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### Canada's Competition and Foreign Investment Rules Under Review

July 13, 2007

On July 12, 2007, the Canadian Government announced the creation of a Competition Policy Review Panel tasked with reviewing key elements of Canada's competition and investment policies. The panel's "core mandate" is to review the *Competition Act* and *Investment Canada Act* ("ICA"). The panel will also examine the foreign ownership restrictions affecting specific sectors (such as telecom, financial services, broadcasting and airlines) and consider the competition and investment regimes of other jurisdictions to assess reciprocity between their rules and those of Canada. Finally, the panel will consider how to encourage Canadian outbound investment.

The five-person panel (consisting of a mix of Canadian legal and business representatives) will consult with executives, academics, business and international organizations, as well as individual Canadians across the country before making its recommendations. The panel is to report back to the Minister of Industry by June 30, 2008.

#### Competition Review

Unlike previous competition law reform efforts, which have been largely initiated or encouraged by the Competition Bureau to strengthen enforcement of the *Competition Act*,

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this latest review has a different purpose and much wider scope, namely, to assess and address the impact of competition regulation on Canada's economic performance and international competitiveness. As such, rather than proposing legislative tweaks to the *Competition Act*, as has been the case in the past, it appears that the panel's focus will likely be on more fundamental issues of how Canada's competition legislation should be structured to promote efficient markets while protecting Canadian consumers from unfair practices within an increasingly global economy.

While much of the recent political attention in the Canadian competition policy area has been focussed on mergers and acquisitions, the panel's mandate extends to all aspects of competition policy. For example, the government's "backgrounder" on the panel suggested that the panel may also wish to examine the meaning of market dominance in global markets and how markets can work efficiently but still protect consumers. (Companies who "dominate" markets in Canada may be subject to greater restrictions under the *Competition Act* than other companies with respect to marketing practices that may be viewed as excluding competitors. Overly aggressive enforcement of competition laws against a major Canadian company could carry the risk of hampering the company's competitiveness either domestically or in international markets.)

In any event, it is possible that the panel could review the *Competition Act*'s restrictions on pricing, distribution and marketing practices, particularly where they are more onerous than Canada's major trading partners, to assess their effect on the competitiveness of Canadian businesses. Conversely, the panel is likely to hear some representations that Canadian competition policy should recognize that, because Canada is a relatively small economy, it ought to permit greater degrees of domestic concentration or collaboration than its larger trading partners, in some contexts.

### **Foreign Investment in Canada**

The review panel will also be called upon to consider the impact on Canada's economic performance of the ICA and sectoral restrictions on foreign investment. According to a recently published report from the OECD, there are more restrictions on foreign investment in Canada than in most OECD countries, which the OECD says hampers productivity and slows the diffusion of new technology and management practices to Canadian businesses.

The review panel's appointment comes at a time of growing controversy over foreign investment in Canada. The recent spate of foreign takeovers of Canadian business "icons" (such as Hudson's Bay, Inco and Alcan) has reinvigorated the always latent concern about a "hollowing out" of corporate Canada. Specific concerns have been raised that the ICA review process does not adequately protect Canadian interests, notwithstanding that foreign acquirors are required to demonstrate that their transactions are of "net benefit" to Canada. The review panel will examine the efficacy of the "net benefit" test as well as another favourite target of foreign investment critics – acquisitions by large foreign state-owned enterprises with non-commercial objectives. In addition, the panel will consider whether the ICA needs to be amended to address national security concerns.

The growing complaints about foreign investment in Canada do not always seem to be supported by empirical evidence. For example, various Statistics Canada reports issued recently demonstrate that: (i) the share of foreign control of the Canadian economy has remained stable over time, at approximately 21% of corporate assets and 30% of corporate operating revenues and operating profits; (ii) more head offices have in fact been created than were closed as a result of foreign takeovers, leading to a net increase in head office employment; and (iii) Canadian direct investment abroad actually exceeds foreign direct investment in Canada. There are also many persons – including Canada's Commissioner of Competition, Sheridan Scott – who believe that foreign ownership rules ought to be liberalized in order to promote greater domestic competition.

Although the government press release announcing the review panel's appointment strikes an overall positive tone about the benefits of foreign investment, there is no telling what direction the review will take once it gets underway. What does seem certain, however, is that the panel's deliberations concerning foreign investment will take place in an especially contentious and politically charged environment.

*Davies Ward Phillips & Vineberg LLP, with over 235 lawyers, practises nationally and internationally from offices in Toronto, Montréal, New York and an affiliate in Paris and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.*

*The information and comments contained herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.*

## "Loose Lips Sink Ships" – And Mergers Too

It is an axiom of competition law compliance that parties must be extremely careful in what they say and write about the competitive implications of their conduct. Liability for breaching competition laws is often based on a company's own documents and other statements. Any skeptics still remaining to be persuaded about the validity of this point would be well-advised to read the complaint issued by the U.S. Federal Trade Commission in the proposed Whole Foods/Wild Oats merger. The FTC is seeking to prohibit the merger on the grounds that the combination of Whole Foods and Wild Oats would lessen competition in the market for "premium natural and organic groceries". As the complaint makes clear, much of the FTC's case against the merger is based on what the companies have said themselves.

