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## Canada Enacts New Prior Approval Process for Transportation Mergers

June 28, 2007

On June 22, 2007, amendments to Canada's principal federal transportation legislation, the *Canada Transportation Act* ("CTA"), came into force. Among other things, the amendments establish a new "public interest" review process for mergers involving "transportation undertakings" falling under federal jurisdiction. The new CTA process is additional to – and to some degree supersedes – the current merger review process under the *Competition Act*. The CTA process has been enacted notwithstanding concerns about how it will apply in practice and the impact it may have on mergers in the transportation industry.

### Public Interest Review Under the CTA

The new CTA merger review provisions apply to transactions that "involve a transportation undertaking" and that are subject to pre-merger notification under the *Competition Act*. (Pursuant to Part IX of the *Competition Act*, and subject to certain exemptions, proposed transactions exceeding specified financial thresholds must be notified to the Competition Bureau prior to closing and cannot be completed until a prescribed waiting period has expired.)

Parties subject to the CTA will now have to submit their pre-merger notifications not only to the Competition Bureau, but to the federal Minister of Transport as well. The parties also will be required to submit information relating to the "public interest" aspects of the transaction insofar as the effect on national transportation is concerned. The specific considerations to be addressed will be set out in guidelines to be drafted by the Minister (in consultation with the Bureau).

Following notification, the Minister will have 42 days to decide whether the proposed transaction raises any "public interest" issues. Where the Minister determines that a transaction does not raise any such issues, notice will be provided to the parties that the public interest merger review provisions of the CTA do not apply. In that case, the usual review process and substantive provisions of the *Competition Act* will apply.

However, where the Minister determines that a proposed transaction does raise public interest issues, the Minister can direct the Canadian Transportation Agency (the "Agency"), or any other person, to investigate such issues and report to the Minister within 150 days. In those circumstances, the usual *Competition Act* review process will cease to apply, and the Competition Bureau will be obliged instead to report any concerns about a "potential prevention or lessening of competition" to the Minister and the parties within 150 days of being notified under the *Competition Act*. The Bureau's report will be made public immediately after the Minister receives it.

Once the Agency and Bureau reports are received, the Minister will recommend to the federal Cabinet whether the transaction should be approved or not. Prior to making this recommendation, the Minister will consult with the Bureau as necessary and also give the parties an opportunity to respond to any public interest or competition concerns raised, including offering undertakings to address these concerns.

The ultimate fate of the transaction will then be up to the federal Cabinet to determine. In deciding whether the transaction is in the "public interest", the Cabinet will be entitled to consider any undertakings proposed by the parties, and could approve the transaction subject to terms and conditions relating both to the public interest and any potential prevention or lessening of competition.

Failure to notify under the new CTA provisions is a criminal offence, as are closing without Cabinet approval where required and failing to adhere to any terms and conditions imposed by Cabinet. In addition to the corporation itself, any officer or director who authorized or participated in the offence is liable. Penalties include fines and/or imprisonment.

## **Implications**

The proposed amendments to the CTA were criticized on a number of grounds prior to enactment. For example:

- The concept of "transportation undertaking" is undefined in the legislation, which creates uncertainty as to the scope of its application. The new merger review process no doubt applies to transportation businesses already within federal jurisdiction, such as inter-provincial or cross-border railways, airlines, pipelines, or trucking and shipping firms. However, based on case

law decided in other contexts, the new process also may apply to businesses that provide important ancillary services to federal undertakings, yet do not transport anything across provincial or international borders (e.g., stevedoring companies).

- The new CTA process applies to mergers that "involve" transportation undertakings. This means that it may apply not only to acquisitions of transportation undertakings, but also to acquisitions by transportation undertakings, including acquisitions that do not necessarily involve the transportation of goods or persons (e.g., if an airline operator acquires a parts manufacturer).
- When the public interest process is invoked, the Competition Bureau will be required to apply a different review standard than the one otherwise used to assess mergers under the *Competition Act*. Thus, the CTA requires the Competition Bureau to report to the Minister on any concerns regarding a "potential prevention or lessening of competition" resulting from the proposed merger. This is a different – and lower – threshold than normally applies to merger review under the *Competition Act*, where the Bureau has to consider whether the proposed transaction is likely to result in a *substantial* prevention or lessening of competition. Although the Bureau has indicated that it intends to continue to apply the usual standard under the *Competition Act* to transportation mergers, it is not clear why the CTA, on its face, establishes a different standard.

Although the proposed amendments were reviewed by committees of both the House of Commons and the Senate, no changes were made to deal with these criticisms.

More generally, no clear explanation has been provided as to why the transportation industry requires a special review process that is different from that applicable to other industries. Even if the various uncertainties surrounding the legislation are clarified, the establishment of the new process means that at least some transportation mergers will be potentially subject to a two-tiered review (and even to a three-tiered review if the *Investment Canada Act* applies), with all of the potential for conflict and delay that multiple regulatory reviews entail.

*If you would like additional information about this topic or any aspect of Canadian competition law, please contact [George Addy](#), [Anita Banicevic](#), [John Bodrug](#), [Richard Elliott](#), [Mark Katz](#), [Hillel Rosen](#), [Elisa Kearney](#) or [Chris Margison](#) or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at (416) 863-0900 (Toronto) or (514) 841-6400 (Montréal).*

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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