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Draft *Competition Act* Amendments Begin Regulatory Reform in Canada's Telecommunications Sector

On December 7, 2006, the federal government tabled telecom-specific amendments to the *Competition Act*. Bill C-41 would allow the Competition Tribunal to impose administrative monetary penalties (i.e., fines) of up to C\$15 million for abuse of dominance by a telecom service provider. Along with Cabinet's reversal of the CRTC's VoIP decision (see below), this is one piece of a broader initiative to increase reliance on market forces in telecoms.

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Canada considers *Investment Canada Act* amendments: Potential focus on foreign state-owned investors

[Sandy Walker](#)

The *Investment Canada Act* (the Act) has returned to the national spotlight. As part of the long-term economic plan released in late November called *Advantage Canada: Building a Strong Economy for Canadians*,ⁱ Canada's Minister of Finance announced, among other things, his intention to review the Act "with the aim of maximizing the benefits of foreign investment for Canadians, while retaining our ability to protect national interests." While identifying screening procedures under the Act as a factor that restricts foreign investment in the Canadian economy (and stating unequivocally that "both inward and outward foreign direct investment bring substantial benefits to Canada"), the report also noted concerns arising from the "rare" occasions when take-overs of Canadian businesses might damage Canada's long-term interests.

The only example cited was that of investment in Canada by a foreign state-owned enterprise (SOE) with "non-commercial objectives and unclear corporate governance and reporting." As has recently been the subject of

some discussion in Canada (see below), the acquisition by a foreign SOE of a significant stake in Canada's natural resources might trigger a concern that such resources would simply be funnelled back to the investor's home country and not sold on the open market. One could also imagine, however, that investment in a defence-related industry by a hostile government might not be in Canada's "long-term interests." Moreover, in the highly charged post-9/11 world of international politics, other grounds may also be raised in opposition to certain investments.

Wariness of foreign state-owned investors is neither novel, nor unique to Canada. South of the border, national energy security was invoked by members of the United States Congress who objected to China National Offshore Oil Corporation's (CNOOC) proposed acquisition of Unocal, a U.S.-based oil producer—objections that may have influenced Unocal's decision to reject CNOOC's offer in favour of a lower bid by Chevron. Earlier this year, a United Arab Emirates state-owned company, Dubai Ports World, announced that it would sell the US port management business it had recently acquired—after a chorus of Congressional opposition to the deal. It was also reported in 2005 that the Chair of the US House of Representatives' Armed Services Committee had urged the Bush administration to pressure Canada to review proposed Chinese investments in Canada's oil sands projects.ⁱⁱ

In Canada, unease with acquisitions by foreign SOEs was demonstrated in 2004, when a number of Canadian Parliamentarians expressed concerns about the proposed acquisition of Noranda, a large Canadian mining company, by China Minmetals Corp., a Chinese SOE. Minmetals was not the successful bidder, so the issue of foreign government control over Canadian "strategic assets" was never fully addressed. Since then, however, China Petrochemical Corp. and CNOOC have purchased minority interests in Canadian oil sands projects without objection by the federal government. Nevertheless, the previous Government responded to the controversy in 2005 by introducing a bill into Parliament (Bill C-59) that would have added "national security" as a ground under the *Investment Canada Act* for reviewing and prohibiting a foreign take-over of a Canadian business. While the then-Industry Minister (responsible for the Act), stated at the time of the Minmetals bid that foreign investment review is "a qualitatively different matter when enterprises are state-owned,"ⁱⁱⁱ foreign state-owned enterprises were not specifically targeted by Bill C-59.^{iv}

The scope of the current Government's concerns, as briefly alluded to in the report (foreign state investments), may be narrower than "national security." That said, like Bill C-59, any legislation the Government brings forward would likely face similar challenges to articulate the criteria on which to reject an investment, while not appearing to discourage foreign investment in Canada. Indeed, criticism of Bill C-59 targeted the potentially very broad reach and uncertain scope of the term "national security." While the Minister of Industry at the time stated that "national security" in the context of foreign investment review referred principally to acquisitions involving sensitive technology (e.g., satellite or encryption technology) or military hardware, the possibility of an expansive interpretation remained. It is worth noting that the federal Treasury Board guidelines for procurement define "national security" as encompassing threats to economic, environmental and human security.

