

Canadian Spectrum Management in Institutional Stasis

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A Public Administration Perspective on Spectrum Policy and Regulation in Canada



Even if you like the sausage you might not appreciate knowing how it was made

Scope Creep: “Godlike Powers”

- The Minister of Industry exercises his/her powers under the *Radiocommunication Act* “**taking into account all matters that the Minister considers relevant** for ensuring the **orderly establishment or modification of radio stations** and the **orderly development and efficient operation of radiocommunication in Canada**”
- Also the Minister “**may have regard to the objectives of the Canadian telecommunications policy** set out in section 7 of the *Telecommunications Act*.”
- “The practical implications of applying the current s. 7 objectives are often unclear. As a result, they are used by parties in CRTC proceedings **to justify arguments in support of a very wide range of different and often conflicting regulatory actions.**”¹
 - Applies equally to the Minister of Industry

Cellular Licensing 1982-1983

- Original policy provided for regional licensing in each of 23 Census Metropolitan Areas
- Individual applicants given the opportunity to meet with DOC officials
 - In camera, no records kept – not even who attended
 - Allegedly not an opportunity to lobby nor to comment on other applicants
 - Following these meetings the DOC announced that only those applications offering nation-wide service to all service areas would be considered further and applicants were invited to resubmit under a different set of criteria
- “... we knew full well that everybody was lobbying like crazy, not only with the then Minister of Communications but also virtually every other member of Cabinet to get some kind of angle on the licensing process”²

A Procedurally Flawed Process

- “Indeed, the lack of a transparent process coupled with the fierce political lobbying that occurred contributed to the lingering belief that the eventual victor didn’t win on the merits of its application, but rather on politics.” ³
- “From a procedural point of view, the absence of public hearings and a lack of any adequate opportunity to comment on rival applications, combined with extensive ex parte contact, must render the final decision somewhat questionable.” ⁴
- “Indeed if this process had taken place under any administrative agency like the CRTC, the grounds for challenge and judicial review would be extensive. It seems as if the DOC believed that, by acting under the guise of political accountability it exonerated the department from any requirements of procedural decency.” ⁵

But it's better now, right?

- “Furthermore, Industry Canada’s policies should be developed in an **open, transparent and reasoned manner**. To this end, Industry Canada carefully **considered input from the public consultations** on the spectrum in the 700 MHz and 2500 MHz bands in formulating its policy measures, as reflected in this document.” 6

“Industry Minister Holds Closed Door Meetings With Big Telecoms And You’re Not Invited” ⁷

- **Over a two week period Industry Minister Paradis met with 13 of Canada’s largest telecom companies.**
- **“Unfortunately, consumers are not included in Minister Paradis’ day-planner to share their views of further marketplace consolidation or wireless spectrum reform. In fact, they don’t even have a right to learn what exactly was discussed during the closed door sessions.”**

“Paradis meets with telcos in advance of final 700 MHz rules”⁸

- Following the receipt of public comment the Minister of Industry meets with individual telecom companies to discuss the 700 MHz auction rules
 - Telus, BCE and Rogers would not give any specific information on what was discussed
 - MTS Allstream said it met with the minister to discuss the 700 MHz auction and other issues
 - Wind Mobile said the meetings were not a further consultation on the 700 MHz auction
 - Industry Canada said “the minister meets with companies and stakeholders on a regular basis to hear their opinions and views”

Auction Politics

- **“Unlike the FCC, which auctions spectrum and oversees its regulation, the Canadian system is divided. In Canada, the CRTC regulates the wireless carrier, while Industry Canada auctions the spectrum. That means Industry Canada’s auction rules can be shaped by politics. Hence the intense lobbying that’s occurred behind the scenes. “The decisions that Industry Canada makes are political decisions. The decisions that the CRTC makes are strictly on the merits of the economy and the public,” says Michael Kedar, who would like to establish a wireless competitor.”** ⁹

