



ICLG

The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2016

9th Edition

A practical cross-border insight into telecoms, media and internet laws and regulations

Published by Global Legal Group, with contributions from:

Andreas Neocleous & Co LLC

Bagus Enrico & Partners

Bello, Gallardo, Bonequi y García, S.C.

Borenus Attorneys Ltd

Bowman Gilfillan

Chajec, Don-Siemion & Zyto

Legal Advisors

Coulson Harney

Davies Ward Phillips & Vineberg LLP

Dr. Norbert Wiesinger, Law Offices

Gün + Partners

Heuking Kühn Lüer Wojtek

Hogan Lovells (CIS)

John W Fooks & Co

King & Wood Mallesons

Kromann Reumert

Linklaters LLP

Melchior, Micheletti & Amendoeira Advogados

Mori Hamada & Matsumoto

NautaDutilh N.V.

Olswang LLP

Pachiu & Associates

Pestalozzi

Sanchez Elia & Associates

Shay & Partners

Sociedade Rebelo de Sousa &

Advogados Associados, RL

The Law Office Krehić

Tilleke & Gibbins

Udo Udoma & Belo-Osagie

Webb Henderson

Wigley & Company

Wilkinson Barker Knauer, LLP

Živković Samardžić

GLG

Global Legal Group

Contributing Editor
Rob Bratby, Olswang LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Commercial Director
Antony Dine

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Editor
Gemma Bridge

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Information Press Ltd.
September 2015

Copyright © 2015
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-910083-61-1
ISSN 2050-7607

Strategic Partners



General Chapter:

1	An Overview of the EU Regulatory Framework – Purvi Parekh & John Enser, Olswang LLP	1
---	--	---

Country Question and Answer Chapters:

2	Angola	Sociedade Rebelo de Sousa & Advogados Associados, RL: Octávio Castelo Paulo & Luís Neto Galvão	11
3	Argentina	Sanchez Elia & Associates: Juan Sanchez Elia & Alejandro Sigfrido Pérez	18
4	Australia	King & Wood Mallesons: Renae Lattey & Neil Carabine	24
5	Austria	Dr. Norbert Wiesinger, Law Offices: Dr. Norbert Wiesinger	34
6	Belgium	Linklaters LLP: Tanguy Van Overstraeten & Guillaume Couneson	41
7	Brazil	Melchior, Micheletti & Amendoeira Advogados: Sílvia Regina Barbuy Melchior	49
8	Canada	Davies Ward Phillips & Vineberg LLP: George Addy & Elisa Kearney	62
9	China	King & Wood Mallesons: Rui Wang	69
10	Croatia	The Law Office Krehić: Tarja Krehić	78
11	Cyprus	Andreas Neocleous & Co LLC: Andrea Kallis Parparinou	85
12	Denmark	Kromann Reumert: Torben Waage & Julie Bak-Larsen	92
13	Finland	Borenus Attorneys Ltd: Jukka Airaksinen & Henriikka Piekkala	99
14	Gabon	John W Ffooks & Co, member of the Bowman Gilfillan Africa Group: Lydia Rasoanirina & Hantamalala Rabarijaona	106
15	Germany	Heuking Kühn Lüer Wojtek: Dr. Dirk Stolz & Dr. Lutz Martin Keppeler	112
16	Hong Kong	King & Wood Mallesons: Joshua Cole	120
17	Indonesia	Bagus Enrico & Partners: Enrico Iskandar & Stephen Sim	128
18	Ivory Coast	John W Ffooks & Co, member of the Bowman Gilfillan Africa Group: Fenosa Rajomarison & Claudia Randrianavory	136
19	Japan	Mori Hamada & Matsumoto: Hiromi Hayashi & Akira Marumo	142
20	Kenya	Coulson Harney, member of the Bowman Gilfillan Africa Group: Edwina Warambo-Ogallo & Richard Harney	151
21	Mexico	Bello, Gallardo, Bonequi y García, S.C.: Carlos Arturo Bello Hernández & Quitzé Alejandra Espetia Mendoza	159
22	Netherlands	NautaDutilh N.V.: Paul M. Waszink & Piet Sippens Groenewegen	167
23	New Zealand	Wigley & Company: Michael Wigley	175
24	Nigeria	Udo Udoma & Belo-Osagie: Olajumoke Lambo & Godson Oghenechuko	181
25	Poland	Chajec, Don-Siemion & Zyto Legal Advisors: Andrzej Abramczuk & Mariusz Busiło	188
26	Portugal	Sociedade Rebelo de Sousa & Advogados Associados, RL: Octávio Castelo Paulo & Luís Neto Galvão	196
27	Romania	Pachiu & Associates: Remus Ene & Ioana Iovanesc	204
28	Russia	Hogan Lovells (CIS): Natalia Gulyaeva & Julia Gurieva	213
29	Senegal	John W Ffooks & Co, member of the Bowman Gilfillan Africa Group: Fenosa Rajomarison & Francky Rakotondrina	221

