Developments in Canadian Merger Control and Foreign Investment Review

Mark Katz and Jim Dinning

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A. MERGER CONTROL UNDER THE COMPETITION ACT

1. Proposed Amendments

On February 6, 2009, the federal government introduced Bill C-10, the *Budget Implementation Act, 2009* (the "Bill") to the House of Commons. The Bill proposes the most significant changes to the *Competition Act* since it was enacted in 1986 (as well as significant amendments to the *Investment Canada Act*, which will be discussed below). Notably, the Bill proposes amending the *Competition Act*'s current merger notification process to mirror the U.S. *Hart-Scott-Rodino Antitrust Improvements Act* process; increasing the current merger notification thresholds; and reducing the time during which the Competition Bureau (the "Bureau") may challenge a merger post-closing.

Second Request Process

Under the *Competition Act*'s current merger review process, transactions that exceed certain financial thresholds and, in the case of share acquisitions, that exceed an additional voting interest threshold, cannot be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing certain prescribed information. The duration of the statutory waiting period depends on whether the acquirer elects to make a short form filing (14 day waiting period) or a long form filing (42 day waiting period). The Bureau’s substantive review of transactions runs on a different (but simultaneous) non-statutory timetable, based on the complexity of the transaction. These nonbinding "service standards" range between 2 weeks (for the least complicated transactions) to over 5 months (for the most complex).

The *Competition Act*'s merger review process has been criticized on a number of grounds. First, the current process creates uncertainty for merging parties at various levels. For one, parties must themselves elect whether to file a short-form or long-form notification, assuming the risk that if they file a short-form notification the Bureau may require them to resubmit a long-form, thereby stopping the waiting period until the long-form filing is made. In addition, because the statutory waiting periods and the Bureau's "service standard" review periods are not correlated, merging parties can find themselves in a position where the waiting period has expired (legally entitling them to close) without the Bureau having completed its substantive review. Parties must then decide whether to wait until the Bureau is done or proceed to closing subject to the risk that the Bureau may seek an injunction to stop them. A related problem is that the Bureau's "service standard" periods are non-binding, meaning that there is effectively no deadline within which the Bureau must complete its merger reviews.

In June 2008, the federally appointed Competition Policy Review Panel released a report reviewing the status of Canadian competition and foreign investment review legislation and policy. The Panel's report recommended sweeping changes, including that the merger review process in Canada be amended to align with the U.S. *Hart-Scott-Rodino Antitrust Improvements*

Act. The stated rationale for the recommended changes was to reduce the uncertainties and costs associated with the current Canadian merger review process.

The Bill incorporates the Panel's recommendations of a U.S.-style system by proposing a new merger review process that would involve an initial 30-day waiting period in which a notified merger may not be completed and the Bureau can assess the likely competitive effects of the proposed transaction. Before that 30-day period expires, the Bureau may choose to issue a "second request" for information, in which case the proposed transaction may not be completed until 30 days after the Commissioner of Competition receives the requested information. Although not express in the Bill, it appears that the current short form/long form filing will be replaced by a single filing form, with regulations mandating the content of this filing not to be released until after the Bill is enacted.

Given the prevalence of cross-border mergers involving both Canada and the United States, there is some merit in more closely correlating the Canadian review process with that in the U.S. However, the wholesale adoption of the U.S. merger review process, including the lengthy, expensive and onerous "second request" process, is of considerable concern, particularly in the current economic climate. The U.S. "second request" process has been widely criticized for imposing excessive and expensive production burdens on merging parties. For example, studies suggest that production costs for a "second request" can range from US $3.3 million (on average) up to US $20 or 25 million (for the most complex cases) and that "second request" investigations can take six or seven months to complete, on average. These studies also indicate that, despite the lengthy and expensive investigations, there is no evidence to suggest that the burden imposed by the second request process leads to better decision making. Moreover, since it was implemented in the United States, no other country has implemented a similar, open-ended "second request" review process.

Another drawback of the proposal is that it would eliminate any judicial oversight over the Bureau's production demands. Currently, the Bureau must obtain a court order to compel production of information from merging parties. As demonstrated in the recent Labatt/Lakeport merger, discussed in more detail below, the Bureau's ability to obtain these orders is not without limits. However, under the proposed amendments, the Bureau will be able to issue a "second request" for any information that is deemed "relevant to the Commissioner's assessment of the transaction" without need for a court order.