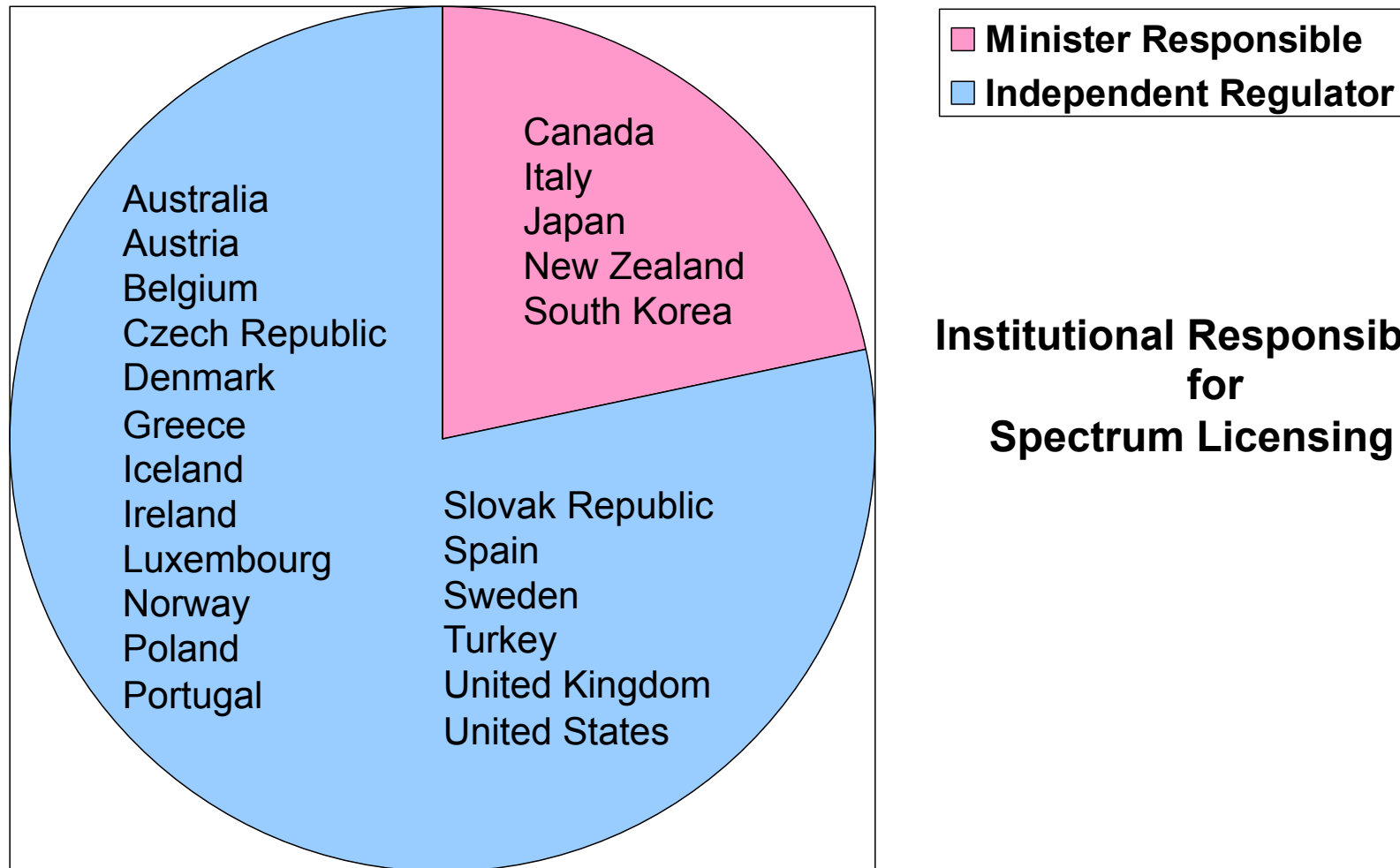
Canada's Ministerial/Political Spectrum Regulation

“Unfettered” discretion
+
Absence of rules of procedure
+
“Often unclear” policy objectives
+
Closed door representations
+
Ambiguity in who decides and is accountable
+
Absence of reasoned decisions

Stakeholder Impacts

Lack of transparency
+
Perception of unfairness / lack of confidence in regulation
+
Media-driven / ad hoc / inconsistent decision-making
+
Weak spectrum usage rights
+
Resources expended in rent-seeking behaviour
+
Regulatory uncertainty
+
Comparative disadvantage with other countries
+
Delay