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

GLG

Global Legal Group

Country Question and Answer Chapters:

30	Serbia	Živković Samardžić: Slobodan Kremenjak & Miloš Stojković	227
31	Singapore	Webb Henderson: Angus Henderson & Daryl Cox	235
32	South Africa	Bowman Gilfillan, member of the Bowman Gilfillan Africa Group: Dominique Saayman & Livia Dyer	244
33	Switzerland	Pestalozzi: Clara-Ann Gordon & Phillip Schmidt	254
34	Taiwan	Shay & Partners: Arthur Shay & David Yeh	261
35	Thailand	Tilleke & Gibbins: Weerawat Distapinyo & Ahmet Yesilkaya	268
36	Turkey	Gün + Partners: Uğur Aktekin & Begüm Yavuzdoğan Okumuş	276
37	United Kingdom	Olswang LLP: Purvi Parekh & Tomos Jones	286
38	USA	Wilkinson Barker Knauer, LLP: Natalie G. Roisman & Brian W. Murray	295

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

One general chapter. This chapter provides an overview of the EU Regulatory Framework for electronic communications and services in the EU Member States.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 37 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Canada

Davies Ward Phillips & Vineberg LLP



George Addy



Elisa Kearney

1 Overview

1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in Canada, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.

Annual revenues in the Canadian telecommunications and broadcasting sectors are approximately \$44.8 billion and \$17.1 billion, respectively. The five largest telecoms and cable companies (BCE Inc., Rogers Communications Inc., Shaw Communications, TELUS Communications Company and Québecor Media Inc.) captured 85% of all communications revenues. The next five largest companies captured 9%.

Three companies (Bell, Rogers and Québecor) offer services in all 11 communications markets, capturing more than 60% of total revenues. There are an estimated 500 internet service providers (ISPs) in Canada. However, the five companies noted above dominate the market. Significant restrictions are imposed on foreign ownership and control in the Canadian telecommunications and broadcasting sectors (see the response to question 1.4).

1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in Canada.

Telecommunications service providers (TSPs) are subject to the *Telecommunications Act*, under the responsibility of the Minister of Industry. TSPs include facilities-based telecommunications common carriers (Canadian Carriers) and resellers. The majority of the regulation focuses on Canadian Carriers, which include incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). ILECs are subject to more onerous regulatory requirements than CLECs and other TSPs. Small ILECs are subject to lighter regulation than the larger ILECs. There are approximately seven ILECs, 35 SILECs and 65 CLECs registered with the Canadian Radio-television and Telecommunications Commission (CRTC). Canadian Carriers may operate as an ILEC in one region of the country and a CLEC in another region.

The regulation of the equipment and activities that make use of the radio spectrum, as well as the allocation and management of the radio spectrum itself, is subject to the *Radiocommunication Act*, also under the responsibility of the Minister of Industry.

Undertakings engaged in broadcasting (both programming transmission and distribution) are subject to the *Broadcasting Act*, under the responsibility of the Minister of Canadian Heritage.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in Canada.

The CRTC, an independent administrative agency that operates at arm's length from the government, regulates and supervises the broadcasting and telecommunications sectors. The powers and jurisdiction of the CRTC are set out in the *Telecommunications Act*, the *Broadcasting Act* and the *Canadian Radio-television and Telecommunications Commission Act*.

The Governor in Council (i.e., the federal Cabinet) has the power to direct the CRTC on a number of matters, including directions of general application on broad policy matters under both the *Telecommunications Act* and the *Broadcasting Act*, and to impose conditions on the issuance, amendment or renewal of a licence under the *Broadcasting Act*. The Governor in Council is also authorised to set aside or refer back to the CRTC any telecommunications decision or any decision to issue, amend or renew a licence under the *Broadcasting Act*.

