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Top Competition and Foreign Investment Review Trends and Issues for 2016

1. Canada's new government and the *Investment Canada Act*

This past October, Canadians elected a Liberal-majority federal government to replace the almost decade-long rule of the Conservative Party. Generally, we believe that foreign investors can expect "business as usual" under the new Liberal government. Indeed, the new government has emphasized its commitment to continued foreign investment. However, the new government has also emphasized transparent decision-making and noted that investment by non-Canadians must occur in a manner "that respects and defends Canadian interests". In light of these policy goals, the Liberal government may well propose incremental reforms to the *Investment Canada Act* (ICA) or to the manner in which it is administered in the next year.

Such reforms could include providing more clarity to investors about the test for approval under the ICA. Currently, where applicable thresholds under the ICA are exceeded, a foreign investor must establish that its proposed acquisition of a Canadian business is likely to be of "net benefit" to Canada in order to obtain ministerial approval for the transaction to proceed. This "net benefit" test has been the subject of criticism on the basis that it is an uncertain standard potentially subject to the whims of the government. The new government has recognized that the net benefit test needs to be clarified to provide more certainty to foreign investors and to Canadians about the circumstances in which investments will be approved under the ICA. Prime Minister Trudeau has specifically commented that foreign investors need clearer rules around takeovers and that "decisions on a political basis rather [than] on a level of clarity [account for] why quite frankly [Canada is] seeing global investment hesitant to engage."

Further, given the Liberal government's policy agenda, its sensitivity to regional interests and Canada's middle class, and its commitment to increased transparency and consultation, we expect that increased focus will be placed on employment, climate, regional economic growth and innovation issues during the "net benefit" review process. This may result in more stringent

undertakings to the government in these areas being required in order to obtain "net benefit" approval.

In addition to the above, we also note that, if implemented, the Trans-Pacific Partnership (TPP) would increase the thresholds for "net benefit" reviews under the ICA applicable to most acquisitions of Canadian businesses by investors from TPP-member countries to $1.5 billion in "enterprise value" of the Canadian business's assets. (Currently, the review threshold is $600 million in enterprise value of the Canadian business's assets. Lower thresholds apply, and will continue to apply, to acquisitions by state-owned enterprises and acquisitions of "cultural businesses".) However, the implementation of these higher thresholds depends upon ratification of the broader TPP, which is highly uncertain and subject to significant public debate.

2. Innovation and the digital economy

As the Canadian digital economy continues to develop, we expect it and other innovative industries to be increasing areas of focus for the Competition Bureau in 2016 and in the years ahead. The Commissioner of Competition recently commented that "technological innovation is the main driver of economic growth" and "while...market inefficiencies…will continue to be the primary area of inquiry for the Bureau in most industries, an argument can be made that the impact to innovation, whether positive or negative, should be the predominant concern in some industries." Indeed, signs of this focus are already evident. In late 2015, the Competition Bureau released a white paper calling on regulators to modernize taxi industry regulations in light of the explosive growth of digital ride sharing services, such as Uber. Additionally, the Bureau also recently completed a review of the broadcasting agreement between Rogers and the National Hockey League and has recently taken enforcement action against Bell Canada in relation to online reviews.

Similarly, the importance of innovation and the digital economy has been echoed by the new government, which has recognized that innovation and new technologies will create jobs and growth for the Canadian economy. In particular, in his mandate letter to the Minister of Innovation, Science and Economic Development, the Prime Minister identified the following as some of the top initiatives for the digital economy: (i) increasing high-speed broadband coverage and work to support competition, choice and availability of such services; (ii) fostering a strong investment environment for telecommunications services to keep Canada at the leading edge of the digital economy; and (iii) reviewing existing measures to protect Canadians and Canada's critical infrastructure from cyberthreats. These initiatives will undoubtedly be on the Commissioner of Competition's mind as he sets his priorities for 2016.

3. Does the Competition Bureau need formal powers to conduct sector studies?

The Competition Bureau has renewed its focus on advocacy efforts under its current Commissioner, John Pecman, and this focus is likely to continue in 2016. Specifically, the Bureau has identified sector or market studies as a key tool to inform policy makers about unnecessary obstacles to competition and to assist in the development of solutions to apparent competitiveness issues.

In recent years, the Bureau has published market studies looking at self-regulated professions (*e.g.*, accountants and lawyers), the generic drug sector and the beer industries in Ontario and Quebec. The outcomes of these studies varied from motivating direct government action to persuading other stakeholders to voluntarily modify certain practices. The Bureau believes that

these studies have also provided it with insights to make better enforcement decisions in the sectors studied.

