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Canada: Investment

Canada Raises Foreign Investment Review Thresholds

By Deborah Salzberger (Stikeman Elliott LLP)

The Canadian government has increased the foreign investment review threshold in respect of all transactions closing in 2006 involving acquisitions of control of Canadian businesses. Specifically, the monetary threshold for review of investments by WTO investors based in WTO-member countries has been increased from $250 million to $265 million*, (*figures are in Canadian dollars) unless one of the exceptional circumstances discussed below applies. However, while foreign investment review thresholds have been increased, the scope and application of Canada's foreign investment legislation remains unchanged.

The increased threshold is actually a result of the inflationary indexing formula prescribed under the *Investment Canada Act* (the *ICA*), rather than a liberalization of Canada's foreign investment policy *per se*. In fact,

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Mexico: Maquiladoras

Sales of Maquiladora Production Into the Mexican Market: Identifying the Issues

By Jaime González-Béndiksen and John A. McLees (Baker & McKenzie)

Maquila operations were originally created for exports. Over the years, sales of the maquiladora production into the domestic market were gradually allowed. Today such sales are ever increasing, to the extent that the sales into Mexico of the production of many maquiladoras far exceed their exports. These sales are typically made by the U.S. owner of the production either directly to Mexican customers or to the maquiladora itself, for resale to the Mexican customers.

This article highlights issues oftentimes overlooked by the US sellers. The article does not discuss drop-shipment sales into Mexico that qualify as virtual exports.

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HIGHLIGHTS

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The Canadian government has increased the foreign investment review threshold for all transactions closing in 2006 involving acquisitions of control of Canadian businesses. *Page 1*

Sales of maquiladora production into the Mexican market present multiple income tax (including permanent establishment), VAT and assets tax issues. The issues vary depending on the sales structure implemented. U.S. sellers must be aware of these implications as they seek to find the optimal tax structure for their particular needs. *Page 1*

The WTO Appellate Body has affirmed that certain Mexican taxes on imported soft drinks are inconsistent with Mexico's national treatment obligations under the GATT. *Page 3*

A bilateral investment treaty permits an investor to pursue a claim for monetary damages directly against the offending state without the involvement or consent of their own government. *Page 14*

The EC publishes its annual report on barriers to trade and investment in the U.S. *Page 15*

EU ends procurement sanctions against U.S. *Page 15*

Competition

Canada Post Monopoly On International Mail Upheld

By Mark Katz
(Davies Ward Phillips & Vineberg LLP)

The Ontario Court of Appeal (the "Court of Appeal") has affirmed a lower court decision holding that Canada Post's monopoly ("exclusive privilege") extends to collecting and/or transmitting letters within Canada for the purposes of delivery to foreign destinations outside of Canada.[1] The result is to prohibit other businesses from competing against Canada Post in providing international mail services in Canada.

Background

Canada Post sued to prohibit Key Mail Canada Inc. and Key Mail International Inc. (collectively, "Key Mail") from providing outbound international mail services in Canada. These services consist of collecting letter mail and other printed materials in Canada and arranging for delivery to points outside of Canada. Canada Post claimed that Key Mail's international mailing operations infringed section 14 of the *Canada Post Corporation Act* (the "Act"), which grants Canada Post "sole and exclusive privilege of collecting, transmitting and delivering letters to the addressee thereof within Canada".[2] Key Mail denied this infringement, arguing that section 14 prohibits the collection and transmission of letters in Canada only to the extent they are to be delivered to Canadian addressees as opposed to addressees outside Canada.

The Key Mail decision eliminates a significant competitive threat to Canada Post, and thus an important competitive option for Canadian businesses.

Canada Post brought a motion to have its action decided without trial on a question of law, namely the correct interpretation of section 14 of the Act (this is akin to a motion for summary judgment). The motions judge, Carnwath J. of the Ontario Superior Court of Justice, ruled in favor of Canada Post. Carnwath J. relied on a principle of statutory interpretation in Canadian law that the French and English versions of a statute are equally authoritative, and that if one version is ambiguous but the other unambiguous, the unambiguous meaning should be adopted as the common meaning for both versions. In accordance with this principle, Carnwath J. looked to the French-language version of section 14, and held that it clearly indicated Parliament's intention to grant Canada Post a monopoly over three distinct activities: (i) the collection of letters within Canada, (ii) the transmission of letters within Canada, and (iii) the delivery of letters to addressees within Canada. Adopting that as the common meaning for section 14, Carnwath J. held that Key Mail had contravened Canada Post's exclusive privilege, because it both collected and transmitted letters within Canada, even though it delivered these letters to addressees outside of Canada. Carnwath J. also held that his interpretation of Canada Post's exclusive privilege was consistent with the purpose of the Act, which is to ensure the provision of a universal postal service at a reasonable cost.

