Legislative Summary **LS-552E**

BILL C-41: AN ACT TO AMEND THE COMPETITION ACT

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LEGISLATIVE HISTORY OF BILL C-41

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	7 December 2006	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-41: AN ACT TO AMEND THE COMPETITION ACT*

BACKGROUND

A. Purpose of the Bill

Bill C-41, An Act to amend the Competition Act, was introduced in the House of Commons and received first reading on 7 December 2006. The bill amends the *Competition Act*(1) by providing a new power to the Competition Tribunal to order a telecommunications service provider to pay an administrative monetary penalty (AMP)(2) if it abuses its dominant position.

The amount of the AMP imposed may be up to $15 million. The bill sets out four specific factors the Competition Tribunal shall take into account in determining the amount to impose in a specific case, but leaves it open to the Tribunal to consider "any other relevant factor." A telecommunications service provider that contravenes an order to pay an AMP under the new provision is not guilty of an offence.

B. The *Competition Act*

The purpose of the *Competition Act* is to encourage Canadian businesses to compete with one another. Enhanced competition produces a more efficient and dynamic marketplace. It provides consumers with prices that more accurately reflect their costs, sometimes leading to lower prices and more product and service choices. The *Competition Act*

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S.C. 1985, c. C-34.

(2) An administrative monetary penalty is theoretically different from a fine in that a penalty is imposed to promote conduct that is in conformity with the Act, rather than to punish. The distinction is unclear, however, since punishment deters non-conformity with the Act.

contains both criminal and civil provisions, which apply to most industries and businesses in Canada. The Act is administered and enforced by the Competition Bureau, an independent law-enforcement agency headed by the Commissioner of Competition.

The *Competition Act* criminalizes some anti-competitive practices. Criminal provisions include: conspiracy to unduly lessen competition (section 45), bid-rigging (section 47), predatory pricing (section 50(1)(c)),[3] and agreements or arrangements between federal financial institutions on specified matters (section 44). The Competition Bureau refers criminal matters to the Attorney General of Canada, who then decides whether to prosecute before the courts. Convictions can lead to fines or imprisonment.

Other business practices are "reviewable" by the Commissioner of Competition, and are subject to civil sanctions. These civil provisions include:

- refusal to deal (section 75);
- consignment selling (section 76);
- exclusive dealing, tied selling and market restriction (section 77);
- abuse of dominant position (section 79); and
- delivered pricing (section 81).

Bill C-41 amends the abuse of dominant position provision (section 79). That reviewable practice occurs when:

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

(3) Note that as an alternative to criminal prosecution, the Commissioner of Competition may institute civil proceedings for predatory pricing under section 79 (abuse of dominant position). To date, the Commissioner of Competition has never referred a matter of predatory pricing for criminal prosecution, but has instituted civil proceedings for such matters seven times.

The Commissioner of Competition[4] can institute formal civil proceedings against people or companies that engage in any of the reviewable practices set out in the *Competition Act*. Depending on the issue, these complaints are heard by the Competition Tribunal, a quasi-judicial body, or by the courts. The Tribunal or court has the power to prohibit the person or company from continuing to engage in that practice, and to make other remedial orders.

Currently, in the special case of the operator of a domestic air service that abuses its dominant position, the Tribunal or court may order an AMP of up to $15 million. Bill C-41 provides a similar power to impose an AMP against a telecommunications service provider that abuses its dominant position.

C. Deregulation of the Telecommunications Sector

Bill C-41 provides more recourse to punish and deter anti-competitive behaviour that could appear as the telecommunications sector makes the transition to a non-regulated environment. The move towards deregulation started in April 2005 when the government appointed the Telecommunications Policy Review Panel (the Panel) "to review Canada's telecommunications policy framework and recommend on how to modernize it to ensure that Canada has a strong, internationally competitive telecommunications industry."[5] The Panel consulted Canadian stakeholders and experts before releasing its Final Report in March 2006.[6]

In its Final Report, the Panel noted that telecommunications markets are changing quickly with the rapid adoption of Internet Protocol-based networks, broadband and wireless technologies and with the convergence of previously distinct information and communications technologies (ICTs). The Panel noted that over the past 20 years, most Canadian telecommunications markets have changed from monopolies to competition-based markets. "At the same time, there has been an increasing recognition that ICTs have become essential 'general

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(4) Any person may seek leave from the Competition Tribunal to bring a complaint under the refusal to deal, exclusive dealing, tied selling and market restriction sections of the *Competition Act*.

(5) Telecommunications Policy Review Panel, Letter of transmittal accompanying the Final Report to the Honourable Maxime Bernier, P.C., M.P., March 2006.

