>perspective

Canadian Competition and Foreign Investment Law: What To Watch For In 2009

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2009 could be a year of significant change for Canadian competition and foreign investment review law. Here are the top 5 developments to watch for:

Competition and Foreign Investment Review

Also of interest:

- Perspective - Canadian Competition Bureau Issues Updated Bulletin on Corporate Compliance Programs *(October 28, 2008)*
- *Investment Canada Act* - Guide for Foreign Investors in Canada *(December 16, 2008)*
- Comments on the Draft Information Bulletin on Trade Associations *(January 22, 2009)*

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1. WHO WILL BE THE NEW COMMISSIONER OF COMPETITION?

Sheridan Scott, Canada's Commissioner of Competition for the last five years, announced in December 2008 that she would not be staying on in her position for a second term. Ms Scott was replaced on an interim basis by Melanie Aitken, who had been in charge of the Competition Bureau's merger branch. It is expected that the new Commissioner will be appointed in the next several months.

Ms Scott had been criticized for a decline in Bureau enforcement levels during her tenure. Our understanding is that the new Commissioner, whoever that may be, will be expected to improve upon this record by investigating more cases and bringing more proceedings. This could tie into developments in the United States, where the Obama administration is also expected to take a more aggressive approach to antitrust enforcement.

2. WILL CANADA'S MERGER REVIEW SYSTEM BE OVERHAULED?

In a report issued in June 2008, the federally-appointed Competition Policy Review Panel ("Panel") recommended that the *Competition Act*'s merger review process be amended to align with U.S. merger review procedures under the *Hart-Scott-Rodino Antitrust Improvement Act*. The U.S. process establishes an initial 30-day waiting period during

which a notified merger may not be completed while the responsible antitrust agency assesses the likely competitive effects of the proposed transaction. If the agency considers that it needs more time to review the transaction, it may issue a "second request" prior to the expiry of the 30 day period, in which case the transaction may not close until 30 days after the merging parties substantially comply with the "second request". As a general rule, compliance with "second requests" in the U.S. is a very lengthy and expensive exercise, with no set termination point.

By contrast, Canada has two different waiting periods (14 or 42 days), depending upon the type of notification submitted ("short form" or "long form"). At the same time, the Bureau's substantive review of transactions runs on a different non-statutory timetable, based on the complexity of the transaction. These "service standards" range between 2 weeks (for the least complicated transactions) to over 5 months (for the most complex).

We understand that the Panel's recommendation to amend the *Competition Act*'s merger review process is being considered very seriously by the government and the Competition Bureau. While there may be some positives to the U.S. approach (e.g., a single initial waiting period), the prospect of adopting the "second request" process in Canada is of considerable concern, given its very negative track record in the U.S.

3. WILL THE COMPETITION ACT'S SANCTIONS BE TOUGHENED?

During the recent federal election campaign, the Conservative Party promised several far-reaching changes to enhance enforcement of the *Competition Act*, including:

- a new criminal conspiracy offence focussed on "hard core" cartel conduct such as price fixing and bid-rigging, with other types of potentially anti-competitive agreements to be dealt with on a separate non-criminal track;

- new maximum penalties for cartels and bid-rigging of $25 million in fines and 14 years in prison (up from the current maximum of $10 million in fines and 5 years imprisonment);

- new fines for abuse of dominance (up to $10 million for initial offenders and $15 million for repeat offenders);

- new penalties for obstructing Competition Bureau investigations (up to $100,000 on summary conviction and up to 10 years imprisonment for an indictable offence); and

- increased penalties for deceptive marketing.

The first proposal is likely the most significant, as it would substantially change cartel enforcement in Canada. Currently, a cartel offence only arises in Canada if the government can prove beyond a reasonable doubt that the cartel prevented or lessened competition "unduly" (the one exception is bid-rigging, which is a *per se* offence). The Bureau claims that its poor enforcement record in contested cartel cases is a direct result of the difficulties it encounters in satisfying this undueness element. The Bureau's perspective is not universally accepted among Canada's competition bar and previous efforts to introduce a *per*

se cartel offence failed. It now appears, however, that the Conservatives (who were elected to form a minority government in October 2008) are committed to seeing this amendment through.

4. WILL CANADA'S FOREIGN INVESTMENT LAWS BE AMENDED?

The Conservatives also promised to enact very significant reforms to the laws governing foreign investment in Canadian businesses. Among other things, they said that they would:

- amend the *Investment Canada Act* ("ICA") to increase the threshold for foreign investment reviews from the current level of $312 million in gross asset value to $1 billion in enterprise value, with the increase to be phased in over 4 years;

- ensure greater transparency in the ICA process by requiring the responsible Minister to give reasons if an investment is disallowed;

- establish a new national security review mechanism in the ICA to ensure that foreign investments cannot jeopardize Canada's national security;

- work with Canada's trading partners to ensure that foreign investment is a "two-way street" and that Canadian companies also receive increased access to investment opportunities abroad;

- increase the permissible level of foreign investment in domestic airlines from 25 per cent to 49 per cent through bilateral negotiations with Canada's major partners such as Europe and the United States that would also secure increased access to international flight routes and landing rights through Open Skies agreements; and

- revise the Non-Resident Ownership Policy for uranium mining and development provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investments in this sector meet the national security test.

Many of these proposals were first made by the Panel in its June 2008 report. The gist of the proposals is that Canada's foreign investment rules should be pared back. In particular, if adopted, the ICA's application will be restricted to very limited circumstances, principally where "national security" interests may be implicated.

5. HOW WILL THE CURRENT ECONOMIC CRISIS IMPACT DEVELOPMENTS?

All of the potential developments outlined above will be influenced by the overarching issue of what effect the global credit crunch and associated economic downturn will have on the design and implementation of Canadian competition/foreign investment review policy.

For example, will the Canadian government still want to adopt substantial changes to Canadian merger and cartel law in this environment or will it conclude that these amendments should be shelved for the time being? Similarly, will the Bureau actually step up its enforcement levels or will it relax its standards in order to accommodate broader

economic concerns beyond the strict application of competition law principles? To date, the Bureau has been silent on these issues, but it will have to face them head on in 2009.

The same questions apply in the foreign investment review area. While the Conservatives are generally in favour of foreign investment, there is also a substantial body of opinion in Canada that is suspicious of – if not hostile to – foreign acquisitions of Canadian businesses. As such, Canada is likely to see more debate over whether this is the right time to be opening up the country even further to foreign acquisitions – as the Conservatives have proposed – or whether steps should be taken to protect Canadian businesses from foreign takeovers, given the potential they carry for domestic job losses and an outflow of investment.

If you have any questions regarding the foregoing, please contact George Addy, John Bodrug, Mark Katz, Anita Banicevic, Hillel Rosen 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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