It remains to be seen whether the new Government's proposed amendments will zero in on foreign SOEs, or will seek broader discretion to reject foreign investment in Canada on "national security" grounds, and exactly how it will attempt to change the perception that the Act discourages foreign direct investment in Canada. It will also be interesting to see how foreign governments will respond. Canada will need to tread carefully, walking a fine line between offending foreign state investors, on the one hand, and promoting foreign investment in Canada, on the other.

i] On-line at www.fin.gc.ca/ec2006/plan/pltoce.html

ii] "U.S. officials sound alarm on China; Unocal bid painted as reserve grab", *Globe and Mail*, Report on Business, p.1, July 14, 2005.

iii] "PM lauds Chinese takeover of Noranda", *The Globe and Mail*, p. A1, October 22, 2004.

iv] Bill C-59 died on the Order Paper as a general federal election was called before its enactment.

v] See [The Competitor July 2005](#)

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Canadian government varies CRTC VoIP decision

[D. Jeffrey Brown](#) and [Kevin Rushton](#)

On November 15, 2006, Canadian Minister of Industry Maxime Bernier announced that the Governor in Council (effectively, the federal Cabinet) had exercised its power under the Telecommunications Act (the Act) to vary the Canadian Radio-television and Telecommunication Commission's (CRTC)¹ 2005 voice over Internet Protocol (VoIP) decision.² Cabinet ordered the CRTC to forbear from regulating retail local access-independent VoIP services provided by incumbent local exchange carriers (ILECs) within their incumbent territories to the same extent the CRTC has forborne from regulating retail local telecommunications services, including VoIP services, provided by competitive local exchange carriers (CLECs).³

VoIP services route voice communications through packet-switching technology over an IP network, in contrast to traditional telephone service provided over circuit-switched networks.⁴ Access-independent VoIP services are VoIP services for which the network access (a broadband Internet connection) and voice services may be supplied by different service providers. Access-dependent VoIP services, in contrast, involve the same service provider supplying, in an integrated manner, both the underlying IP network connection (other than a retail Internet connection) and the voice services. As noted, Cabinet's order only pertains to access-independent VoIP services. Access-dependent VoIP services will continue to be subject to the existing regulatory regime which, among other things, subjects ILECs, but not CLECs, to rate regulation for services within their incumbent territories.

In its VoIP decision, the CRTC had determined that retail "local VoIP services should be regulated as local exchange services, and that the regulatory framework governing local competition ... applies to local VoIP service providers." Despite arguments of low barriers to entry and competition from cable companies, the CRTC found "no evidence" that ILECs did not possess market power in respect of local exchange services, including VoIP services. Accordingly, the CRTC rejected applications from ILECs to forbear from regulating VoIP services, concluding that "if forbearance were granted prematurely, the ILECs' ability and incentive to engage in the combination of targeted below-cost pricing of local VoIP services, as well as bundling strategies, prior to the entry and roll-out of other facilities-based competitors, would have a material negative impact on the potential for sustainable competition in the provision of local VoIP services." As a result, "when ILECs provide local VoIP services in their incumbent territories, they are required to adhere to their existing tariffs or to file proposed tariffs as appropriate." CLECs (including cablecos who provide VoIP services over their cable networks) and ILECs providing local VoIP services outside their incumbent territories were not required to file VoIP tariffs.

On petition under the Act from, among others, ILECs,⁵ the federal Cabinet ordered the CRTC in May of 2006 to reconsider its VoIP decision.⁶ In doing so, Cabinet cited the telecommunications policy objective in the Act to "foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective," as well as the March 2006 report of the Telecommunications Policy Review Panel.⁷ On September 1, 2006, the CRTC reaffirmed the regulatory framework for local VoIP services established in its original 2005 decision.⁸

In varying the CRTC's original decision, Cabinet took issue with the CRTC's imposition of the same regulatory regime on both access-dependent and access-independent local VoIP services. Cabinet considered the two types of VoIP services to be "quite different," with "barriers to market entry [being] much lower for retail local access-independent VoIP services as no provision of network facilities is required." Cabinet decided that "retail local access-independent VoIP services should thus be treated as a distinct class of local telephone services, for regulatory purposes." In light of this distinction, Cabinet concluded "that it would be consistent with the Canadian telecommunications policy objectives to refrain from regulating the retail local access-independent class of VoIP services provided by the ILECs within their incumbent territories, at this time, since forbearance from economic regulation for those services would stimulate competition and innovation."