Finally, the proposed amendments do not adequately address one of the key failings of the current merger review process, namely the lack of a set deadline within which the Bureau must complete its reviews of mergers that go beyond the initial 30-day review. The only proposed limitation is that the Bureau must make a decision within 30 days of receiving the information required under the "second request". However, there is no limit on how long the "second request" process can last – the burden is placed on merging parties to respond as quickly as they can. Moreover, unlike in the United States, parties cannot start the 30-day clock by achieving "substantial compliance". The Bureau must "receive" all of the required information, i.e., there must be "full compliance", which potentially means even greater costs and delay in Canada than under the U.S. process.

Increased Merger Notification Thresholds

The Bill also proposes to increase certain of the thresholds for pre-merger notification. Currently, the *Competition Act* generally requires the aggregate value of the assets in Canada, or the annual gross revenues from sales in or from Canada of the acquired party, to exceed $50 million in order for the notification requirements to be triggered (the value is currently $70 million for amalgamations). The Bill would increase this "size of the transaction" threshold for all forms of transactions to $70 million initially, with future increases tied to changes in inflation (or as prescribed by regulation).

No changes have been proposed in the Bill to the "size of the parties" threshold, which currently requires that the parties and their affiliates have combined assets in Canada or gross revenues from sales in, from or into Canada of at least $400 million in order for a merger to be subject to notification.

The increase to the "size of the transaction" threshold will be welcomed by businesses and investors and will help to alleviate some of the investigative burden placed on the Bureau, especially in light of the proposed new "second request" process.

Ex Post Review

The *Competition Act* currently grants the Bureau the ability to challenge a transaction up to three years following closing in certain circumstances. The Bill proposes to curtail this time period to one year following closing. This amendment is beneficial to merging parties, as post-closing deal risk will be reduced.

Implications

Certain of the Bill's proposed amendments are welcome, e.g., the increased review thresholds and the reduced time for post-closing challenges. However, the wholesale adoption of the U.S. merger review process is a cause for concern, given the prospect that it will greatly increase costs to merging parties, extend timelines for transactions and create the potential for a chilling effect on investment and merger activity in the already volatile economic climate.

Concerns about the scope of certain of the proposed changes are only magnified by concerns with the legislative process adopted by the Canadian government to secure their enactment. Typically, amendments to the *Competition Act* have been preceded by consultations with stakeholders to ensure that their views are taken into account and that potential issues are properly considered. In this case, however, the proposed amendments in the Bill are part of a larger budget implementation process that is expected to see the Bill enacted quickly because it contains measures designed to "stimulate" Canada's economy. As a result, there is unlikely to be much in the way of prior consultation or room to suggest modifications to the proposed amendments. This would be unfortunate in light of the scale of the proposed changes. Moreover, there has been no explanation as to why the proposed changes to the *Competition Act* must be enacted with such haste. It is hard to believe that these amendments are a critical component of the government's strategy to jump start the Canadian economy.

2. Other Developments

Apart from the proposed amendments, there have been other significant developments in Canadian merger control over the past year. These include the release of draft guidelines for mergers involving transportation undertakings; the fallout from the Federal Court's setting aside of two Bureau production orders obtained in the course of a merger investigation; and the continued focus on co-ordination of merger remedies by the Bureau with foreign merger authorities.

Transportation Guidelines

In July 2008, the Department of Transport released draft *Guidelines for Mergers & Acquisitions involving Transportation Undertakings* regarding the new merger review provisions of the *Canada Transportation Act* ("CTA") that came into force in June 2007. Under the CTA merger review provisions, any proposed transaction that is required to be notified under the merger provisions of the *Competition Act* and which "involves" a federal "transportation undertaking" must also be notified to the Minister of Transport. If the Minister determines that the proposed transaction "raises issues with respect to the public interest as it relates to national transportation", then the transaction cannot be completed unless approved (potentially subject to modifications or conditions) by the federal Cabinet. If no public interest issues are raised, there is no further review under the CTA.