However, there has been criticism that the Bureau does not have the jurisdiction under the *Competition Act* to carry out these market studies. Further, even if the Bureau undertakes such initiatives, it must rely on information voluntarily provided by market participants in conducting its studies. Unlike Canada, several jurisdictions, including the United States, Europe, Mexico and the United Kingdom, have formal authority to engage in such studies and compel the production of information from industry participants.

The Bureau may seek to address these issues by asking for amendments to the *Competition Act* that would provide it with formal powers (similar to those granted to regulators in other jurisdictions) to conduct market studies. While the government has not commented on the possibility of introducing any such amendments, we expect it to remain a high priority of the Commissioner in 2016. At a minimum, we expect the Bureau to continue its focus on market studies using the tools and resources currently available to it. In fact, the Bureau has stated that it intends to complete at least two market studies every year in regulated sectors that are of particular importance to the Canadian economy.

4. Testing the Federal Court of Appeal's abuse of dominance principle

In our last annual forecast we discussed the potential impact of the Federal Court of Appeal's decision in the Commissioner of Competition's abuse of dominance litigation against the Toronto Real Estate Board (TREB), which arguably expanded the reach of the *Competition Act*'s abuse of dominance provisions to include conduct that affects a market in which the allegedly dominant entity does not itself compete. In the case at issue, the Commissioner alleged that TREB, a trade association comprising most of the Realtors® in the Greater Toronto Area, controls, and is abusing a dominant position in, the residential real estate brokerage services market even though TREB does not itself compete in that market. Specifically, the Commissioner alleged that a TREB rule restricting its members from posting certain historical data on virtual office websites substantially lessens or prevents competition in the market for residential real estate brokerage services.

The Supreme Court of Canada denied TREB's application seeking leave to appeal in July 2014, and the case was sent back to the Competition Tribunal for reconsideration. (See our discussions of the case following the Federal Court of Appeal and Supreme Court decisions.) In late 2015, the Tribunal reheard the case, and its decision is expected to be released in early 2016.

The Tribunal's forthcoming decision will be significant as it will be the first to consider the abuse of dominance provisions in light of the Federal Court of Appeal's decision and will set the stage for future enforcement in the abuse of dominance arena. Dominant companies and trade associations will be well-advised to consider their conduct in light of this upcoming decision.

5. Competition Bureau decision-making in 2016: Time for reassessment?

In recent years, the Competition Bureau has suffered a number of significant defeats, including two major criminal cases in 2015.

Chocolate price-fixing

In 2007, the Competition Bureau initiated an investigation into alleged price-fixing by Canadian manufacturers of chocolate, including executing search warrants on a number of manufacturers. The matter came to the attention of the Bureau after Cadbury, one of Canada's largest chocolate manufacturers, provided details of the alleged conspiracy under the Bureau's Immunity Program. Following a six-year investigation, price-fixing charges were brought in 2013 against a number of manufacturers and certain of their executives, and one wholesaler. Shortly thereafter, one manufacturer, Hershey, pleaded guilty and agreed to pay a fine of $4 million. However, prior to commencement of the trial against the remaining accused parties, in late 2015, the Crown stayed proceedings, effectively terminating the case. While the Crown did not provide reasons for the stay of proceedings, it can be reasonably inferred that the Crown considered there to be no reasonable prospect of conviction.

Bid-rigging of IT service contracts

In 2006, the Competition Bureau initiated a criminal inquiry into bid-rigging allegations against 14 individuals and seven companies relating to IT service contracts with the Canadian federal government. Like the Bureau's chocolate industry investigation, this investigation also arose out of an application under the Bureau's Immunity Program.

Following an almost 10-year-long investigation (which included a number of guilty pleas), a seven-month trial and the expenditure of significant resources (likely in excess of $5 million), the six individuals and three companies that elected to be tried by a jury were acquitted of all 60 bid-rigging charges in April 2015. Following the jury's not-guilty verdicts, the Commissioner of Competition stated that "the Bureau and the Public Prosecution Service of Canada will take the time necessary to consider next steps, including whether to appeal the verdicts"; ultimately they decided not to appeal.

Given these recent high-profile losses, the Bureau may revisit its investigatory and decision-making processes in such high-profile matters, including its immunity and leniency programs, especially given the high costs to companies and taxpayers of lengthy and ultimately unsuccessful investigations. However, despite the outcomes of these recent cases, the Commissioner has stated his belief that the Bureau's immunity and leniency policies are still effective programs.