(6) Industry Canada, *Telecommunications Policy Review Panel Final Report*, Ottawa, 2006.

purpose technologies' that contribute to many aspects of Canada's economic prosperity and social well-being."[7]

The Panel concluded that it was time for significant changes to telecommunications regulation in Canada in order to permit the industry to respond rapidly to new technology and market developments. In its Final Report, the Panel made 127 recommendations, including accelerating the pace of deregulation of competitive telecommunications markets and relying more on market forces to achieve Canada's telecommunications policy objectives. The Panel also recommended establishing a new Telecommunications Competition Tribunal that would be a type of "joint panel" of the Canadian Radio-television and Telecommunications Commission (CRTC) and the Competition Bureau, to address competition issues in the telecommunications sector. This new Tribunal would have all the *Telecommunications Act*[8] powers available to the CRTC and all the *Competition Act* powers available to the Competition Tribunal in civil cases, including the power to levy AMPs.

Shortly after the Panel released its Final Report, the government referred a decision of the CRTC back to the Commission for reconsideration.[9] In that decision, the CRTC had set out a regulatory regime for the provision of Voice over Internet Protocol (VoIP) services.[10] In its referral back to the CRTC, the government noted that an objective of the Canadian telecommunications policy "is to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective."[11]

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(7) *Ibid.*, p. 3.

(8) S.C. 1993, c. 38.

(9) CRTC decision 2005-28, *Regulatory framework for voice communication services using Internet Protocol.*

(10) Voice over Internet Protocol supports the two-way transmission of voice traffic over a packet-switched Internet Protocol (IP) network. This network can be a public carrier network, the Internet, or a private company's intranet. VoIP involves sending voice information in digital form in discrete packets rather than in analog form via the traditional circuit-committed protocols of the public-switched telephone network. Unlike circuit-based networks, IP networks do not require the dedication of switching and transport infrastructure to particular types of voice or data traffic. VoIP calls can be made directly from a computer, a special VoIP phone, or a traditional phone connected to a special adapter. For most VoIP services, a broadband Internet connection is required.

(11) CRTC decision 2006-53, *Reconsideration of Regulatory framework for voice communication services using Internet Protocol*.

On 1 September 2006, the CRTC confirmed its prior decision, finding that it "would not be appropriate to forbear from regulating local VoIP services without an examination of the entire relevant market for local exchange services."(12) In response, on 9 November 2006, the government varied the decision, ordering the CRTC to refrain from regulating retail local access-independent VoIP services.(13)

On 23 November 2006, the Department of Finance issued an economic plan entitled *Advantage Canada: Building a Strong Economy for Canadians*. In that plan, the government made a commitment to take "further steps to ensure that Canadians can benefit more fully from increased competition in the telecommunications sector, while preserving safeguards against anti-competitive behaviour that could hurt consumers."(14) Two weeks later, on 7 December 2006, the Minister of Industry introduced Bill C-41 in the House of Commons to empower the Competition Tribunal to impose an AMP on a telecommunications service provider that abuses its position of dominance within the industry.

On 14 December 2006, the government registered an order issuing a policy direction to the CRTC.(15) Drawing heavily on a proposal recommended by the Panel, the policy direction requires the CRTC to rely on market forces to the maximum extent feasible and to regulate, where there is still a need to do so, in a manner that interferes with market forces to the minimum extent necessary.

On 16 December 2006, the government proposed an order to vary another CRTC decision.(16) The purpose of the proposed order is "to provide for more streamlined and flexible criteria in order to facilitate deregulation of the retail local telephone market in a more timely and efficient manner so as to ensure that regulation only applies where there is still a need to regulate and that such regulation interferes with market forces to the minimum extent necessary."(17) A final order to vary the decision is expected before 6 April 2007.

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(12) *Ibid.*, para. 78.

(13) S.O.R./2006-0288.

(14) Department of Finance, *Advantage Canada: Building a Strong Economy for Canadians*, Ottawa, November 2006, p. 81.

(15) S.O.R./2006-355, Order under section 8 of the *Telecommunications Act* – Policy Direction to the CRTC.

(16) CRTC decision 2006-15, *Forbearance from the regulation of retail local exchange services.*

(17) *Canada Gazette*, Part I, Vol. 140, No. 50 – 16 December 2006 – Order Varying Telecom Decision CRTC 2006-15.

DESCRIPTION AND ANALYSIS

Bill C-41's three clauses amend the *Competition Act* to allow the Tribunal to impose an AMP in a case of abuse of dominant position by a telecommunications service provider.