The Draft Guidelines set out a series of factors relevant to determining whether a proposed transaction raises public interest issues relating to national transportation. These include economic (e.g. the transaction's impact on prices and employment), social (e.g. the transaction's impact on low-income workers and Canadian sovereignty), environmental, security and safety factors. Many of the economic factors overlap with issues dealt with under the *Competition Act* (e.g. impact on prices, service quality and Canadian competitiveness). However, the Draft Guidelines do not clarify whether the Minister of Transport will refrain from reviewing a proposed merger where it raises only public interest issues that relate to competition.

The public interest review process under the CTA opens the possibility that the Minister of Transport may recommend approval for mergers even if they raise competition issues. This authority may turn out to be of particular importance in the current economic downturn.

Mergers and Production Orders

Among its various investigative powers, the Bureau is entitled to apply *ex parte* to a judge for orders requiring the production of documents and other information. The use of these orders has been controversial, with the business and legal communities expressing concern over the Bureau's general unwillingness to consult with parties prior to seeking such orders, and the tendency of such orders to be overbroad and poorly drafted.

On January 28, 2008, a Federal Court judge took the unusual step of setting aside two Bureau production orders obtained in the course of an inquiry into the Labatt/Lakeport merger on the grounds that the Bureau's applications for the orders were "misleading, inaccurate and incomplete". As a result of this criticism, the Minister of Industry ordered an investigation into the Bureau's processes and procedures for obtaining production orders. The report was publicly released on August 13, 2008. Although largely refraining from finding fault with the Bureau, the report offered several helpful suggestions that could, if implemented, alleviate some of the concerns about the use of production orders. These recommendations include encouraging the Bureau to engage in pre-application dialogue with parties where feasible; limiting the number of custodians whose documents must be searched; discouraging production orders from being sought in furtherance of a criminal inquiry against a person who is a suspect at the time of the application; and requiring the Commissioner of Competition to inform the court of any point of fact or law known to the Commissioner why a requested production order should not be granted.

Co-ordinated Remedies

In January 2009, the Bureau announced that commitments made by Dow Chemical Company had alleviated the Bureau's concerns about the competitive effects of Dow's proposed acquisition of Rohm and Haas Company, clearing the way for the merger's completion. This follows a similar announcement earlier in 2008 in which the Bureau allowed Thomson Corporation's acquisition of Reuters PLC to continue unchallenged, after commitments were made by Thomson to divest certain assets, based on remedies negotiated with U.S. and European authorities.

In both instances, the Bureau's assessment of the merger was conducted in conjunction with counterparts at the US Federal Trade Commission and the European Commission's Competition Directorate and divestments based on negotiations with those other authorities formed part of the basis for the Bureau's ultimate clearance. As Acting Commissioner of Competition, Melanie Aitken has noted: "For international mergers, the overriding concern for the Bureau is to secure a remedy to resolve a likely substantial lessening or prevention of competition in Canada. Where appropriate, the Bureau will refer to remedies agreed on in other jurisdictions, provided the remedy required addresses Canadian issues."

The increasing international nature of many mergers is likely to result in more co-ordinated merger reviews of this nature. The Bureau's "Information Bulletin on Merger Remedies in Canada" states that the Bureau will attempt to co-ordinate its reviews with foreign authorities in instances where international mergers will have similar effects in Canada that they will elsewhere. This is beneficial for businesses as it reduces the potential for uncertainty and conflicting outcomes.

B. FOREIGN INVESTMENT REVIEW

1. Proposed Amendments to *Investment Canada Act*

Bill C-10 also includes a number of significant proposed amendments to the *Investment Canada Act*, which applies to acquisitions of Canadian businesses by non-Canadians. Notably, the proposed amendments would increase the review threshold for most direct foreign acquisitions of Canadian businesses. Currently, that threshold is $312 million, based on the value of assets of the Canadian business as reflected in its most recent financial statements. The proposed amendments would make such acquisitions reviewable only if the "enterprise value" of the assets of the Canadian business is equal to or greater than: (a) $600 million, in the case of investments made during the first two years after the amendments come into force; (b) $800 million, in the case of investments made during the third and fourth years after the amendments come into force; and (c) $1 billion, in the case of investments made between the fifth year after the amendments come into force and December 31 of the sixth year after the amendments come into force. This threshold would thereafter be adjusted on an annual basis based on the inflation rate. In addition, lower thresholds ($5 million or $50 million, depending on the nature of the transaction) currently applicable to the transportation, financial services and uranium sectors would be repealed. Unfortunately, the proposed amendments do not define the term "enterprise value"; presumably, this will be explained in forthcoming regulations.