Foremost among the quotations cited by the FTC are selections from a presentation made by John Mackay, Whole Foods' CEO, to its Board of Directors. In this presentation, Mackay observed, among other things, that the acquisition of Wild Oats would help avoid "nasty price wars" in certain overlap markets and prevent more traditional supermarket chains from using Wild Oats as a "springboard" to launch a "competing national natural/organic food chain to rival [Whole Foods]". The FTC also quotes from the companies' corporate filings to support the argument that "premium natural and organic groceries" is a distinct product market.

The Whole Foods example is a timely – and sobering – reminder of the basic rule of thumb that applies in these situations: DO NOT write or say anything that you would not want to see on the front page of a newspaper or in a court document filed in proceedings against you. Words count – and none more so than your own incriminating statements.

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**Recent Major Transactions**

***Agricore United*** – Counsel to Agricore in its acquisition by Saskatchewan Wheat Pool, following a takeover battle with James Richardson International. Agricore United, based in Winnipeg, Manitoba, is Western Canada's largest grain handling and merchandising company.

***Reuters Group PLC*** – Counsel to Reuters in the \$17.6 billion merger of Reuters Group PLC and Thomson Corporation to create Thomson-Reuters Corporation.

***B-Filer Inc.*** – Acting for B-Filer in its appeal of a recent decision of the Competition Tribunal dismissing an application under the refusal to deal provisions. This is the first appeal of its kind to the Federal Court of Appeal.

***Abitibi Consolidated Inc.*** – Acting for Abitibi to obtain Investment Canada Act approval in connection with Abitibi's merger with Bowater Inc.

***Xstrata plc*** – Counsel to Xstrata in its bid to acquire LionOre Mining International Ltd. and counsel to Xstrata in its successful Cdn. \$24 billion acquisition of Falconbridge Limited in 2006.

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**Recent Publications**

***Cartel Enforcement in Canada: What Asian Companies Should Know*** - Mark Katz, Richard Elliott and Elisa Kearney, published in The Asia-Pacific Antitrust Review 2007, a Global Competition Review publication (May 2007)

***Investment Canada Act Review of Xstrata's Acquisition of Falconbridge*** - Richard Elliott, prepared for the Insight Information 2nd Annual U.S./Canadian Cross-Border M&A Forum, New York (April 26-27, 2007)

***What to do When the Bureau Comes Calling: Successfully Handling a Competition Bureau Investigation*** - John Bodrug, Davies Ward Phillips & Vineberg LLP and Antoinette Bozac, Vice President, Secretary & General Counsel, Unisource Canada Inc., presented at the Canadian Institute Competition Law Compliance Conference, Toronto (March 28-29, 2007)

***Competition Compliance in Canada*** - Mark Katz, published in the North American Corporate Lawyer, a Federated Press publication, Vol. 9, No. 1 (March 2007)

***Evaluating Canada's Competition Act After 20 Years*** - George Addy and Mark Katz, published in the North American Free Trade & Investment Report, Vol. 17, No. 4 (February 28, 2007)

***The Application of the Competition Act to Online Advertising*** - Christopher D. Margison and Le Huong Truong, presented at the Canadian Institute 13th Annual Advertising and Marketing Law Conference (January 25-26, 2007)

***Are You Prepared for a Search? Suggested Procedures for Responding to a Competition Bureau Investigation*** - Davies Ward Phillips & Vineberg LLP (January 15, 2007)

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**Recent Policy Contributions**

**George Addy and Anita Banicevic** – Members of a Canadian Bar Association sub-committee providing comments on the recently revised Competition Tribunal Rules

**George Addy and Anita Banicevic** – Non-governmental advisors to the unilateral conduct working group of the International Competition Network

**Mark Katz and Elisa Kearney** – Members of an American Bar Association working group providing comments on the European Commission's Draft Revised Notice on Remedies Acceptable under the Merger Regulation

**Richard Elliott and Chris Margison** – Participated at the Competition Bureau's Stakeholder Consultation on Mergers

**John Bodrug** – Appeared on behalf of the Canadian Bar Association, National Competition Law Section, before the Standing Senate Committee on Transport and Communications regarding Bill C-11, An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts

**George Addy** – Speaker at The Economist's Executive Roundtable on Reshaping the Business Landscape in Canada

**Mark Katz** – Participated at the OECD Competition Committee Working Party 2 on Competition and Regulation Roundtable on Increasing Competition in Real Estate Transactions

**John Bodrug** – Invited to attend the Bundeskartellamt/IBA 13<sup>th</sup> International Conference on Competition

**Mark Katz and Elisa Kearney** – Members of an American Bar Association working group providing comments on the European Commission's Draft Notice on Immunity from Fines and Reduction in Fines in Cartel Cases

**George Addy** – Non-governmental advisor to the telecom policy working group of the International Competition Network

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