

DEVELOPMENTS IN NORTH AMERICA

Mark Katz & Erika Douglas, Davies Ward Phillips & Vineberg LLP (Toronto, ON, Canada)



Canada

1. Changes to Telecommunications Act

On June 29, 2012, the Canadian Parliament passed amendments to the Telecommunications Act to relax foreign ownership restrictions on telecommunications carriers in Canada.⁶¹ Prior to the amendments, the Telecommunications Act imposed a cap of 46.67% on foreign ownership of the voting shares of all Canadian telecommunications carriers and also prohibited foreign “control in fact” of such carriers.⁶² The amendments permit non-Canadians to acquire control of Canadian telecommunications carriers that account for less than a 10% share of overall Canadian telecommunications services revenues, as determined by the Canadian telecommunications regulator.⁶³ The

amendments also permit foreign-controlled telecommunications carriers who later grow their revenues above the 10% share threshold to continue to benefit from the exemption from foreign ownership restrictions in certain cases.⁶⁴ The amendments reflect the Canadian government’s plan to promote domestic competition by providing foreigners greater scope to invest in the Canadian telecommunications sector.

2. Changes to Investment Canada Act

The Canadian government also introduced a number of proposed amendments to Canada’s foreign investment review process under the Investment Canada Act (“ICA”). The changes would, among other things, authorize the Minister who conducts the foreign investment review process to provide greater public disclosure of interim reasons and notices issued pursuant to ICA.⁶⁵ ICA already permits the Minister to disclose final notices sent to an investor indicating whether or not the Minister is satisfied that the investment is likely to be of net benefit to Canada, along with any reasons for the finding.⁶⁶ The objective of the proposed amendments is to increase the level of transparency for ICA-related decisions.

The Canadian government has also proposed changes to the financial threshold used to determine whether acquisitions of Canadian businesses by (or from) investors from World Trade Organization (“WTO”) member countries will be subject to review under ICA.⁶⁷ Although there are other review thresholds under ICA, the threshold applicable to WTO member country investors is the most frequently applied in practice. The amendments propose a new basis for calculating whether the threshold that triggers a review is reached, introducing the concept of “enterprise value,” rather than the current approach of using the book value of the Canadian business’ assets.⁶⁸ The likely effect of the proposed changes would be to further limit the number of acquisitions subject to ICA review. This reflects the Canadian government’s continuing desire to focus its foreign investment review process on only the most significant transactions in Canada.

⁶¹ See, *Telecommunications Act*, SC 1993, c. 38, s. 16; Bill C-38-Jobs, Growth and Long-term Prosperity Act, House of Commons Canada, 1st Session, 41st Parliament [hereinafter, Bill C-38].

⁶² *Telecommunications Act*, *id.* s. 16(2) (prior to 2012 amendments), s. 2(1).

⁶³ Bill C-38, *supra* note 40, ss. 595-600.

⁶⁴ *Id.*

⁶⁵ Bill C-38, *supra* note 40, ss. 479,480.

⁶⁶ *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), s. 36(4).

⁶⁷ Canada Gazette, Part I, Vol. 146 No. 22 at 1456 (June 2, 2012).

⁶⁸ *Id.*

DEVELOPMENTS IN NORTH AMERICA

3. State-Owned Enterprises (“SOEs”)

Another major focus in 2012 has been the Canadian government’s approach to review of the acquisition of control of Canadian businesses by foreign SOEs. Two proposed acquisitions of Canadian energy companies, one by a Malaysian government-controlled entity and the other by a Chinese government-affiliated entity, have brought this issue into the limelight. Although the Canadian government issued guidelines in 2007 on the application of the ICA review process to SOEs, there remains significant uncertainty on how the government will assess such transactions.⁶⁹ In October 2012, shortly after the Malaysian transaction received an unfavorable interim decision from the reviewing Minister, Canada’s Prime Minister stated that the government intends to issue a “clear and new policy framework regarding [SOE] transactions” in the “not too distant future.”⁷⁰

⁶⁹ See Industry Canada, Guidelines—Investment by state-owned enterprises—Net benefit assessment, *available at* <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2>.

⁷⁰ Shawn McCarthy et al., *Petronas, Progress push to Save Deal*, GLOBE AND MAIL, Oct. 22, 2012, *available at* <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/petronas-progress-push-to-save-deal/article4628162/>