The Commissioner for Complaints for Telecommunications Services, an independent, industry established consumer complaints agency, deals with complaints regarding services the CRTC has forborne from regulating.

The Minister of Industry is responsible for the regulation of the equipment and activities that make use of the radio spectrum and the allocation and management of the radio spectrum.

1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in Canada?

A Canadian Carrier must be Canadian-owned and -controlled unless it holds less than a 10% share of total Canadian telecommunications services revenues, as determined by the CRTC.

The definition of "Canadian" is based on citizenship, permanent resident status and/or the percentage of share capital owned and controlled by non-Canadians. Effectively, non-Canadians may own up to 46.67% of the voting shares of a Canadian Carrier through direct ownership of 20% of the voting shares of the corporation and the ownership of 33.33% of the voting shares of the Canadian

Carrier's parent corporation. 80% of the members of the board of directors of the Canadian Carrier must also be Canadian. In addition, non-Canadians are not permitted to control a Canadian Carrier, whether on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control (control in fact).

The restrictions on foreign ownership do not apply to resellers and other TSPs that only operate switches, routers or other exempt transmission apparatus.

Similar foreign ownership restrictions apply in the broadcasting sector. There is, however, no exception for broadcasting entities that have less than a 10% share of broadcasting revenues. In addition to the restriction on non-Canadians indirectly owning more than 46.67% of the voting shares of a broadcasting undertaking, the chief executive officer of the licensee and 80% of the board of directors of the licensee must be Canadian. An Independent Programming Committee must be established if: (i) Canadians own less than 80% of the voting shares of the parent corporation; (ii) the chief executive officer of the parent corporation is a non-Canadian; or (iii) fewer than 80% of the directors of the parent corporation are Canadian.

Non-Canadians can own non-voting shares of broadcasting undertakings or Canadian Carriers to increase their overall equity participation. However, the equity participation of non-Canadians is a factor considered in the control-in-fact test.

2 Telecoms

General

2.1 Is Canada a member of the World Trade Organisation? Has Canada made commitments under the GATS regarding telecommunications and has Canada adopted and implemented the telecoms reference paper?

Canada is signatory to the WTO Agreement on Basic Telecommunications and has adopted the Reference Paper. Telecommunications services regulated under the *Broadcasting Act* and telecommunications services supplied for the transmission of broadcasting services directly to the public are expressly excluded from Canada's schedule of specific commitments. Canada's commitments on market access, traffic funding and foreign ownership (of international submarine cables and satellites) have been implemented.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

The CRTC is required to regulate TSPs to implement the policy objectives set out in the *Telecommunications Act*. However, the CRTC has jurisdiction to forbear from regulating (entirely, partially or conditionally) in cases in which it finds there is sufficient competition or where forbearance is consistent with policy objectives. Forborne services include: certain retail local exchange services; retail wireless services; long-distance and international services; retail internet services; various data and private line services; VoIP services; terminal equipment and inside wiring; and satellite services and services provided by non-dominant carriers.

Services that continue to be regulated by the CRTC may only be offered in accordance with tariffs approved in advance by the CRTC, following a public process (see also the response to question 2.9).

The CRTC regularly retains jurisdiction to deal with complaints of unjust discrimination even where it has otherwise forborne from regulating rates and services.

2.3 Who are the regulatory and competition law authorities in Canada? How are their roles differentiated? Are they independent from the government?

The Competition Bureau, an independent law enforcement agency, is the general competition authority in Canada. The transfer of ownership and control of licensed broadcasting undertakings is subject to the overlapping jurisdictions of both the Competition Bureau and the CRTC. The CRTC is not required to approve a change in control of TSPs except to confirm compliance with the eligibility requirements.

The Competition Bureau's jurisdiction also extends to reviewing anti-competitive market practices, such as exclusive dealing, market restriction and abuse of dominance, which may overlap with the CRTC's broad authority to oversee the market conduct of TSPs and broadcasting undertakings. When the CRTC requires certain conduct from regulated entities but that conduct contravenes a provision of the *Competition Act*, the entity may be relieved from liability under that statute under the so-called regulated conduct doctrine.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

Within 30 days of CRTC decisions or orders, an appeal may be brought on questions of law or jurisdiction to the Federal Court of Appeal, with leave of the court. In addition, the Federal Court of Appeal has jurisdiction to hear applications for judicial review of decisions or orders of the CRTC on grounds other than questions of law or jurisdiction. See also the response to question 1.3 for the power of the Governor in Council to overturn decisions of the CRTC.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in Canada?