The principal new power is set out in clause 2(1) of the bill, which adds a new subsection to the abuse of dominant position provision (section 79) of the *Competition Act*. The new subsection provides that in a case where the Tribunal has made an order against a telecommunications service provider for abuse of dominant position, it may also order that company to pay an AMP "in an amount not greater than $15 million."

The bill sets out four specific factors the Tribunal must take into account in determining the amount of the AMP to be imposed, as well as "any other relevant factor" (clauses 2(2) and (3)). The bill clarifies that the purpose of an AMP is "to promote practices by [an] entity that are in conformity with the purposes of this section [79], not to punish" (clause 2(4)). This concept is reinforced by an amendment to section 66 that clarifies that breach of an order to pay the AMP is not an offence (clause 1).

Clause 3 of Bill C-41 is a consequential amendment stating that the amount of an AMP imposed under the new subsection is a debt owing to the government and is enforceable in court. The bill will come into force on Royal Assent.

COMMENTARY

The imposition of AMPs has been a contentious issue. In relation to a prior attempt to amend the *Competition Act*,[18] the Competition Bureau consulted with stakeholders through an independent, non-profit organization called the Public Policy Forum (PPF). In April 2004, the PPF released a report summarizing stakeholder positions on the proposed

(18) Bill C-19 was introduced on 2 November 2004. It received first reading and was referred to committee before dying on the *Order Paper*.

measures.[19] The majority of stakeholders consulted opposed the imposition of AMPs. Several reasons were cited.

First, critics pointed out that the *Competition Act*'s civil provisions govern behaviour that is not inherently anti-competitive, and is prohibited only after the Competition Tribunal determines it is anti-competitive. Therefore, penalties imposed for such behaviour should be limited to forward-looking remedies such as cease and desist orders.[20]

On a related point and in the case of abuse of dominant position, critics noted that predatory behaviour is not easily distinguished from aggressive pro-competitive behaviour. The prospect of being ordered to pay an AMP of up to $15 million may have a chilling effect on some companies in that it may deter them from engaging in aggressive competitive pricing strategies.[21]

Second, because AMPs are punitive in nature, the constitutional validity of imposing them without providing customary criminal law safeguards is questionable.[22] This point was articulated by Professor Peter Hogg in relation to a prior attempt to amend the *Competition Act* to increase the power to impose AMPs.[23] He explained that, although the *Competition Act* asserts that the purpose of an AMP is not to punish but to promote conformity with the Act, such a large fine could be seen as a true penal consequence[24] that would attract the guarantees of section 11 of the *Canadian Charter of Rights and Freedoms.*[25] He commented that the magnitude of the penalty, $15 million, is unheard of even in statutes that are avowedly criminal. He pointed out that the *Competition Act* itself limits the fines for the crimes of conspiracy and bid-rigging to $10 million.

Professor Hogg outlined three ways in which the *Competition Act* fails to meet Charter standards in relation to AMPs. The first relates to the presumption of innocence. AMPs are ordered in relation to practices proved on the balance of probability; criminal offences must

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(19) Public Policy Forum, *National Consultation on the Competition Act: Final Report*, 8 April 2004.

(20) *Ibid.*, pp. 8-9.

(21) *Ibid.*, p. 9.

(22) *Ibid.*

(23) Bill C-19, First Reading, 2 November 2004.

(24) Professor Hogg was relying on *R.* v. *Wigglesworth*, [1987] 2 S.C.R. 541.

(25) Part I of the *Constitution Act, 1982* (U.K.), 1982, c. 11.

be proved beyond a reasonable doubt. The second relates to disclosure of evidence. In criminal cases there must be full disclosure to the defence, and the defence has a right to silence. Those guarantees are ignored by the *Competition Act* in relation to civil proceedings that may lead to the imposition of AMPs. The third Charter issue, in Professor Hogg's view, is that the type of conduct that would attract an AMP is not well defined. There is no clear standard of behaviour upon which companies may rely.

Somewhat ironically, other critics have claimed that the $15 million maximum AMP is too low to be an effective deterrent and will be treated by the incumbent carriers(26) as just another cost of doing business. This concern is questionable, however, as considerable telecommunications infrastructure is a class of assets considered "sunk" to the location and/or function for which it was installed.(27) Predatory behaviour would succeed only in changing the identity of the owner of the competitive infrastructure; it would not have the assets removed from the marketplace. Therefore, such behaviour would not be profitable and is unlikely to occur.

(26) For example, Bell and Telus.

(27) There is a significant difference between the capitalized value and salvage value of sunk assets because the costs of these assets are not fully recoverable in their next best alternative use.