Also of significance, the amendments propose to introduce a national security test, which would allow the Minister of Industry to review any foreign acquisition if there are reasonable grounds to believe that the acquisition could be "injurious" to national security. If the Minister is satisfied that the acquisition would have this effect, the federal Cabinet, on the recommendation of the Minister, may then take any measures that it considers advisable to protect national security, including the outright prohibition of a foreign investment in Canada. Time frames for the national security review process have not yet been determined.

The proposed introduction of a national security test follows the Minister of Industry's denial of approval to the proposed acquisition by Alliant Techsystems Inc. of MacDonald, Detwiller and Associates Ltd ("MDA") in May 2008. That refusal marked the first time that a proposed acquisition not involving a "cultural business" was denied approval since the *Investment Canada Act* was enacted in 1985.

Although the reasons for the refusal are confidential, reports indicated that concerns were raised that the sale of MDA's Radarsat 2 satellite to a foreign investor would compromise Canada's ability to exercise sovereignty over disputed territories in the Arctic. While it is generally accepted that the Minister of Industry's discretion in determining whether a transaction will be a "net benefit" to Canada is broad, the specific factors listed in the *Investment Canada Act* to be taken into account by the Minister in making such a determination do not include a national security test. However, it appears that the Minister nonetheless refused approval on national security grounds. The proposed introduction of an explicit national security test would remove any ambiguity and make it clear that national security concerns are to be addressed in any review.

2. <u>Foreign Ownership Limitations</u>

As part of its election platform in the fall of 2008, the Conservative party promised to lessen the foreign ownership restrictions currently in place in the air transportation and uranium industries.

Currently, under the *Canada Transportation Act*, ownership and control of voting interests held in a Canadian air carrier may not exceed 25% and control in fact must be held by Canadians. Bill C-10 proposes to allow foreign ownership of up to 49%, subject to control in fact still being held by Canadians and there being a reciprocal agreement with the foreign investor's home country.

As to uranium mining, the federal government currently has a policy in place limiting non-resident ownership of uranium mining properties to 49% at the stage of first production. There are no restrictions on uranium exploration by foreign entities. The Conservative government has stated its intention to increase foreign ownership limits in uranium mines provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investment in the sector is not contrary to Canadian national security.

DEVELOPMENTS IN CANADIAN MERGER CONTROL & FOREIGN INVESTMENT REVIEW

Bill C-10, the *Budget Implementation Act*, and the changing business landscape

By Mark Katz & Jim Dinning; *Davies Ward Phillips & Vineberg LLP*

A. Amendments

On March 12, 2009, the Canadian Parliament passed Bill C-10, the *Budget Implementation Act, 2009* (the Bill). The Bill institutes the most significant changes to the *Competition Act* since it was enacted in 1986. Notably, the Bill amends the *Competition Act*'s merger notification process to mirror the US *Hart-Scott-Rodino Antitrust Improvements Act* process, increases the merger notification thresholds, and reduces the time during which the Competition Bureau (the Bureau) may challenge a merger post-closing.

The Bill also makes important changes to the *Investment Canada Act*, including establishing a new threshold for review for many foreign acquisitions of Canadian businesses and introducing a new review process for foreign acquisitions that "could be injurious to national security."

The amendments to the *Competition Act* and *Investment Canada Act* were part of a broader legislative package designed to implement the Canadian budget and introduce measures to combat the current economic downturn. For that reason, there was virtually no time provided for consultation or comment, which is unfortunate because of concerns with certain of the changes.

1. Competition Act Amendments

Merger Review Process

Under the *Competition Act*'s merger review process used prior to passage of the Bill, transactions that exceeded certain financial thresholds and, in the case of share acquisitions, that exceeded an additional voting interest threshold, could not be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing certain prescribed information. The duration of the statutory waiting period depended on whether the acquiror elected to make a short-form filing (14 day waiting period) or a long-form filing (42 day waiting period). The Bureau's substantive review of transactions ran on a different (but simultaneous) non-statutory timetable, based on the complexity of the transaction. These non-binding "service standards" ranged from two weeks (for the least complicated transactions) to over five months (for the most complex).