Decision of the Court of Appeal

On appeal by Key Mail,[3] the Court of Appeal agreed with Carnwath J.'s interpretation of section 14 of the Act. In a unanimous judgment, the Court of Appeal held that, while the English version of section 14 is ambiguous, the French version makes it clear that the Act gives Canada Post a monopoly, within Canada, over the collection, transmission, and/or delivery of letters to their addressees.

The Court of Appeal also agreed that this interpretation is consistent with the corporate objects of Canada Post, as set out in the Act, which include the need to provide "basic customary postal service" on a "self-sustaining financial basis". The Court of Appeal accepted that Canada Post's monopoly over all aspects of "the lucrative letter mail business" must be protected in order for it to provide universal postal service throughout Canada in a financially viable way.

The Court of Appeal also noted that its understanding of section 14 is in line with other provisions of the Act, particularly the section which makes it an offense to violate Canada Post's exclusive privilege:
56. Every person who, in violation of the exclusive privilege of the Corporation under section 14, collects, transmits *or* delivers to the addressee thereof, *or* undertakes to collect, transmit *or* deliver to the addressee thereof, any letter within Canada, *or* receives or has in his possession within Canada any letter for the purpose of so transmitting *or* delivering it, commits an

offense in respect of each such letter. [Emphasis added by the Court of Appeal]

The Court held that there "is no question" that this section creates an offense with respect to the discrete activities of collecting, transmitting and delivering letter mail within Canada, which means that the exclusive privilege as set out in section 14 must be read in that way as well.

Among the other arguments made in support of the appeal was that Carnwath J.'s decision was contrary to a rule of interpretation that a statute creating monopoly rights must be strictly construed against the monopolist. The Court of Appeal rejected this argument, holding that even if the rule applied in Canada, which is not at all certain, it would not govern in a situation where the language of the provision is clear and fits "harmoniously" with the scheme and object of the legislation.

The Court of Appeal also rejected the submission that a Canada Post monopoly over international mail is inconsistent with the Canadian *Competition Act*. The Court of Appeal stated that Canada Post could not be said to be competing unfairly if it is operating pursuant to its statutory authority as granted by Parliament. (Although not expressly referred to by the Court, this is the same result that would follow under the common law "regulated conduct doctrine", which provides a form of immunity from enforcement under the *Competition Act* to persons engaged in conduct that is directed or authorized by other validly enacted legislation.) Finally, the Court of Appeal rejected the argument that the meaning it ascribed to section 14 does not comport with international postal conventions. The Court of Appeal noted that these conventions specifically state that they do not derogate from the domestic legislation of signatory countries.

Conclusion

The *Key Mail* decision eliminates a significant competitive threat to Canada Post, and thus an important competitive option for Canadian businesses (including, perhaps ironically, the other federal government departments that used the international mailing services of Canada Post's competitors).

The Canadian situation may be contrasted with that in Europe, where the European Commission issued a directive in 2002 requiring that all outgoing cross-border mail be opened to competition as of January 1, 2003 unless deemed necessary to maintain universal postal service within a jurisdiction. This directive was part of an ongoing process that aims to completely liberalize postal services in Europe by 2009. A majority of EU Member States have now complied with the directive and permit competition in the provision of outgoing international mail services.

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[1] *Canada Post Corporation* v. *Key Mail Canada Inc., et al* (2005), 77 O.R. (3d) 294 (C.A.). Leave to Appeal to the Supreme Court of Canada was denied without reasons on December 22, 2005.

[2] The meaning of "letter" for these purposes is specifically defined in the Act.

[3] Also participating in the appeal was another international mailer operating in Canada that had been granted leave to intervene in support of Key Mail's position

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