

FOCUS ON CORPORATE COMMERCIAL

COMMENTARY: Tories target Canada's sluggish productivity

By Mark Katz

When first elected, the Conservative government demonstrated a distinct lack of interest in Canadian competition law. Industry Minister Maxime Bernier, for example, publicly stated that amending the *Competition Act* was not a priority and that the Conservative government had no plans to review the legislation.

In particular, the Tories were not inclined to pursue proposed amendments to the *Competition Act* which the Liberal government had introduced prior to its defeat. Among other things, these proposed amendments would have imposed fines (euphemistically called "administrative monetary penalties" or AMPs) for cases of abuse of dominance.

Times have changed, however, and the issue of competition law reform has clearly moved up in importance on Minister Bernier's "to do" list.

To begin with, in December of 2006, the minister introduced proposals to impose AMPs as a penalty for abuses of dominance in the telecom sector (but not more broadly). This was part of a wider effort to decrease the CRTC's role in telecom regulation in favour of market principles, backed up by enhanced competition law enforcement.

Then, in a move that took many by surprise, the government announced in its annual budget released in March of 2007 that it planned to appoint a panel of independent experts to undertake a comprehensive review of Canadian competition policy. The panel's mandate and composition remains to be fixed. However,

unlike previous reform efforts, which were initiated by the Competition Bureau to strengthen its enforcement powers, it appears that this latest review will be directed at something quite different and potentially more far-reaching; namely, the impact of competition (and other) 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, the panel's focus will likely be on the more fundamental issue of how Canada's competition legislation affects the overall productivity and competitiveness of the Canadian economy.

The review panel also is likely to examine the impact of other government regulations on Canadian economic performance, most notably the general screening process for foreign acquisitions under the *Investment Canada Act* ("ICA") and the foreign ownership restrictions affecting specific industries such as telecom, broadcasting and airlines. According to the Organization for Economic Co-operation and Development (OECD), there are more restrictions on foreign investment in Canada than in most OECD countries, which hampers productivity and slows the diffusion of new technology and management practices to Canadian businesses.

This may be one reason why yet another organization, the Conference Board of Canada, has reported that Canada's "socio-economic performance" is below that of other developed countries. Canada's record is especially poor

when it comes to innovation, i.e., developing and exploiting new products, processes and services or upgrading the quality of what we already produce.

The initial signal from the government was that it shared these concerns about the negative impact of Canada's foreign investment regime and that the review process would result in recommendations to loosen the limits on foreign ownership and make ICA review less cumbersome for investors. (Currently, foreign investors whose acquisitions of Canadian businesses are subject to review under the ICA must generally offer up various types of undertakings in order to secure ministerial approval for their transactions).

The OECD and others notwithstanding, any proposal to liberalize Canada's foreign investment rules is sure to encounter opposition. The recent spate of foreign takeovers of Canadian business "icons" (such as Hudson's Bay and Inco) has reinvigorated the always latent concern about the "hollowing out" of corporate Canada. The usual suspects have become involved – the Liberals, for example, suggested that all approvals under the ICA be withheld until a review of the legislation is completed. Some business leaders have suggested that caution is in order, including heads of companies that have themselves actively pursued acquisitions outside of Canada. Public opinion polls have also registered a level of disquiet with the ongoing pace and scope of foreign investment in Canada.

The empirical evidence avail-



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able does not necessarily support these concerns. 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 per cent

of corporate assets and 30 per cent 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.

That said, the government's proposed review will take place in a contentious and politically charged atmosphere, which means that the end result may not bear any resemblance to what was originally intended.

Mark Katz is a partner in the Competition & Foreign Investment Review group of Davies Ward Phillips & Vineberg LLP in Toronto.