The *Competition Act*'s prior merger review process had been criticized on a number of grounds. First, the process created uncertainty for merging parties at various levels. For one, parties had been required to elect themselves whether to file a short-form or long-form notification, assuming the risk that if they filed a short-form notification the Bureau may have required them to resubmit a long-form, thereby stopping the waiting period until the long-form filing was made. In addition, because the statutory waiting periods and the Bureau's "service standard" review periods were not correlated, merging parties could find themselves in a position where the waiting period had expired (legally entitling them to close) without the Bureau having completed its substantive review. Parties then had to decide whether to wait until the Bureau was done or proceed to closing subject to the risk that the Bureau may have sought an injunction to stop them. A related problem was that the Bureau's "service standard" periods were non-binding, meaning that there was effectively no deadline within which the Bureau had to complete its merger reviews.

In June 2008, the federally appointed Competition Policy Review Panel released a report reviewing the status of Canadian competition and foreign investment review legislation and policy. The panel's report recommended sweeping changes, including that the merger review process in Canada be amended to align with the US *Hart-Scott-Rodino Antitrust Improvements Act.* The stated rationale for the recommended changes was to reduce the uncertainties and costs associated with the current Canadian merger review process.

The Bill incorporates the panel's recommendations of a US-style system by enacting a new merger review process that involves an initial 30-day waiting period in which a notified merger may not be completed and the Bureau can assess the likely competitive effects of the proposed transaction. Before that 30-day period expires, the Bureau may choose to issue a "second request" for information, in which case the proposed transaction may not be completed until 30 days after the Commissioner of Competition receives the requested information. The previous short-form/long-form filing is replaced by a single filing form, although regulations mandating the content of this filing have not yet been released.

Given the prevalence of cross-border mergers involving both Canada and the United States, there is some merit in more closely correlating the Canadian review process with that in the US. However, the wholesale adoption of the US merger review process, including the lengthy, expensive and onerous second request process, is of considerable concern, particularly in the current economic climate. The US second request process has been widely criticized for imposing excessive and expensive production burdens on merging parties. For example, studies suggest that production costs for a second request can range from $3.3 million (on average) up to $20 or $25 million (for the most complex cases) and that second request investigations can take six or seven months to complete, on average. These studies also indicate that, despite the lengthy and expensive investigations, there is no evidence to suggest that the burden imposed by the second request process leads to better decision making. Moreover, since it was implemented in the United States, no other country except Canada has implemented a similar, open-ended second request review process.

Another drawback of the new law is that it eliminates any judicial oversight over the Bureau's production demands. Previously, the Bureau had to obtain a court order to compel production of information from merging parties. As demonstrated in the Labatt/Lakeport merger, discussed in more detail below, the Bureau's ability to obtain these orders was not without limits. However, under the amendments, the Bureau is able to issue a second request for any information that is deemed "relevant to the Commissioner's assessment of the transaction" without need for a court order.

Finally, the amendments do not adequately address one of the key failings of the previous merger review process, namely the lack of a set deadline within which the Bureau must complete its reviews of mergers that go beyond the initial 30-day review. First, there is no limit on how long the second request process can last — the burden is placed on merging parties to respond as quickly as they can. Moreover, unlike in the US, parties cannot start the second 30-day clock by achieving "substantial compliance." The Bureau must receive all of the required information (i.e. there must be "full compliance"), which potentially means even greater costs and delay in Canada than under the US process. Finally, there is nothing in the amendments to require the Bureau to complete its review by the end of the second 30-day waiting period. In theory, it could continue its investigation beyond that point and again force merging parties to either wait further or close with the risk of incurring a post-closing challenge.

Increased Merger Notification Thresholds

The Bill also increases certain of the thresholds for pre-merger notification. Previously, the *Competition Act* generally required the aggregate value of the assets in Canada, or the annual gross revenues from sales in or from Canada of the acquired party, to exceed C$50 million in order for the notification requirements to be triggered (the value was C$70 million for amalgamations). The Bill increases this "size of the transaction" threshold for all forms of transactions to C$70 million initially, with future increases tied to changes in inflation (or as prescribed by regulation).

No changes were made to the "size of the parties" threshold, which requires that the parties and their affiliates have combined assets in Canada or gross revenues from sales in, from or into Canada of at least C$400 million in order for a merger to be subject to notification.

The increase to the "size of the transaction" threshold will be welcomed by businesses and investors and will help to alleviate some of the investigative burden placed on the Bureau, especially in light of the new second request process.

