel for the remaining parties shall provide written submissions as to costs, both as to the allocation and quantum, not to exceed (3) pages in length, within thirty (30) days from the date of the release of the Reasons and Judgment herein.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-26-10
STYLE OF CAUSE:	**PUBLIC MOBILE INC., (Applicant) v. ATTORNEY GENERAL OF CANADA, GLOVALIVE WIRELESS MANAGEMENT CORP., BELL CANADA, ROGERS COMMUNICATIONS INCL, SHAW COMMUNICATIONS INCL AND TELUS COMMUNICATIONS COMPANY, (Respondents) v. ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, COMMUNICATINS, ENERGY AND PAPERWORKS UNION OF CANADA, AND FRIENDS OF CANADIAN BROADCASTING (Interveners)**
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	January 19 & 20, 2011
REASONS FOR JUDGMENT:	HUGHES J.
DATED:	February 04, 2011

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