Canadian Carriers are required to register and file data regularly with the CRTC, attest that they are eligible to operate as a Canadian Carrier (see the response to question 1.4) and obtain a Basic International Telecommunications Services (BITS) licence. Resellers and other non-facilities-based TSPs are also required to register and file data with the CRTC and obtain a BITS licence if they carry telecommunications traffic between Canada and another country. They are not, however, subject to the ownership and control regime.

The rates, facilities and services of Canadian Carriers are regulated by the CRTC unless an exemption applies or the CRTC has forborne from regulation (see also the response to question 2.9).

All TSPs are required to participate in the CRTC's Contribution Regime to support local access service in high-cost areas (i.e., universal service) at a level based on their registration status, the exchange served and total revenues (less certain deductions). The Contribution Regime does not extend to broadband internet access.

2.6 Please summarise the main requirements of Canada's general authorisation.

See the response to question 2.5.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

The term of a BITS licence may not exceed 10 years and may be transferred only with the consent of the CRTC.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Canadian Carriers have a conditional right to construct, maintain or operate their transmission lines on highways and in public places. The municipality's consent must be sought before Canadian Carriers are permitted to construct facilities. If consent is not granted, the Canadian Carrier may apply to the CRTC, which is authorised to grant Canadian Carriers a right of access to support structures of transmission lines constructed on a highway or other public place. The CRTC's jurisdiction does not extend to electrical utility support structures, which are regulated by provincial utility authorities.

To ensure that persons in Multi-Dwelling Units (MDUs) have access to the LEC of their choice, the CRTC imposes conditions on TSPs that allow CLECs to access and enter into MDUs to connect and/or install their facilities. Terms and conditions of building-access agreements entered into must be published on the LEC's website. The CRTC also mandates wire-sharing on terms that depend on whom the wiring belongs to and whether it is copper wiring or fibre.

Access and Interconnection

2.9 How is network-to-network interconnection and access mandated?

The CRTC's wholesale services framework sets out the rates, terms and conditions under which certain Canadian Carriers are required to make available parts of their respective networks to competitors including access services, interconnection services and co-location services (Telecom Decision CRTC 2015-326).

Disaggregated wholesale high-speed access services are subject to the CRTC's wholesale services framework, including making wholesale high-speed access services available over fibre-access facilities.

Unbundled local loops are no longer subject to the wholesale services framework.

2.10 How are interconnection or access disputes resolved?

Commercial disagreements over issues relating to tower- and site-sharing may be subject to Industry Canada's Arbitration Rules and Procedures.

CRTC-assisted dispute settlement mechanisms for telecommunications matters include (i) staff-assisted mediation, (ii) final offer arbitration, and (iii) expedited hearings.

2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

Regulated services may be offered only by Canadian Carriers in accordance with tariffs filed with and approved by the CRTC, following a public process. Terms and conditions of building-access agreements entered into must be published on the LEC's website.

2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

The CRTC uses a range of methods when exercising its discretion to determine whether rates for regulated services are "just and reasonable" and do not "unjustly discriminate" or "give an undue or unreasonable preference", including to the Canadian Carrier itself.

The tariffs for disaggregated wholesale high-speed access services are still to be determined.

With respect to wireless services, wireless carriers are required to provide wholesale roaming services at commercially negotiated rates, terms and conditions, as well as tower-sharing. In addition, Canadian Carriers are prevented by the legislation from charging other Canadian Carriers more for wholesale wireless roaming services (voice, text and data) than they charge their own retail customers, although repeal of this cap is expected. However, the rates charged by Canada's three largest wireless carriers (Bell, Rogers, Telus) to other Canadian wireless companies for wholesale roaming services are subject to cost-based price regulation (Telecom Decision CRTC 2015-177).

2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

Structural separation has not been pursued in Canada. The CRTC requires each ILEC and large cable company to establish a customer/carrier services group (CSG), a distinct, functionally separate group within the company whose role is to liaise and coordinate with competing TSPs when conducting a variety of inter-carrier activities, primarily with respect to customer transfers.

2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

Unbundled local loops are no longer subject to regulation under the CRTC's wholesale services framework. ADSL access services and TPIA services provided by cable carriers are also subject to regulation under the CRTC's regulatory framework for wholesale services. (See the response to question 2.9.)