OECD Countries Favour Independent Spectrum Regulators For Licensing



**Institutional Responsibility
for
Spectrum Licensing** ¹³

Time for an Independent Regulator

- **“There is a simple solution to ameliorate the problems of unstructured political decision-making and the concomitant absence of transparency and due process. Canada should consider adopting the approach common to most other members of the OECD, namely to assign spectrum licensing to an independent regulatory agency.”** ¹⁰
- **“The Panel believes, as Canada’s major trading partners and the majority of OECD countries have recognized, that the increased convergence of wireless and wireline telecommunications and broadcasting technologies calls for a more consistent and unified regulatory approach. The functions of spectrum licensing, management and enforcement should be assigned to an independent regulator (the CRTC), which is mandated to use transparent procedures in implementing spectrum policy.”** ¹¹

Not Necessarily the CRTC

- **“It is our view that the spectrum manager should be constituted as an independent regulatory agency responsible only for the regulation of the spectrum resource and subject to direction from the federal government as to the objectives of spectrum management, but with the power to choose its own means of accomplishing these objectives. Such an arrangement removes the details of spectrum management from the political arena.”** ¹²

“Arm’s Length” – a well developed concept in Canada

- “Maintaining an arm’s length relationship to Ministers is particularly important for those organizations whose mandate is **to make decisions that determine or regulate the privileges, rights or benefits of Canadians.**”
- “Governments delegate decision-making powers to these bodies, in part, **to preserve public confidence in the fairness of the decision-making process.** In turn, the exercise of these powers requires careful attention to ensure that the appropriate degree of independence is maintained.”
- “The nature of the relationship between a Minister and an agency is a particularly sensitive issue for administrative tribunals or other independent decision-making organizations carrying out quasi-judicial functions. These are statutory bodies responsible for administering, determining, establishing, controlling or regulating an economic or business activity, or adjudicating cases that affect individual rights and benefits.”
- “**The purpose of such structures is to balance Ministers’ accountability for overall policy development and utilization of public resources with the independence needed for these bodies to make specific decisions in a transparent, fair and non-partisan manner.**” ¹⁴

A Broad-based Consensus on Fundamental Principles for Effective Spectrum Management

Independent Canadian Studies

- Telecom Policy Review Panel
- C.D. Howe Institute
- Atlantic Institute for Market Studies
- Montreal Economic Institute

Industry

- GSM Association
- Telecommunications Industry Association

- **Independent regulator**
- **Transparency**
- **Regulatory certainty**
- **Strengthened usage rights in spectrum licences**
- **Liberal approach to secondary markets**
- **Effective enforcement**

Financial Institutions

- World Bank

Other Countries

- OECD counterparts
- ITU

Spectrum Management for the Digital Economy – Do we have it right?

***First we shape our institutions,
then they shape us.***

Winston Churchill

Endnotes

1. Telecommunications Policy Review Panel Report 2006
2. Gregory Kane as quoted in The Licensing of Wireless technologies in Canada: An Examination of the use of Ministerial Licensing, Robert Clendenning, 1999, p.34
3. High Wire Act: Ted Rogers and the Empire That Debt Built, Caroline Van Hasselt, p.267
4. Due Process at the Department of Communications: Kneeling at the Chancellor' s Foot, H.N. Janisch, 1990. p. C2
5. The Licensing of Wireless technologies in Canada: An Examination of the use of Ministerial Licensing, Robert Clendenning, 1999
6. Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio Services (BRS) – 2500 MHz Band, Industry Canada, March 2012, p. 2
7. Phillip Dampier article on Stopthecap.com, August 30, 2011
8. High Wire Act: Ted Rogers and the Empire That Debt Built, Caroline Van Hasselt, p.524
9. The Wire Report, February 25, 2013
10. Industry Canada as Economic Regulator, Richard Schultz, in How Ottawa Spends, 2011-2012, Trimming Fat or Slicing Pork?, p.213
11. Report of the Telecommunications Policy Review Panel, 2006, p. 5-24
12. Study of Market-Based Exclusive Spectrum Rights, McLean Foster & Co., 2007
13. Derived from Report of the Telecommunications Policy Review Panel, 2006, p. 5-23
14. Guidebook for the Heads of Agencies: Operations, Structures and Responsibilities in the Federal Government, Privy Council Office