Ex Post Review

The *Competition Act* previously granted the Bureau the ability to challenge a transaction up to three years following closing in certain circumstances. The Bill curtails this time period to one year following closing. This amendment is theoretically beneficial to merging parties, but the practical advantages are limited because the Bureau has only rarely exercised its authority to re-open merger files after closing.

Implications

Certain of the Bill's amendments are welcome (e.g. the increased review thresholds and the reduced time for post-closing challenges). However, the wholesale adoption of the US merger review process is a cause for concern, given the prospect that it will increase costs to merging parties, extend timelines for transactions and create the potential for a chilling effect on investment and merger activity in an already volatile economic climate.

2. Amendments to *Investment Canada Act*

The enactment of Bill C-10 also ushered in a number of significant amendments to the *Investment Canada Act*, which applies to acquisitions of Canadian businesses by non-Canadians. Notably, the review threshold for most direct foreign acquisitions of Canadian businesses will be increased at a future date to be determined by the federal Cabinet. Currently, that threshold is C$312 million, based on the value of assets of the Canadian business as reflected in its most recent financial statements. Once brought into force, the new threshold will make such acquisitions reviewable only if the "enterprise value" of the assets of the Canadian business is equal to or greater than: (a) C$600 million, in the case of investments made during the first two years after the amendments come into force; (b) C$800 million, in the case of investments made during the third and fourth years after the amendments come into force; and (c) C$1 billion, in the case of investments made between the fifth year after the amendments come into force and December 31 of the sixth year after the amendments come into force. This threshold will thereafter be adjusted on an annual basis based on the inflation rate. Unfortunately, the amendments do not define the term "enterprise value" — presumably, this will be explained in forthcoming regulations. In addition, lower thresholds (C$5 million or C$50 million, depending on the nature of the transaction) that were applicable to the transportation, financial services and uranium sectors have been repealed (effective immediately).

Also of significance, the amendments establish a national security test, which allows the Minister of Industry, in consultation with the Minister of Public Safety and Emergency Preparedness, to review any foreign acquisition if there are reasonable grounds to believe that the acquisition could be "injurious" to national security. If the Ministers are satisfied that the acquisition would have this effect, the federal Cabinet may take any measures that it considers advisable to protect national security, including the outright prohibition of a foreign investment in Canada. Time frames for the national security review process have not yet been determined.

The introduction of a specific national security test follows the Minister of Industry's denial of approval to the proposed acquisition by Alliant Techsystems Inc. of MacDonald, Dettwiler and Associates Ltd. (MDA) in May 2008. That refusal marked the first time that a proposed acquisition not involving a "cultural business" was denied approval since the *Investment Canada Act* was enacted in 1985. Although the reasons for the refusal are confidential, reports indicated that concerns were raised that the sale of MDA's RADARSAT-2 satellite to a foreign investor would compromise Canada's ability to exercise sovereignty over disputed territories in the Arctic.

B. Other Developments

Apart from the Bill C-10 amendments, there have been other significant developments in Canadian merger control law over the past year. These include the release of draft guidelines for mergers involving transportation undertakings; the fallout from the Federal Court's setting aside of two Bureau production orders obtained in the course of a merger investigation; the continued focus on coordination of merger remedies by the Bureau with foreign merger authorities; and relaxing limitations on foreign investment in certain sectors.

1. Transportation Guidelines

In June 2008, Transport Canada released draft *Guidelines for Mergers & Acquisitions involving Transportation Undertakings* regarding the new merger review provisions of the *Canada Transportation Act* (CTA) that came into force in June 2007. Under the CTA merger review provisions, any proposed transaction that is required to be notified under the merger provisions of the *Competition Act* and which involves a federal "transportation undertaking" must also be notified to the Minister of Transport. If the minister determines that the proposed transaction "raises issues with respect to the public interest as it relates to national transportation," then the transaction cannot be completed unless approved (potentially subject to modifications or conditions) by the federal Cabinet. If no public interest issues are raised, there is no further review under the CTA.

The draft guidelines set out a series of factors relevant to determining whether a proposed transaction raises public interest issues relating to national transportation. These include economic (e.g. the transaction's impact on prices and employment), social (e.g. the transaction's impact on low-income workers and Canadian sovereignty), environmental, security and safety factors. Many of the economic factors overlap with issues dealt with under the *Competition Act* (e.g. impact on prices, service quality and Canadian competitiveness). However, the draft guidelines do not clarify whether the Minister of Transport will refrain from reviewing a proposed merger where it raises only public interest issues that relate to competition.