2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

See the response to question 2.9.

Price and Consumer Regulation

2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

The CRTC has forbore from price regulation for a significant portion of wireline services, as well as for wireless and internet services. Rates for regulated services must be “just and reasonable” and must not “unjustly discriminate” or “give an undue or unreasonable preference”.

2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

TSPs are subject to obligations respecting the protection of customer information under the *Personal Information Protection and Electronic Documents Act* and CRTC regulation. Absent express consent, customer information may not be disclosed.

The CRTC’s Code of Conduct for wireless services mandates standards for service contracts, customer billing, portability of handset devices and caps on data overage and roaming charges.

The CRTC’s Unsolicited Telecommunications Rules, including the Telemarketing Rules and National Do Not Call List (DNCL) Rules, require telemarketers to ensure numbers on the DNCL are not called. Administrative monetary penalties may be awarded for violation of the DNCL Rules.

Anti-spam legislation (*An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities*, or CASL) was enacted in 2010, entered into force in July 2014 and is being phased in over three years. The CRTC has primary responsibility (together with the Competition Bureau and the Office of the Privacy Commissioner) to investigate and apply monetary penalties against those who send unwanted spam, alter transmission data (as of July 2014) and install malware, including phishing and spyware (as of January 2015).

Numbering

2.18 How are telephone numbers and network identifying codes allocated and by whom?

The CRTC has delegated its powers to administer and assign telephone numbers to the Canadian Numbering Administrator (CNA). Canadian Carriers have direct access to numbering resources from the CNA; resellers do not. The CNA receives and processes Canadian applications for area codes, carrier identification codes and certain line numbers, and forwards them to the North American Numbering Plan Administrator.

2.19 Are there any special rules which govern the use of telephone numbers?

Canadian Carriers must attest that they have implemented local number portability before being assigned telephone numbers.

2.20 Are there any obligations requiring number portability?

Full number portability is mandated in Canada for both wireline and wireless service providers within the same local exchange area.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The authority of the Minister of Industry to regulate the allocation and management of the radio spectrum and the equipment and services that make use of the radio spectrum is exercised by Industry Canada, which is not an independent administrative or law enforcement agency like the CRTC or the Competition Bureau.

3.2 How is the use of radio spectrum authorised in Canada? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative ‘beauty parades’, etc.?

The Minister of Industry is authorised to issue radio licences (broadcasting certificates, radio operator certificates and technical apparatus certificates) and spectrum licences.

A first-come, first-served approach is used when there is sufficient spectrum to meet demand in a given frequency band and when no additional measures are required to advance particular policy objectives. Competitive processes (which may include an invitation to express interest and spectrum auctions) are also used. Auctions for the 700 MHz spectrum, Advanced Wireless Service in the bands 1,755 to 1,780 MHz and 2,155 to 2,180 MHz (AWS-3) and the 2,500 MHz spectrum occurred in January, March and April 2015 respectively. Spectrum set aside for new entrants, as employed in the 2008 AWS auction, has been employed in all subsequent spectrum auctions together with spectrum caps, spectrum packaging, block and tier sizes, and deployment requirements.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Specific licence exemptions apply to certified devices used on board aircraft or ships, or by a certified amateur radio operator. In addition, Industry Canada has established regulations that allow for the use of licence-exempt radio devices that operate within specially designated frequency bands and on a strict “no-interference, no-protection” basis in relation to all other radio systems.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Fees for radio licences are based on the type of radio station licensed and the type of service it is used for.

There are annual spectrum fees and spectrum licence issuance fees calculated for different services, as described in a number of Industry Canada publications. Fees are not applied for licences obtained under a competitive bidding process. Annual licence fees are applied to licences that are renewed at the end of the licence term, including licences initially obtained under a competitive bidding process.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

Approval of the Minister of Industry is required for any change in control of a licensee.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so on what conditions?

Radio licences and spectrum licences may not be amended, transferred or assigned without approval from the Minister of Industry. Transfer requests are treated as set out in Client Procedure Circular CPC-2-1-23, *Licensing Procedure for Spectrum Licences for Terrestrial Services*. Industry Canada approval is also required for a subordinate licence and for future agreements to transfer a commercial mobile spectrum licence to another holder of a commercial mobile spectrum licence. Industry Canada has taken steps to promote the development of secondary markets for certain spectrum licences, allowing licensees in some circumstances to sell existing spectrum rights to third parties, subject to the policy and licensing framework applicable to specific licences.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

The interception of private communications without consent or without judicial authorisation is generally prohibited by the *Criminal Code*. Warrants authorising the interception of private communications and assistance orders may be sought from the courts under a number of federal statutes.