The Canadian Government's variation of the CRTC's VoIP decision is a step toward creating a more symmetrical regulatory regime for VoIP as between ILECs and competitors. More generally, Cabinet's order is consistent with recent moves by the CRTC to ease the regulatory burden on ILECs,⁹ as well as with the Telecommunications Policy Review Panel's recommendation that "[m]arket forces should be relied upon to the maximum extent feasible as the means of achieving Canada's telecommunications policy objectives,"¹⁰ and with Cabinet's proposed policy direction to the CRTC to that effect.¹¹

Nonetheless, Cabinet's order only forbears from economic regulation in respect of access-independent VoIP services provided by ILECs in their incumbent territories; ILECs must continue to file tariffs with the CRTC in respect of access-dependent VoIP services in those territories. At the same time, Cabinet variation of a CRTC decision is very rare and signals a clear policy favouring increased reliance upon market forces in the regulated telecommunications sector. The long-term effect of Cabinet's decision on competition in local exchange services, and the impact – if any – on future CRTC decisions will be watched closely.

¹] The CRTC is a sector-specific regulatory authority mandated by Parliament to regulate the Canadian broadcasting system, under the *Broadcasting Act*, and, under the *Telecommunications Act*, telecommunications common carriers and service providers falling under federal jurisdiction.

²] Telecom Decision CRTC 2005-28, *Regulatory framework for voice communication services using Internet Protocol*, 12 May 2005 (VoIP Decision).

³] SOR/2006-288, Order Varying Telecom Decision CRTC 2005-28, 9 November 2006 (VoIP Order-in-Council).

⁴] VoIP services do, however, ultimately connect to the Public Switched Telephone Network (PSTN).

⁵] See *Canada Gazette*, Part I, Vol. 139, No. 36, 3 September 2005, at 2833.

⁶] P.C. 2006-305, Referral of Telecom Decision CRTC 2005-28 back to the Canadian Radio-television and Telecommunications Commission for reconsideration, 4 May 2006.

⁷] See Telecommunications Policy Review Panel, *Final Report*, March 2006 (TPR Final Report).

⁸] Telecom Decision CRTC 2006-53, *Reconsideration of Regulatory framework for voice communication services using Internet Protocol*, 1 September 2006.

⁹] See Telecom Decision CRTC 2006-75, *Rate ranges for services other than voice over Internet Protocol services*, 23 November 2006, in which the CRTC approved the use of "rate ranges" by

ILECs for the provision of local exchange services (other than VoIP). The decision will allow ILECs to apply for approval of confidential rate ranges and to "change rates within an approved range, at any time, without delay and without the requirement to file a tariff application and obtain [CRTC] approval."

10] TRP Final Report, at 4.

11] See *Canada Gazette*, Part I, Vol. 140, No. 24, 17 June 2006, at 1606.

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Recent Group Activities

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On November 24-25, 2006, [Shawn Neylan](#) spoke as a panellist at the 12th International Seminar on Antitrust Law, in Campos do Jordão, State of São Paulo, Brazil. Other panellists included a Brazilian judge and Brazilian lawyers experienced in competition law. Topics discussed included cartel leniency programmes, evidentiary issues and emerging international practices. Shawn presented a conference paper entitled "Northern Exposure: Canadian Cartel Law", co-authored by [Michael Kilby](#).

On December 1, 2006, [Shawn Neylan](#) spoke as panellist at the Continuing Legal Education Society of British Columbia's "Competition Law Essentials" conference in Vancouver, BC. Shawn presented a conference paper entitled "Distribution Practices: Private Parties and the Competition Tribunal", co-authored by [Michael Kilby](#).

[Shawn Neylan](#), [Jeffrey Brown](#) and [Paul Collins](#) acted for Companhia Vale do Rio Doce (CVRD), a Brazilian company and the largest metals and mining company in the Americas, in connection with its \$19-billion acquisition of Inco Limited.

[Susan Hutton](#) will speak on "National Champions and Barriers to Foreign Competition" at the 2007 Competition Law & Policy Forum, being held from February 11-13, 2007 at Langdon Hall in Cambridge, Ontario. Participation in this Forum is by invitation of the Northwind Professional Institute.

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