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Canada: Telecommunications

Expert Panel Urges Reform of Canadian Telecom Regime

By Charles Tingley & Mark Katz
(Davies Ward Philips & Vineberg LLP)

An expert body established by the Canadian government, the Telecommunications Policy Review Panel (the "Panel"), has urged fundamental and rapid reform of the institutional and regulatory framework governing Canada's telecommunications industry. The Panel's recommendations are contained in a final report issued on March 22, 2006 (the "Report"), which is available at http://www.telecomreview.ca.

The Need for Change

While acknowledging the strength of Canada's telecom industry, the Panel concludes in the Report that the industry is nonetheless lagging in crucial areas such as the deployment of next generation networks (*e.g.*, fibre to home) and wireless services, and is not keeping pace with new

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Regional: Energy

Three Governments Offer a New Self-Portrait

By Joseph M. Dukert
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A little less than four years ago, Canada, Mexico, and the United States posed deliberately for their first-ever, official *self*-portrait showing where each stood in regard to energy—and what was being done (for their mutual benefit) to collaborate more closely. This important, jointly produced document was issued in three languages (and entitled in English, *North America—The Energy Picture*).[1] Now, members of the North American Energy Working Group (NAEWG) have released their updated version of that snapshot in the form of a 94-page, multicolored report.[2] It is a mix of good news, bad news, and lots of uncertainty.

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HIGHLIGHTS

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Martin, who resigned as leader after the Liberal's recent election defeat. All parties recognize that it is too soon to take Canadian voters back to the polls.

Whatever else may be said about the budget, there is broad recognition that it represents for the Conservatives a political tool aimed to charm middle class voters in preparation for the next general election, whenever that may be.

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Trade

Tentative Agreement Reached on Softwood Lumber

By B.J. Shannon and Elizabeth Hein
(Alston & Bird LLP)

In late April, the United States and Canada reached a tentative agreement in the ongoing softwood lumber battle. According to the terms of the deal, the United States will revoke antidumping and countervailing duty orders on Canadian lumber imports. In exchange, Canada is to impose an extensive system of taxes and border restraints on its softwood lumber exports. The deal also removes all restrictions on softwood lumber exports from Canada, so long as the U.S. price of Canadian lumber stays above $355 per thousand board feet.

If the U.S. price of Canadian lumber dips below $355 per thousand board feet, Canadian provinces may impose either an export charge or, alternatively, a lower export charge plus a volume restraint. Any proceeds from the export charge will remain within the respective provinces of Canada.

Canadian companies and the Canadian maritime provinces that are already excluded from the current antidumping or countervailing duties, will not be subject to this deal.

Since the imposition of antidumping and countervailing duties on Canadian softwood lumber imports, the United States has collected approximately $5 billion in duties deposited by the importers-of-record. Under the terms of the deal, of this $5 billion collected, approximately $4 billion will be returned to the U.S. importers-of-record. Half of the remaining $1 billion will be distributed to the members of the Coalition for Fair Lumber Imports, and the other 50 percent will be used to promote North American lumber.

Once the deal is official and incorporated into the legal texts of both countries, it is expected to be in place for seven years, with an optional two-year renewal. All current litigation regarding softwood lumber between Canada and the United States will cease upon entry into force and no new legal cases will be brought while the agreement is in place.

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technologies, increasing demand and innovative approaches to policy and regulation. The Panel attributes much of the problem to the fact that Canada maintains "one of the most detailed, prescriptive and costly regulatory frameworks in the world", which it found to be especially burdensome for incumbent telecom providers that are facing competition from established facilities-based rivals as well as new entrants. The Panel warns that without significant and rapid changes in Canada's regulatory and policy framework, the Canadian telecom industry will fail to capitalize on the opportunities presented by the key trends of the day, including: (i) the shift to Internet Protocol-based networks; (ii) open network architecture; and (iii) the resultant convergence of telecom, the Internet, broadcasting and other media.

Market Forces Rather than Regulation

According to the Panel, reliance on market forces should be the rule rather than the exception in telecom markets. In the Panel's view, economic regulation is less effective and more costly in today's highly competitive, dynamic and complex telecom markets, where information is imperfect and confident predictions are difficult, if not impossible, to make. Thus, it is no longer appropriate to presume that regulation will produce a better result than market forces – even when such forces work imperfectly.

The Panel recommends that economic regulation of the telecom industry be limited to constraining anticompetitive conduct by telecom service providers that possess "significant market power", which the Panel says is synonymous with market dominance. The goal would also be to move away from *ex ante* regulatory prescriptions towards a greater reliance on *ex post* intervention. Such intervention would be guided by principles of competition law, modified to account for specific features of the telecom service industry. Telecom markets without dominant service providers would be free from economic regulation. In addition, social or technical regulation would be treated as separate matters; for example, under no circumstances would economic measures like price controls be used to achieve "social" policy objectives.

The Panel's recommended approach reverses the current legislative presumption to regulate telecom markets unless and until the Canadian Radio-television and Telecommunications Commission ("CRTC") decides to forbear. The Panel would allow a transition period of 12 to 18 months in which all telecom markets would be reviewed to determine whether any service provider has market dominance. Thereafter, any affected participant in a telecom market could request a review to either de-regulate or re-regulate that market on the basis of that analysis.

New Telecom Tribunal

Significantly, the Panel recommends the creation of a new Telecommunications Competition Tribunal ("TCT") to decide important competition issues relating to the telecom industry, including: (i) market definition, (ii) market dominance, (iii) allegations of anticompetitive conduct, (iv) merger review and (v) de-regulation/re-regulation. The TCT would be a three-person panel comprised of a cabinet-appointed chairperson and a senior representative from each of the CRTC and the Competition Bureau (the "Bureau"), in order to combine the sectoral knowledge of the CRTC with the Bureau's expertise in competition law. The TCT's functions would terminate at the end of five years, unless there continued to be significant market power in a substantial number of telecom markets.