Comprehensive lawful access legislation has been tabled on a number of occasions that would have forced TSPs to provide subscriber information to authorities when compelled to do so, possess data preservation facilities, maintain capacities to provide intercept services and decrypt communications that they were responsible for encrypting. Such lawful access legislation has not (yet) passed into law.

4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Wireless service providers are required, by condition of their spectrum licences, to maintain lawful intercept capabilities in compliance with a set of enforcement standards developed by Public Safety and Emergency Preparedness Canada, a federal government department. No similar legislation exists for other TSPs. (See the response to question 4.1.)

4.3 How does the state intercept communications for a particular individual?

At present, no Canadian legislation compels TSPs to use apparatus capable of intercepting communications. (See the response to question 4.1.)

4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state?

At present, TSPs are not required to give law enforcement agencies access to decrypted communications. (See the response to question 4.1.)

4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?

TSPs are not required to collect and retain information about their subscribers' use of their services. TSPs can, however, disclose the names and addresses of subscribers with their consent. Most service agreements with the major TSPs permit disclosure to law enforcement agencies.

The courts may order retention and preservation of data in the course of civil actions.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in Canada?

The *Broadcasting Act* covers both the transmission of audio-visual programming (i.e., broadcasting) and the distribution of such programming (i.e., broadcast distribution). All broadcasting undertakings (both programming and distribution) must be either licensed or exempt from licensing by the CRTC.

With regard to the transmission of programming, a broadcasting certificate must first be issued by the Minister of Industry under the *Radiocommunication Act* before the CRTC will issue a broadcasting licence under the *Broadcasting Act*. The CRTC has broad authority to prescribe classes of licences and to issue licences for terms not exceeding seven years, subject to conditions deemed appropriate for the implementation of Canadian broadcasting policy. The CRTC has prescribed classes of licence for radio, conventional television (i.e., broadcast networks), specialty services (i.e., cable networks) and VOD, pay and PPV services. Within specialty services, the CRTC issues licences for Category A, Category B and Category C specialty services. Among other terms and conditions, a minimum percentage of Canadian content exhibition and expenditure is imposed. Generally, 35% and 55% of the content aired on private radio and conventional television stations, respectively, must be Canadian. Canadian content exhibition and expenditure requirements for specialty and pay television services vary.

With regard to distribution, there are three distribution platforms for the broadcast of television programming in Canada: (i) conventional transmission by licensed broadcasting undertakings, which is free of charge; (ii) licensed broadcast distribution undertaking (BDU) over dedicated landline (cable), wireless (satellite) or private IP network facilities (IPTV) to paying subscribers; and (iii) digital media broadcast undertakings via the internet or using point-to-point technology and received by way of mobile devices that are exempt from regulation under the *Exemption order for digital media broadcasting undertakings*.

BDUs are not subject to price regulation. However, the CRTC can require BDUs to give priority to the carriage of certain programming and mandate carriage of other programming services. The majority of the television signals distributed by BDUs must be Canadian. A few channels are mandated by the CRTC to be part of every basic service package on the basis that the channels fulfil important policy objectives under the Act. Moreover, BDUs are required to distribute all Category A specialty services but not necessarily as part of the basic package. Carriage of Category B and Category C specialty services must be negotiated with the BDUs. If a BDU carries a Category B specialty television service in which it or an affiliate owns more than 10%, it must distribute at least three non-affiliated Category B specialty television services for each affiliated service carried.

In addition, due to vertical integration of broadcasting and broadcast distribution undertakings, the CRTC imposes restrictions on vertically integrated entities, including a comprehensive code of conduct for commercial arrangements and interactions between BDUs and programming undertakings.

5.2 Is there a distinction between the linear and non-linear content and/or content distributed over different platforms?