6. Contested mergers and hold separate orders

In April 2015, the Commissioner of Competition filed an application challenging a proposed merger between two major gasoline retailers, Parkland Fuel Corp. and Pioneer Energy, seeking to prohibit acquisition of (or require the post-closing divestiture of) retail gas stations and related supply agreements in 14 local markets (representing less than 10% of the overall transaction). The Commissioner also brought an application under section 104 of the *Competition Act* seeking an injunction preventing the merging parties from implementing the transaction in those 14 markets pending the outcome of the Commissioner's challenge. This marked the first time that the Competition Tribunal considered a contested case in respect of an injunction that would be in place pending a full hearing on a contested merger.

In May 2015, the Tribunal issued its injunction decision, ordering Parkland and Pioneer to hold separate retail gas stations and supply agreements in six of the 14 markets, pending resolution of the Commissioner's challenge by the Tribunal. Notably, the Tribunal confirmed that the test

for an interim injunction under section 104 is based on the standard for injunctions used in courts. Specifically, the Commissioner must (i) demonstrate there is a serious issue to be tried; (ii) provide "clear and non-speculative" evidence that irreparable harm will result if the injunction is not granted; and (iii) establish that the balance of convenience supports the granting of relief. The Bureau failed to obtain injunctions in the eight other markets because it did not provide sufficient "non-speculative" evidence demonstrating irreparable harm: *i.e.*, that consumers in those markets would face higher prices were the stations to consolidate. (The outcome of the full case is still pending and the hearing has been scheduled for May 2016.)

The decision, including the legal test set by the Tribunal, illustrates the need for both the Competition Bureau and merging parties to develop ample economic evidence during the course of merger planning and review where the merger may raise significant competition issues. Going forward, we expect that the Bureau will increase its efforts to obtain such evidence from merging parties during the course of its reviews of transactions that it is considering challenging. Further, we expect that section 104 applications will continue to be used as a tool by the Bureau in future contested merger proceedings.

7. Will the *Price Transparency Act* be passed under the new government?

The previous Canadian government identified what it viewed as an unjustified gap between American and Canadian prices on certain products, in particular where companies with market power charged higher prices in Canada than in the United States and where those higher prices were not reflective of "legitimate" higher costs of operating in Canada. The previous government attempted to address this concern through Bill C-49, the *Price Transparency Act*. The Bill would have amended the *Competition Act* to authorize the Commissioner of Competition to investigate geographic price discrimination and report publicly on his findings, thus shedding light on any unjustified differences. The amendments would have effectively granted the Commissioner authority to compel companies to provide documents to justify their pricing. However, the Commissioner would not have been given authority to prohibit or impose penalties for price differentials.

Bill C-49 met with considerable opposition, based on concerns that analyzing cross-border price differences would require in-depth investigations that would be impractical, costly and disruptive, and that the Competition Bureau is not qualified to assume such a regulatory role and make complex determinations relating to differentials in price.

Although the new Liberal government has yet to comment on the prospect of resuscitating the *Price Transparency Act*, given the current weak Canadian dollar, coupled with the significant costs and burdens that could result from such a law, it is unlikely that cross-border price discrimination will be a priority for the government in 2016.

8. Technical amendments to the *Competition Act*

Agreements and transactions between "affiliates" under common control are, for good reason, exempt from a number of provisions of the *Competition Act*, including the conspiracy, price maintenance and merger notification provisions. It is generally accepted that agreements or transactions between entities under common control should not be subject to prohibitions under the *Competition Act* because such entities are not expected to compete with one another. Rather, the expectation is that they will coordinate their activities as efficiently as possible.

However, although the current definition of affiliate under the *Competition Act* addresses corporations under common control, it does not, for example, apply at all to trusts and does not apply fully to partnerships. Although Competition Bureau guidelines state that the Bureau will consider whether other types of entities are under common control in deciding whether to refer an agreement for prosecution, the guidelines are not binding on the Bureau or a court. Further, such guidelines are inapplicable to a determination of whether a merger notification is required under the *Competition Act*.

As part of Bill C-49, the prior Conservative government proposed a number of helpful technical amendments to the *Competition Act*, including modifications to the definition of "affiliate", in order to promote consistency between how corporate and non-corporate entities are treated under the *Competition Act*. In the coming year, we hope to see the Liberal government move forward on these non-controversial technical amendments to help clarify the application of the *Competition Act*.

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