The TCT would have both investigative and adjudicative powers and would draw resources and staff from the CRTC and Bureau while assuming exclusive responsibility for sectoral application of the *Competition Act*'s civil provisions to the telecom industry (*e.g.*, merger review, abuse of dominance, exclusive dealing, tied selling and refusals to deal). The Bureau would only retain jurisdiction to investigate telecom service providers in relation to criminal and misleading advertising matters under the *Competition Act*. For its part, the CRTC would apply economic regulation where authorized by the TCT and would continue to address issues of a technical, rate-setting or social nature.

To ensure that competition law principles applied by the TCT are properly adapted to complex telecom markets, the CRTC and Competition Bureau would draft telecom-specific guidelines on market definition, market power and the types of conduct that could amount to an abuse of dominance under the *Competition Act*.

The transfer of important responsibilities to the TCT would also require significantly reconfiguring the CRTC. The Panel recommends reducing the number of full-time CRTC commissioners from 13 to five, with recruitment based on experience and qualifications rather than political considerations. CRTC decision-making would also be expedited through a streamlined tariff filing procedure and made more transparent through consolidation of CRTC rules into a regulatory code.

Foreign Ownership

The Report offers numerous additional recommendations affecting other areas of telecom policy, such as technical regulation and adoption of information and communications technology. Of particular note is that the Report tackles the controversial issue of foreign investment limits, although the Panel was not required to do so under its terms of reference. These limits, including a 20% cap on direct foreign ownership of common telecom carriers, are in the Panel's view among the most restrictive and inflexible in the OECD. Given the benefits of expanded investment in Canadian telecoms, especially in emerging markets, the Panel recommends replacing current foreign ownership restrictions with a more flexible "public interest" test. The new test would assess potential investments based on a variety of factors, including improved competition, better service and innovation, head office location and functions, R&D, employment, public safety and national security. The Panel urges that any relaxation of foreign investment rules be applied consistently and in a competitively neutral way to both the telecom and broadcasting industries given their rapid convergence.

Implications

As expected, reaction to the Report has been mixed, with some saying the Panel's emphasis on market forces is too drastic and incumbent-friendly while others fear the Panel's challenge to the regulatory *status quo* is too late. The Panel's counter-cultural stance comes as little surprise, however, given its decidedly non-bureaucratic makeup – the Panel's three members were all drawn from the private sector and only one had prior experience with the CRTC.

The fate of the Panel's recommendations is up to the new Conservative minority government and, in particular, the new federal Industry Minister, Maxime Bernier. Telecom reform is not a stated policy priority of the new government, and the Report raises a variety of potentially divisive issues that may be difficult to resolve in a minority Parliament. That said, there are positive indications that the new government looks favorably on the Panel's recommendations. Recently, the federal Cabinet required the CRTC to reconsider its controversial decision in May 2005 to regulate VoIP services offered by incumbent service providers. This was the first time in a decade that the CRTC has been ordered to reconsider one of its decisions. Moreover, according to the press release announcing this decision, the CRTC has been expressly directed "to reconsider [its VoIP] decision in light of the detailed work recently completed by the Telecommunications Policy Review Panel".

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UNITED STATES

Foreign Investment

U.S. Congress Seeks to Tighten Scrutiny Over Foreign Investments

By Thomas E. Crocker (Alston & Bird LLP)

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee of the U. S. government charged with national security reviews of foreign acquisitions in the United States. Beginning late last year, CFIUS came under increased scrutiny from the U.S. Congress because of its perceived laxity in approving foreign acquisitions and the secrecy with which it conducts its reviews. As a result, there are currently at least 15 CFIUS reform bills now pending or about to be filed in Congress.

The principal of these, the "National Foreign Investment and National Security Act of 2006," sponsored by Senators Richard Shelby (R-AL) and Paul Sarbanes (D-MD) and recently approved in executive session by the Senate Committee on Banking, Housing and Urban Affairs, would significantly tighten standards for CFIUS reviews and insert Congress directly into the CFIUS process. The effect on future foreign investment in the United States could be chilling if this bill passes without further amendment. Other pending bills would go even further than the Shelby-Sarbanes legislation, providing measures such as a direct congressional veto over CFIUS decisions.

In competitive business environments where the decision to award acquisitions is in the hands of a third party (e.g., bankruptcy, auction, forced divestment of the target company), forcing foreign bidders to first obtain the approval of CFIUS - or indeed Congress and even state governors, as required by some of the bills - could effectively foreclose foreign investment in much of the U.S. market. The practicality of vetting prospective transactions with 535 individual members of Congress who are in session only sporadically is daunting, if not unworkable.[1]

Nonetheless, the die is cast in favor of a greater level of congressional intervention into a process heretofore the sole responsibility of the administration. The questions remaining center on the scope of Congress' oversight and the impact that oversight will have on the future of foreign investment in the United States. The next several months are likely to be critical to the shaping of this legislation. In the meantime, the legal certainty that foreign investors seek in pursuing U.S. acquisitions will be elusive at best.

History of CFIUS

Originally formed in 1975, CFIUS is an interagency committee chaired by the Department of the Treasury that is charged with conducting national security reviews of foreign acquisitions. CFIUS is exclusively an executive branch committee and includes the following 12 members: the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Secretaries of the Treasury (Chair), State, Defense, Homeland Security and Commerce, the Attorney General, the Director of the Office of Management and Budget, the U.S. Trade Representative and the Chairman of the Council of Economic Advisers.

The statutory basis for CFIUS reviews is the Exon-Florio Amendment to the Defense Production Act of 1950.[2] The Exon-Florio Amendment was enacted as part