The public interest review process under the CTA opens the possibility that the Minister of Transport may recommend approval for mergers even if they raise competition issues. This authority may turn out to be of particular importance in the current economic downturn.

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Among its various investigative powers, the Bureau is entitled to apply *ex parte* to a judge for orders requiring the production of documents and other information. The use of these orders has been controversial, with the business and legal communities expressing concern over the Bureau's general unwillingness to consult with parties prior to seeking such orders, and the tendency of such orders to be overbroad and poorly drafted.

On January 28, 2008, a Federal Court judge took the unusual step of setting aside two Bureau production orders obtained in the course of an inquiry into the Labatt/Lakeport merger on the grounds that the Bureau's applications for the orders were "misleading, inaccurate and incomplete." As a result of this criticism, the Minister of Industry ordered an investigation into the Bureau's processes and procedures for obtaining production orders. The report was publicly released on August 13, 2008. Although largely refraining from finding fault with the Bureau, the report offered several helpful suggestions that could, if implemented, alleviate some of the concerns about the use of production orders.

These recommendations include encouraging the Bureau to engage in pre-application dialogue with parties where feasible; limiting the number of custodians whose documents must be searched; discouraging production orders from being sought in furtherance of a criminal inquiry against a person who is a suspect at the time of the application; and requiring the Commissioner of Competition to inform the court of any point of fact or law known to the Commissioner why a requested production order should not be granted.

Significantly, pursuant to the Bill C-10 amendments, the Bureau will no longer have to resort to the courts to obtain production orders if it requires additional information from merging parties; it will be able to issue a "supplementary request" on its own initiative and without judicial oversight. This new power is a direct response to the Bureau's setback in *Labatt/Lakeport*.

3. Coordinated Remedies

In January 2009, the Bureau announced that commitments made by Dow Chemical Company to the Bureau and to US antitrust authorities had alleviated the Bureau's concerns about the competitive effects of Dow's proposed acquisition of Rohm and Haas Company, clearing the way for the merger's completion. This follows a similar announcement in 2008 in which the Bureau allowed The Thomson Corporation's acquisition of Reuters Group PLC to continue unchallenged, after commitments were made by Thomson to divest certain assets, based on remedies negotiated with US and European authorities.

In both instances, the Bureau's assessment of the merger was conducted in conjunction with counterparts at the US Federal Trade Commission and the European Commission's Competition Directorate-General and divestments based on negotiations with those other authorities formed part of the basis for the Bureau's ultimate clearance. As Interim Commissioner of Competition, Melanie Aitken has noted, "For international mergers, the overriding concern for the Bureau is to secure a remedy to resolve a likely substantial lessening or prevention of competition in Canada. Where appropriate, the Bureau will refer to remedies agreed on in other jurisdictions, provided the remedy required addresses Canadian issues."

The increasing international nature of many mergers is likely to result in more coordinated merger reviews of this nature. The Bureau's Information Bulletin on Merger Remedies in Canada states that the Bureau will attempt to coordinate its reviews with foreign authorities in instances where international mergers will have similar effects in Canada that they will elsewhere. This is beneficial for businesses as it reduces the potential for uncertainty and conflicting outcomes.

4. Reduction of Foreign Ownership Limitations

As part of its election platform in the fall of 2008, the Conservative party promised to reduce the foreign ownership restrictions currently in place in the air transportation and uranium industries.

Previously, under the CTA, ownership and control of voting interests held in a Canadian air carrier could not exceed 25 percent and control in fact had to be held by Canadians. Bill C-10 amends the CTA to allow foreign ownership of up to 49 percent, subject to control in fact still being held by Canadians and there being a reciprocal agreement with the foreign investor's home country. No such reciprocal agreements have been entered into yet.

As to uranium mining, the federal government currently has a policy in place limiting non-resident ownership of uranium mining properties to 49 percent at the stage of first production. There are no restrictions on uranium exploration by foreign entities. The Conservative government has stated its intention to increase foreign ownership limits in uranium mines provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investment in the sector is not contrary to Canadian national security.

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