Content delivered by digital media broadcast undertakings via the internet or using point-to-point technology and received by way of mobile devices (non-linear content) is exempt from regulation under the *Exemption order for digital media broadcasting undertakings*.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

See the response to question 5.1.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

CRTC broadcasting licences (both programming and distribution) cannot be transferred without the CRTC's approval. In approving a transfer or change in control, the CRTC will confirm that the Canadian ownership requirements are met and that the transfer or change in control complies with its Diversity of Voices policy. The CRTC will not generally approve transactions that result in an entity controlling more than 45% of the total television audience share in either the English language or the French language market, or transactions that would result in an entity controlling a specified number of conventional television and radio stations in the same language in the same local market.

The CRTC may impose obligations on each transfer or change in control, including the payment of certain tangible and intangible benefits to the Canadian broadcasting system.

See also the response to question 2.3.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

The Supreme Court of Canada has generally been consistent in the application of the mere conduit defence to protect TSPs

from liability for the mere carriage of content carried over their networks. In the context of copyright law, Canada has adopted a voluntary "notice and notice" regime whereby ISPs are protected from copyright liability in situations in which the infringement is known, provided the ISP forwards notice of copyright infringement received from a copyright owner to the subscriber responsible for the infringing content.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

TSPs are not permitted to disclose personal information about their subscribers absent a court order to do so. See also the response to question 6.1.

6.3 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any 'net neutrality' requirements?

Under the CRTC's Internet Traffic Management Practices framework, ISPs may not use traffic management practices that block the delivery of content, degrade time-sensitive internet traffic, or slow non-time-sensitive traffic to the extent that it amounts to blocking the content absent prior approval from the CRTC.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?

The *Telecommunications Act* prohibits the control of content by TSPs unless the CRTC orders otherwise. The CRTC has denied past applications to block internet sites.

6.5 How are 'voice over IP' services regulated?

Like wireline services, VoIP services are not regulated in the vast majority of local exchanges. General conditions, including requirements relating to registration, provision of an emergency '911' service, protection of customer data and payment to the Contribution Regime, also apply to VoIP services. If a Canadian Carrier provides VoIP interconnection to an affiliate or an unrelated service provider, the Canadian Carrier must provide the interconnection to any other carrier that requests it.

**George Addy**

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7
Canada

Tel: +1 416 863 5588
Fax: +1 416 863 0871
Email: gaddy@dwpv.com
URL: www.dwpv.com

George Addy is the senior partner heading the firm's Competition and Foreign Investment Review group and is also part of the Technology and Communications & Media practices. He was head of the Canadian Competition Bureau (1993-1996) and its merger review branch (1989-1993). He left public service to become Executive Vice President and Chief General Counsel at TELUS, Canada's second largest telecommunications firm. George's practice covers regulatory and competition law, including strategic advice and representation before sector regulators and competition authorities in Canada and abroad in relation to cartels, mergers, acquisitions, joint ventures, abuse of dominance and other reviewable trade practices. He is consistently listed as one of the most frequently recommended competition law practitioners in legal directories. He has acted as external counsel to Canada's telecommunications and broadcasting regulator (CRTC) and frequently advises firms in the telecoms, broadcasting, cable distribution and hi-tech sectors, as well as private equity firms on regulatory, competition and investment matters.

**Elisa Kearney**

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7
Canada

Tel: +1 416 367 7450
Fax: +1 416 863 0871
Email: ekearney@dwpv.com
URL: www.dwpv.com

Elisa Kearney is a partner in the Competition & Foreign Investment Review, Technology, Communications & Media and Retail practices. Elisa has had significant experience advising firms in the telecommunications, broadcasting, cable distribution and digital media sectors on regulatory, competition, advertising and investment matters. She has acted as external counsel to the CRTC, Canada's telecommunications and broadcasting regulator, and the Competition Bureau, Canada's competition law enforcement agency.

Davies Ward Phillips & Vineberg LLP is an integrated firm of approximately 240 lawyers with offices in Toronto, Montréal and New York. The firm focuses on business law and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its clients, regardless of borders. We act for a wide range of leading industrial and commercial companies and financial institutions, both public and private, in Canada, the United States and abroad. As well, our clients include governments, regulatory bodies, charitable organisations, international agencies, educational institutions, individuals and trusts and estates. Many clients are directed to us for special-purpose engagements by other North American and international law firms.

Recognised by clients, other professionals and rating agencies as world-class, our lawyers are results-focused, and known for their business insight and decisiveness. In each of our core practice areas, including corporate, mergers and acquisitions, capital markets, tax, competition, real estate and litigation, Davies is regarded as a market leader.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk