Update

Significant Changes to Canada's Competition Law and Foreign Investment Regime

In our February 6, 2009 *Osler Update*, we drew attention to the important changes to the *Competition Act* and the *Investment Canada Act* (*ICA*) proposed in Bill C-10, the *Budget Implementation Act, 2009* of the federal government, which was introduced that day. Since then, Bill C-10 has been expeditiously ushered through the Finance Committee and Second and Third Readings in the House and the Senate. It received Royal Assent on March 12, 2009. Most of the amendments to the *Competition Act* and the *ICA* in Bill C-10 are now in force although a few will not come into force until a date fixed by the Governor-in-Council or following the expiry of a set transitional period. The changes brought about by these amendments, which are the most significant in over two decades, have important and far-reaching implications for the business and legal communities.

Bill C-10 implements all but one of the amendments to the *Competition Act*[1] proposed by the government-appointed blue ribbon Competition Policy Review Panel (Panel),[2] which reported in June 2008, and implements a few of the amendments to the *ICA* proposed by the Panel.[3] These amendments fundamentally restructure Canadian conspiracy laws and the merger review process, and significantly increase corporate and individual penalties to the highest levels anywhere in the world in some cases. They also introduce a national security regime into our foreign investment law.

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1 The Panel recommended that a specialized and independent Canadian Competitiveness Council be created and that responsibility for competition advocacy be vested in such entity. This recommendation was not reflected in Bill C-10.

2 *Compete to Win* (June 2008), Competition Policy Review Panel, available online at: www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home.

3 Notably, Bill C-10 does not adopt the Panel's sensible recommendations relating to *ICA* to (i) change the applicable review standard and reverse the onus (currently requiring applicants to demonstrate "net benefit to Canada") to require that the Minister be satisfied that consummation of the proposed transaction would be contrary to Canada's national interest, before disallowing the transaction; (ii) remove the obligation, other than for cultural businesses, that investors notify Industry Canada with regard to acquisitions that fall below review thresholds or upon the establishment of any new business; (iii) establish a "*de minimis* exemption" for the acquisition of a business with cultural business activities that are ancillary to its core business (e.g., where the revenues from the cultural business activities are less than the lesser of $10 million or 10% of gross revenues of the overall business); or (iv) require the Minister of Canadian Heritage to conduct a five-year review of cultural industry policies and to conduct an immediate review for the purposes of considering increases and revisions to the review threshold for cultural businesses and the desirability of continuing the Minister's ability to review and approve the establishment of any new cultural businesses by foreign investors.

Not only will the amendments themselves require the business community to reflect on and change some of its existing and future business strategies and activities, they will require the Competition Bureau (Bureau) and the Investment Review Division to adjust their practices and guidelines to reflect the new law that they will now be responsible for enforcing.

Many of these amendments will need to be accompanied by new regulations and guidelines that explain how they will be administered and enforced. Until such guidance is available, the legal and business communities may find it difficult to navigate through the new provisions and will face unpredictable challenges in satisfying new obligations. Existing corporate compliance programs, in particular, will have to be reviewed and, in many cases, revised. In view of the potential for significantly increased criminal exposure for agreements with competitors, combined with the increased enforcement of cartel laws by antitrust regulators around the world, companies without competition compliance programs should consider implementing them as soon as possible. This is particularly true for companies currently in joint ventures, strategic alliances, co-production, co-marketing or facility sharing arrangements with competitors.

The repeal of the pricing discrimination, promotional allowance, price maintenance and predatory pricing provisions will provide businesses with considerably more flexibility in structuring their pricing and distribution strategies and practices. However, businesses with leading positions in their industries now potentially face significant financial penalties for engaging in abusive behaviour. This is a dramatic change. In light of this potential exposure, industry leaders will need to be more aware of how their aggressive business practices are affecting or may affect the market.

While the amendments do not change our substantive merger law, companies contemplating transactions will have to adapt closing conditions, filing requirements and timing expectations to reflect the new merger process which, to a significant extent, aligns the Canadian merger review process with its U.S. counterpart. In addition, both buyers and sellers and their financial and legal advisors will have to assess the timing and execution risk associated with a potentially uncertain national security review where the buyer is non-Canadian.

Below is a discussion of the principal amendments to the *Competition Act* and the *ICA* as set forth in Bill C-10. Appendix A summarizes in chart form the amendments to the *Competition Act* and the *ICA* that are now in force and indicates when others will come into force.

AGREEMENTS BETWEEN COMPETITORS – THE DUAL-TRACK APPROACH

The establishment of a dual-track approach to agreements between competitors is arguably the most significant change proposed by Bill C-10. Under this approach, three narrowly defined categories of agreements would be subject to a strict *per se* criminal prohibition, while all other types of agreements between competitors would be subject to review under a non-criminal framework.

This two-track approach has been debated for some time. It was first proposed in 1996 and has since been recommended by the Organisation for Economic Co-operation and Development, a number of independent experts retained by the Bureau, Parliament's Standing Committee on Industry, Science and Technology in its 2002 Report entitled, *A Plan to Modernize Canada's Competition Regime*, and the Panel in June 2008. Other jurisdictions, such as Australia, are also moving to criminalize so-called hard-core cartel behaviour.

The New Criminal Track – Section 45

Per se criminal liability will apply to agreements between "competitors" that:

- fix, maintain, increase or control the price for the supply of a product in respect of which the agreeing parties are competitors;
- allocate sales, territories, customers or markets for the production or supply of the product; or
- fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

The term "competitor" is defined as including "a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement" described above. It is not clear how this test will be applied; however, it will have to be established on the criminal burden of proof, namely, "beyond a reasonable doubt." This may make it difficult for the prosecution to establish that the test is met by two persons who do not actually compete, but who are merely *potential* competitors.

The term "price" is defined to include "any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product."

The amendments establish two statutory defences to the *per se* criminal provisions: an ancillary restraints defence and a regulated conduct defence.

The new "ancillary restraints" defence would apply where it can be established, on a balance of probabilities, that the agreement (i) is ancillary to a broader or separate agreement or arrangement that includes the same parties and (ii) is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement. In addition, it would have to be established that the broader or separate agreement, considered alone, does not itself fall within the scope of any of the three categories of *per se* liability. If the words "directly related to, and reasonably necessary for giving effect to" are interpreted too narrowly and without due regard to commercial realities, many types of provisions that are commonly included in agreements between competitors, including non-compete provisions in purchase

and sale agreements, may not qualify under this exemption, and this could raise serious issues under this new criminal law. For example, more care will need to be taken in drafting non-compete provisions in purchase and sale agreements to ensure that the duration and geographic scope of the non-compete is reasonably necessary to protect the goodwill of the business being acquired and is not a disguised form of market allocation. Additionally, further questions could arise over whether provisions of legitimate joint venture agreements that touch on price, volumes, sales territories, or customers meet the requirements of the ancillary restraints defence.

The "regulated conduct defence" attempts to codify permitted behaviour, but does not resolve a fundamental question that has been raised in the jurisprudence: will the regulated conduct defence only be available when the statutory provision in question incorporates an "undue lessening of competition" test, a "public interest" test, or other "leeway" that is not present in the *per se* liability approach in Bill C-10.[4]

The new section 45 proposed by Bill C-10 is aimed at hard-core cartel behaviour and in this respect is similar to section 1 of the *Sherman Act* in the United States. However, unlike the broadly-worded section 1 of the *Sherman Act*, the proposed new law attempts to specifically address some of the recognized categories of presumptive illegal behaviour developed over decades of jurisprudence in the United States and legislate a statutory ancillary restraints defence. It may be expected that Canadian courts will draw upon the U.S. jurisprudence, at least to some degree, but will primarily be guided by their own interpretations of the specific wording of the new amendments.

Importantly, Bill C-10 increases the maximum penalties for violations of the new section 45 from five to 14 years' imprisonment and from $10 million to $25 million. The 14-year provision brings section 45 in line with penalties under Canada's *Criminal Code* for fraud over $5,000 and appears to represent the most stringent maximum individual penalty for antitrust violations in the world. As a result, in contested cases Canadian courts can reasonably be expected to hold the government to exacting standards.

Since the new criminal offence does not contain a competitive effects test, not only will it be easier for the Crown to prosecute cases, it will also make it easier for plaintiffs to succeed in private actions brought under section 36 of the *Competition Act*. In this regard we expect these amendments will lead to a significant increase in competition law-based class action litigation. Section 36 of the *Competition Act* (which has not been amended) allows any person who has suffered loss or damage as a result of a violation of any criminal provision of the *Competition Act* to sue to recover actual (single) damages to compensate for this loss. We anticipate that the move to a *per se* conspiracy law will result in more strategic litigation based on what one might consider non-hardcore cartel activity. This is perhaps one of the unintended and undesirable consequences of these changes.

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4 *Garland v. Consumers Gas Co*, [2004] 1 S.C.R. 629.

New Administrative Track-Section 90.1

Agreements between competitors that do not fall within one of the three prescribed categories of *per se* liability defined in the new section 45 will no longer be subject to criminal liability. For these purposes, the Commissioner of Competition (Commissioner) will now have the ability to review such agreements between competitors under a new reviewable trade practice provision. The term "competitor" is defined in essentially the same way in the new civil provision as in the new criminal provision (discussed above); however, the civil provision omits the requirement that the parties be competitors in respect of the product that is the subject matter of the agreement. The new provision permits the Competition Tribunal (Tribunal), on application by the Commissioner, to make a remedial order where the Commissioner is able to prove, on a balance of probabilities, that the agreement "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market." The Tribunal's remedial powers are limited to (i) prohibiting any person, *whether or not a* party to the agreement or arrangement, from doing anything under the agreement or arrangement; and (ii) requiring any person, whether or not a party to the agreement or arrangement, with the consent of that person and the Commissioner, to take any other action. The Tribunal will not be authorized to impose any monetary penalty nor will private parties have the ability to sue for damages based on a breach of this section. The power to issue prohibition orders to non-parties to agreements or arrangements may raise procedural fairness issues. Businesses should appreciate that this new provision allows the Commissioner to review and potentially obtain a remedial order in respect of agreements with competitors which otherwise would not be reviewable under the substantive merger provisions because such agreements do not involve an acquisition of a significant interest in a business.

Significantly, this new civil provision sets forth the same non-exhaustive list of assessment criteria and the same efficiency defence that exist in the substantive merger provisions of the *Competition Act*. Presumably, this is intended to establish a symmetrical substantive analytical approach for reviewing mergers, strategic alliances and other forms of co-operation between competitors, without in any way biasing the regulatory framework based on the particular form of co-operation.

Implications for Vertical Agreements

The wording of the prior section 45 of the *Competition Act* was not confined to agreements between competitors. It extended to agreements, arrangements, conspiracies and combinations between any two or more persons. Significantly, the new dual-track approach would be confined to agreements, arrangements or conspiracies between competitors. Therefore, other types of agreements (e.g., vertical agreements between suppliers and customers, or benchmarking agreements between parties who are not in a vertical or competitive relationship) would no longer be subject to review under the *Competition Act* unless they fall within the scope of another provision, such as the reviewable trade practice provisions relating to tied selling, exclusive dealing, market restriction, price maintenance (as amended by Bill C-10) or abuse of dominance.

Transitional Matters

The new dual-track regime relating to agreements between competitors will not come into force until one year after the day on which Bill C-10 receives Royal Assent. In the meantime, any party to an agreement or arrangement entered into before the day on which Bill C-10 receives Royal Assent can apply for an advisory opinion under section 124.1 of the *Competition Act* regarding the potential applicability of the new criminal and civil provisions to such an agreement, without having to pay the usual fee. Section 124.1 seems to be intended to provide parties to existing business arrangements with an opportunity either to obtain comfort that such agreements will not expose them to liability under the amended law or to restructure their arrangements in such a way as to ensure compliance with the new law. However, given the potential civil and criminal liability risks associated with obtaining an adverse advisory opinion, parties may determine that it is better to self-assess their compliance with the revised law than risk exposing themselves to the government.

The Bureau and Public Prosecution Service of Canada can be expected to issue guidelines as to the types of agreements and arrangements that will be pursued under the new criminal and civil tracks, respectively, in order to explain how this new regime will be applied. It seems reasonable to assume that prosecutions of cases in which alleged misconduct ceased prior to enactment of the amendments will be governed by the provisions existing prior to the promulgation of Bill C-10 which, among other things, require demonstrating that the agreement or arrangement, if implemented, would prevent or lessen competition unduly. However, for cases that involve conduct that continued into the post-enactment period, the prosecution may argue that the amended section 45 should apply to the entire period of the conspiracy. In replying to this, an accused may attempt to invoke the *Canadian Charter of Rights and Freedoms* in an effort to gain the benefit of the prior law, at least concerning that portion of the conduct that occurred prior to the amendments.

BID-RIGGING AND OTHER MISCELLANEOUS MATTERS

Bill C-10 amends section 47, the bid-rigging provision of the *Competition Act*, to prohibit an agreement or undertaking from withdrawing a bid or tender that was submitted in response to a call for bids or tenders. This amendment responds to the Ontario Superior Court's decision in *R. v. Rowe*,[5] a case in which the prosecution failed in an attempt to prosecute such conduct under the pre-existing wording of section 47. Consistent with the increased penalties for conspiracy pursuant to Bill C-10, the maximum term of imprisonment for bid-rigging has been increased from five to 14 years. (The maximum fine for bid-rigging remains in the discretion of the court.)

It is also worth noting that Bill C-10 amends the following other penalty provisions of the *Competition Act*:

- Consistent with the penalty prescribed in the *Criminal Code* for obstruction of justice, penalties for obstruction under the *Competition Act* have been increased from five to

5 (2003), 29 C.P.R. (4th) 525 (Ont. S.C.).

10 years' imprisonment (on indictment) and maximum fines have been increased from $5,000 to unlimited (on indictment) and $5,000 to $100,000 (on summary conviction).

- Maximum fines for failing to comply with a section 11 order (e.g., for document production) or failing to comply with a search warrant or electronic search process have been increased from $5,000 to unlimited (on indictment) and from $5,000 to $100,000 (on summary conviction).
- Penalties for destroying or altering a record or other thing required to be produced under a section 11 order or in respect of which a search warrant was issued have been increased from five years' to 10 years' imprisonment (on indictment) and maximum fines have been increased from $50,000 to unlimited (on indictment) and from $25,000 to $100,000 (on summary conviction).

REPEAL OF THE CRIMINAL PRICING PROVISIONS

The repeal of the criminal price discrimination, promotional allowance and price maintenance provisions provides significantly greater flexibility to Canadian businesses in structuring their day-to-day business relationships and practices. The repeal of the criminal predatory pricing provisions will not likely change current enforcement practice.

In particular, the repeal of the criminal price discrimination and promotional allowance provisions leaves these activities subject only to the civil abuse of dominance provisions of the *Competition Act*. Businesses not holding a dominant market position will now be free to offer preferential pricing or promotional allowances to certain customers but not others, regardless of the relative volumes purchased or the reasons for differential treatment. Businesses holding a dominant market position will be able to rely on a considerably broader range of business justifications for extending preferential pricing or promotional allowances to certain customers but not others. More importantly, discriminatory pricing and promotional spending are not likely to raise concerns for dominant firms unless such practices (i) are found to have an anti-competitive (i.e., disciplinary, exclusionary or predatory) purpose directed at the firm's actual or potential competitors (e.g., aggressively targeting the customers of competitors out of proportion to what may be found to be reasonably warranted in a particular circumstance) **and** (ii) are likely to result in a substantial lessening or prevention of competition in a particular market.

The amendments also replace the criminal price maintenance provisions of the *Competition Act* (which made price maintenance a *per se* criminal offence subject to only very limited statutory exemptions) with new civil provisions that allow for the imposition of limited remedies where it can be established that the price maintenance activity in question is likely to have an "adverse effect on competition in a market." The meaning of the term "adverse" is not entirely clear; however, based on its treatment in the refusal to deal context, it means something less than a "substantial" lessening of competition. The new civil provisions retain the standard defences to price maintenance, namely

loss leader selling, bait and switch selling, misleading advertising, and unreasonable service levels and continue to allow suggested retail pricing and maximum retail prices. In terms of remedies, the Tribunal is permitted, upon application of the Commissioner or a private person with leave, to make an order prohibiting the price maintenance activity or requiring the supplier to supply on usual trade terms. The Tribunal is not empowered to order financial penalties. In addition, no provision is made to allow a private party to sue for damages based on a breach of these provisions.

The new civil price maintenance law essentially conforms the Canadian treatment of resale price maintenance with the "rule of reason" approach taken by the United States Supreme Court in *Leegin*.[6] As a result, U.S. businesses operating in Canada no longer need to ensure that their Canadian advertising and pricing strategies comply with the stricter Canadian rule. For example, minimum advertised price or "MAP" programs that are not likely to adversely impact competition are now permissible in Canada.

Bill C-10 also repeals the criminal predatory pricing provisions of the *Competition Act*, leaving below cost pricing to be examined only under the civil abuse of dominance provision. However, this is likely to have only a minor practical impact on business conduct. First, anti-competitive below cost pricing occurs only rarely. Secondly, as reflected in its 2008 *Predatory Pricing Enforcement Guidelines*, the Bureau currently examines all but the most egregious allegations of predation (e.g., to enforce a conspiracy) under the civil abuse of dominance provisions so, in this respect, the repeal reflects current enforcement practice. Third, any loss of deterrent effect that may result from the repeal of the criminal provision is likely to be offset by the introduction of substantial administrative monetary penalties (AMPs) for conduct that has been found to be anti-competitive under the abuse of dominant position provisions, as discussed below.

ABUSE OF DOMINANCE – SIGNIFICANT AMPS PROPOSED

Bill C-10 introduces significant AMPs for conduct that is found to be anti-competitive under the civil reviewable trade practice abuse of dominance provisions of the *Competition Act*. Specifically, the amendments empower the Tribunal to levy AMPs for abuse of dominance "in an amount not exceeding $10,000,000 and, for each subsequent order ... an amount not exceeding $15,000,000." They provide that, in determining the amount of AMP to be ordered in a particular circumstance, the Tribunal must take into account any evidence of the following:

- the effect on competition on the relevant market
- gross revenue from sales affected by the practice
- any actual or anticipated profits affected by the practice
- the financial position of the person against whom the order is made

6 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

- the history of compliance with the *Competition Act* by the person against whom the order is made
- any other relevant factor

Despite the magnitude of the AMPs available under section 79, the section continues to provide that the purpose of an order is to promote practices that are in conformity with the purposes of section 79 and **not** to punish.

This amendment differs from the Panel's recommendation to grant the Tribunal the power to issues AMPs of up to $5 million, but it is consistent with the recommended changes to the penalty provisions for the civil deceptive marketing practices provisions of the *Competition Act* and previous proposed legislative amendments.[7] (Note that Bill C-10 also repeals the airline-specific abuse provisions in respect of which AMPs were an authorized form of remedy.)

While the abuse of dominance provisions of the *Competition Act* had been criticized for some time as lacking teeth, the introduction of such significant AMPs for conduct found by the Tribunal to be abusive is controversial. Discerning the line between merely aggressive competition and illegal abusive behaviour can be very difficult. The same act by different market participants or in different market situations may be found to be pro-competitive, benign or anti-competitive. More importantly, the new AMPs raise basic constitutional issues as respondents in abuse of dominance proceedings will not have the benefit of the customary criminal law protections and yet will face severe monetary penalties which, to date, have been applied only in connection with violations of serious criminal offences.

DECEPTIVE MARKETING PRACTICES

Criminal Track

It already was not necessary for the government to prove that any person was actually deceived or misled by a representation that was false or misleading in a material respect, in determining whether the representation was knowingly or recklessly made to the public. The new provisions now further provide that it is not necessary to establish that the representation was made to persons in Canada, or that the representation was made in a place accessible to the public. Accordingly, organizations in Canada targeting individuals outside of the country with misleading representations could be held criminally liable, as could companies which have made such representations in publicly inaccessible places (such as on products that are boxed or only available via catalogue or other remote sales method).

Consistent with the increased penalties for violations of section 45 (conspiracy) and section 47 (bid-rigging) of the *Competition Act*, the penalties under Bill C-10 for

7 Bill C-19, an Act to amend the *Competition Act* and to make consequential amendments to other Acts, 1st Session, 38th Parl. 2004 s. 8.

knowingly or recklessly making false or misleading representations, sending deceptive notices of winning a prize, deceptive telemarketing or telemarketing without prescribed disclosures, increase to a maximum term of imprisonment of 14 years from five years and a fine at the discretion of the court.

Administrative Track

The reviewable (civil) matters provisions governing deceptive marketing practices have been amended to mirror the above-mentioned proposed changes to the substantive criminal offence for misleading advertising (specifically, that it is no longer necessary to establish that any person was actually deceived or misled, that any member of the public to whom the representation was made was within Canada, or that the representation was made in a public place accessible to the public). In addition, the application of the "general impression" test[8] has been expanded to representations regarding product testing or testimonials.

Importantly, Bill C-10 creates a framework for the issuance of injunctive orders in respect of deceptive marketing practices. If, on application by the Commissioner, the court finds a strong *prima facie* case that a person is making materially false or misleading representations to the public and the court is satisfied that the person is disposing of or is likely to dispose of assets in respect of which the enforceability of an order is substantially dependant, the court may issue an interim injunction forbidding the disposal of such assets.

Bill C-10 also substantially increases the maximum AMPs that may be ordered for deceptive marketing practices. Maximum AMPs for corporations have increased from $100,000 ($200,000 for each subsequent violation) to $10 million ($15 million for each subsequent violation) and maximum AMPs for deceptive marketing practices by individuals have increased from $50,000 ($100,000 for each subsequent violation) to $750,000 ($1 million for each subsequent violation). Similar to the new AMP provision for abuse of dominance, in determining the amount of the AMP for a specific deceptive marketing practice Bill C-10 requires the Tribunal to take into account a number of prescribed factors as well as "any other relevant factors." While this significant increase in penalties for deceptive marketing practices is intended to send a clear signal to the marketplace that deceptive marketing practices are considered to be very serious violations of the *Competition Act*, it will be important that the Bureau issue guidelines outlining its enforcement priorities in this area in order not to unduly "chill" legitimate creative activity.

Bill C-10 also introduces new provisions permitting a court to order the distribution of money to those persons who purchased the misrepresented products (excluding wholesalers, retailers or other distributors to the extent that they have resold or distributed the products).

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8 The "general impression" test requires that both the general impression and literal meaning conveyed by the impugned representation must be taken into account in considering whether a person has engaged in reviewable conduct.

These amendments, most notably the provisions dealing with misrepresentations made outside of Canada and the increased fines and penalties, respond in part to reports from U.S. agencies of some Canadian-based companies targeting U.S. residents with marketing scams, in particular telemarketing scams. These changes, with the new injunction provisions, are expected to facilitate increased monitoring and prosecution of deceptive marketing practices in Canada.

THE PROPOSED TWO-STAGE MERGER REVIEW REGIME

The adoption of a U.S.-style two-stage merger review process is perhaps the most controversial of the *Competition Act* amendments in Bill C-10, primarily because there was very little consultation on this change.

The move to a two-stage merger review process reflects the Panel's recommendation that the existing process be aligned more closely with the process in the United States. More specifically, the Panel recommended replacing the existing statutory waiting periods for short-form (14 days) and long-form (42 days) notification filings with an initial review period of 30 days followed by a discretionary second stage "review that would extend the review period for an additional period ending 30 days following full compliance with a 'second request' for information."

To effect the Panel's recommendation, Bill C-10 establishes an initial waiting period of 30 days following which the parties can close their transaction provided that the Commissioner has not unilaterally exercised her discretion to extend the waiting period by issuing a notice (a Second Request) requiring the notifying party "to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction." Upon the issuance of the Second Request, the clock (i.e., waiting period) stops until a complete response has been submitted. Once the response to the Second Request is submitted, a further 30-day period starts to run and the parties can close their transaction following its expiry unless the Commissioner challenges the transaction or obtains an injunction to prevent or delay the closing. Importantly, the ability of parties to request, and the Commissioner to issue, advance ruling certificates or ARCs has been retained. If issued, an ARC exempts a transaction from the notification regime and effectively immunizes the transaction from further challenge. However, ARCs typically are issued only where it is very clear that a transaction is not likely to have any adverse impact on competition whatsoever (i.e., in transactions classified as "non-complex" under the Bureau's internal protocol).[9]

While the Commissioner retains the ability to challenge a transaction post-closing (except where an ARC is issued), Bill C-10 reduces the post-closing challenge period from three years to one year. This is an important change as it should reduce the post-closing period of uncertainty that merging parties have to face. It can be expected that this, combined with the much longer review period in cases where a Second Request is issued, will cause

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9 Competition Bureau, *Fee and Service Standards Handbook* (2003), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01338.html.

parties in Canada to align competition law closing conditions with typical U.S.-style closing conditions and to complete transactions without having received affirmative comfort (in the form of a "no-action" letter) before closing in Canada.

The information to be submitted in the initial notification will be "prescribed" in amendments to the *Notifiable Transactions Regulations*. Draft regulations have not yet been issued for public comment. It is anticipated that new disclosure requirements will be at least as extensive as the existing short-form requirements and may include a possible additional requirement to disclose the transaction agreements and any documents analyzing the transaction (known as 4(c) documents in the United States, which are required to be submitted with the *Hart-Scott-Rodino Act* (HSR) form).[10]

As to the content of Second Requests, Bill C-10 simply states that they "shall specify the particular additional information or classes of additional information that are to be supplied." Given the Bureau's resource limitations and the reported excesses associated with the U.S. merger review process, it is hoped that Second Requests issued by the Bureau will not be as burdensome as those typically issued in the United States (although there is no assurance at this stage that that will be the case).

We anticipate that the Bureau will use its Second Request power sparingly. However, based on the U.S. experience, it would be prudent to expect that, for transactions involving potentially serious competition concerns (those which are "very complex" transactions under the current protocol), the total time required from the initial filing until the expiry of the additional 30-day statutory waiting period following substantial compliance with the Second Request may be greater than the current maximum five-month non-binding period set forth in the Bureau's existing "service standards."[11]

The challenge for the Bureau and merging parties and their counsel will be to avoid Second Requests for "complex" transactions (the middle category under the current protocol). To help avoid a Second Request in such cases, it would be advisable for merging parties to continue the existing practice in Canada of providing the Bureau with a thorough voluntary competitive impact statement detailing the reasons why the transaction is not likely to lessen or prevent competition substantially in any relevant market and providing objective support for those reasons. Also, refraining from seeking comfort from the Bureau in the form of a no-action letter or an ARC may mitigate the risk of receiving a Second Request in such cases. Beyond this, certain U.S. practices may become useful in the Canadian context, including entering into timing agreements, pulling and refiling to avoid a Second Request being issued, or using hold separate agreements more frequently.

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10 The two-stage merger review regime is in force even though amended regulations reflecting the new provisions have not yet been issued. Section 124 of the *Competition Act* requires that any regulations relating to merger notification be published in draft form and be open for comment for at least 60 days. By virtue of the *Federal Interpretation Act*, since the existing regulations under sections 114 and 116 are likely considered "reasonably workable" for an interim period in the context of the new regime, the fact that amended regulations are not yet available has not delayed the introduction of the new two-stage merger regime.

11 It is worth noting that in the United States on average over 95% of reportable transactions are cleared in 30 days or less, without the issuance of a Second Request. It is hoped that the Commissioner will be similarly judicious in her use of the Second Request power.

Importantly, Bill C-10 does not seek to repeal or to limit the ambit of section 100 or section 11 of the *Competition Act*. The Commissioner's ability under section 100 to seek an injunction to prevent the implementation of a transaction so that she may complete her inquiry remains intact and may undermine the certainty of the fixed review periods provided for under new section 123. Similarly, the broad section 11 power of the Commissioner to seek an order compelling the production of information or testimony at any time during an inquiry also remains in effect, even though it arguably is unnecessary vis-à-vis the merging parties given the new "Second Request" powers vested in the Commissioner. It may be expected that the interface between the new merger regime and sections 11 and 100 of the *Competition Act* will be clarified in Bureau guidelines. In this regard, the Commissioner has indicated that the Bureau plans to issue draft guidelines for public consultation on how the merger process will work under the new regime.[12]

Bill C-10 also provides the Tribunal or a court with new remedial powers to deal with actual or likely non-compliance with the new waiting periods. These include the power to issue an interim injunction or, in the case of a completed transaction, the power to (i) dissolve the merger, (ii) divest assets or shares, (iii) impose an administrative monetary penalty in an amount not exceeding $10,000 for each day of non-compliance, or (iv) grant any other relief that it considers appropriate. While it is doubtful that anyone has ever been fined for failing to notify the Bureau of a notifiable transaction in Canada despite the previous provision providing for a maximum $50,000 fine, antitrust authorities in other jurisdictions – most notably the United States and Europe – have become stricter in this regard. The more onerous penalty provisions introduced by Bill C-10 may signal that the Canadian practice will become more aligned with that in the United States, where multi-million dollar penalties have been imposed for non-compliance with reporting requirements.

In addition to the foregoing changes to the merger review process, Bill C-10 amends the notification thresholds by increasing the "size of transaction" threshold from $50 million to $70 million ($140 million for "amalgamations"). In addition, this threshold is indexed to inflation. (The existing $400 million "size of parties and their affiliates" threshold remains unchanged.)

ICA – THE PROPOSED NATIONAL SECURITY REGIME

The long-expected amendments to the *ICA* dealing with national security included in Bill C-10 allow the Canadian government to review, prohibit or impose conditions on a very broad range of investments by non-Canadians on national security grounds. The proposals are virtually unchanged in substance from those set out in Bill C-59, which was introduced in June 2005 but which died on the order paper when an election was called later that year.

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12 Notes for an Address by Melanie L. Aitken, Interim Commissioner of Competition to the Northwinds Professional Institute 2009 Competition Law and Policy Forum, Cambridge, Ontario, February 12, 2009.

These amendments are likely to introduce considerable uncertainty, at least initially, over their potential application both to recently closed deals and pending deals. These changes follow recent guidelines for investments by state-owned enterprises, which may also be relevant in this context. Details of the procedures to be followed, particularly timelines, will be set out in regulations which are not yet available. For example, unlike the national security review process in the United States, there is (as yet) no timeline for review, no prescribed content for filings and no guidance available on what might constitute a national security threat. As in the United States, it appears that filings in Canada will be voluntary, but this is not explicitly specified in the amendments. The Canadian authorities undoubtedly will need to work closely with Canada's allies in enforcing the new law. When completely implemented, it can be hoped and perhaps even expected the Canadian process will be similar to the existing national security review process in the United States.

Coverage

The new review process applies not only to those types of investments currently covered under the *ICA*, such as an establishment of a new Canadian business or an acquisition of control of a Canadian business under certain circumstances, but also to a much broader class of transactions currently not subject to the *ICA*. For example, an acquisition of an entity that "in whole or in part" may have relatively little connection to Canada could be subject to review. Similarly, even small transactions that fall well below the review thresholds potentially will be subject to review.

The amendments do not include any safe harbours for investors. As a result, an acquisition of less than, for example, 10% of the voting shares of a publicly-traded corporation potentially may be subject to review. Indeed, the reference to "in part" seems intended to capture minority investments that potentially raise national security concerns. This is in contrast to the U.S. law, which focuses on whether a transaction could result in foreign control and which includes a definition of control in regulations (influence short of control is not sufficient to constitute control). The new Canadian regime therefore arguably is broader than its U.S. counterpart.

The legislation also confers broad discretion on the Minister of Industry to determine whether an investor is a non-Canadian and therefore subject to national security review.

Test

The relevant test under the amendments is whether an investment by a non-Canadian is "injurious to national security". Bill-10 does not set out any definition of what could be injurious to national security. It may be that the drafters intended that this concept be flexibly interpreted by the government. In the United States, parties are guided by an illustrative list of relevant factors informing what may constitute a potentially injurious investment that was set out in recent amendments to U.S. national security legislation. Ideally, the Canadian government will likewise specify a similar list in the forthcoming

regulations. In addition, the U.S. Treasury Department has published guidance on the types of transactions that have presented national security considerations. Again, it is hoped that the Canadian government will do the same. The U.S. guidance has identified transactions involving the following types of businesses or activities as potentially raising national security concerns:

- businesses that provide products and services to government agencies, particularly in the defence, security and law enforcement sectors
- industry segments such as weapons, munitions, aerospace, information technology, telecommunications, energy, natural resources, and goods and services affecting security or vulnerability to sabotage or espionage
- businesses involved in the energy sector at various stages, including exploitation, transportation (pipelines), conversion and provision of energy (this is of particular relevance to Canada with its extensive natural resources and energy infrastructure)
- maritime shipping and port terminal operations and aviation maintenance, repair and overhaul
- critical infrastructure including major energy assets
- advanced technologies such as semi-conductors and components with commercial and military applications
- goods and services involving cryptography, data protection, internet security and network intrusion detection
- R&D, technology, goods, software and services subject to export controls

Based on the scope of the Treasury Board of Canada's *Guidelines for Invoking National Security Exceptions* in government procurement, the Canadian approach could be as broad as the U.S. approach. The Treasury Board guidelines state that "[n]ational security is more than military territorial integrity and traditional concepts of national sovereignty. It is also about threats to economic security, environmental security and human security." The guidelines also highlight protection of intelligence directed at criminal activities such as drug trafficking, illegal immigration, and industrial espionage.

Review Procedure

The new review procedure does not prescribe a voluntary or mandatory pre-closing filing process, although it appears that filings will be a voluntary process. Unlike the U.S. review process, there is no timeline for review and no prescribed content for filings.

Bill C-10 proposes a three-step review approach:

1. **Notice.** If the Minister of Industry "has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security," the Minister may

send the non-Canadian a notice that a review of the investment may be ordered. The non-Canadian receiving the notice is then prohibited from implementing the proposed investment until the issue is resolved.

2. **Review by Minister and Referral to Cabinet.** Actual review of an investment will occur if the Minister of Industry, after consultation with the Minister of Public Safety and Emergency Preparedness, "considers that the investment could be injurious to national security," and the federal Cabinet on the recommendation of the Minister orders a review of the investment. The investor will have an opportunity to argue its case to the Minister. The Minister can then either (a) refer the investment to the Cabinet because the investment would be injurious to national security or because it is not possible to determine whether it would be injurious or (b) inform the non-Canadian that no further action will be taken.

3. **Cabinet Decision.** Upon an investment being referred to it, the Cabinet may order the non-Canadian not to implement the investment, or it may authorize the investment if the investor provides undertakings or otherwise implements it on terms and conditions set out in the Cabinet order. If the investment has already been implemented, the Cabinet may also order the non-Canadian to divest itself of control of the Canadian business or of its investment.

Information

The amendments provide broad authority for the Minister to compel production of information and to share that information with an as yet unnamed "prescribed investigative body."

Transitional Provisions

The amendments have immediate application to transactions which close in the period between February 6, 2009 and March 12, 2009 (being the day on which the amendments receive Royal Assent). These transactions will be subject to review if the Minister of Industry sends a notice to the non-Canadian investor within 60 days after March 12, 2009.

Comment

The national security review process introduces a new contingency into planning and executing a Canadian deal for both foreign investors and sellers of businesses in Canada. In contrast, other amendments in Bill C-10 will reduce the *ICA* burden by raising the threshold for review and removing certain sectors from special scrutiny. The national security elements of Canada's foreign investment review regime are no doubt consistent with Canada's international trade obligations so long as they are applied to situations involving genuine national security concerns. Since the *ICA* came into effect in 1985,

Canada has exercised restraint in disapproving foreign investment. Only one major transaction (the Alliant/MacDonald, Dettwiler case in 2008) has been disallowed under the *ICA*. Instead of being barred outright, transactions raising national security issues are more likely to take more time to resolve, and require careful negotiation of solutions.

OTHER *ICA* AMENDMENTS

In addition to the new national security review regime, Bill C-10 has made significant amendments to our foreign investment review regime. These are discussed below.

Raising and Changing the General Review Threshold

Leaving aside transactions that may be reviewed under the new "national security" provisions discussed above, only acquisitions of control of Canadian businesses exceeding prescribed monetary thresholds are subject to review under the *ICA*.

Consistent with the Panel's recommendations, Bill C-10 raises the monetary review threshold for an acquisition of control of a Canadian business by a non-Canadian, other than a cultural business. The Panel stated that "a higher threshold is consistent with the scope for intervention being narrower, and thus, more exceptional, than under the current *ICA*. ... [A] higher threshold would be aligned with Canada's underlying premise that foreign investment is, except in unique circumstances, beneficial to Canada." Whether Bill C-10 achieves its full potential in realizing this objective remains to be seen, particularly since the meaning of "enterprise value" has yet to be prescribed by regulations and is the determining factor in this equation.

It is important for the time being to note that the amendments in Bill C-10 affecting the general review threshold are **not** yet in force. **Unlike** the other *ICA* amendments, these amendments only come into force on a day to be fixed by order of the Governor-in-Council.

When these amendments come into force, the current review threshold of $312 million based on the book value of the assets of the Canadian business is increased over a 5-year period to $1 billion, based on the enterprise value of the Canadian business. On the date these amendments become law, the review threshold is increased to $600 million for the remainder of 2009 and 2010. The review threshold will increase to $800 million for 2011 and 2012, respectively. Bill C-10 does provide that, where an application for review has been submitted and the Minister has not yet issued a decision by the time these provisions are proclaimed into force, the application will be deemed to never have been filed provided the enterprise value of the assets is less than the new monetary review threshold (i.e., $600 million). For subsequent years beyond the initial five-year period, Bill C-10 prescribes a formula to re-calculate the review threshold based on measuring nominal gross domestic products.

Upon coming into force, the current measurement standard – book value of the assets of the Canadian business – is replaced with a new measurement standard: the "enterprise

value" of the Canadian business. While the regulations defining "enterprise value" have not yet been released, the concept of "enterprise value" generally is a measurement of what the market believes a business is worth (i.e., the value of the gross assets of the business *plus* the value of the business's intangible assets, such as people, know-how, intellectual property etc., which in the Panel's words are "not recognized in a balance sheet by current accounting methods"). While it remains to be seen how "enterprise value" will be defined in the regulations, the concept has been critiqued as one that will lead to uncertainty and unpredictability. If, for example, "enterprise value" is treated as tantamount to the "purchase price" of a business, it is not clear how the regulations will deal with the many variables and unknowns that can affect the "purchase price" in a transaction (e.g., transactions where the purchase price is not known prior to closing or transactions where the purchase price is dependent on fluctuating external factors). The government can be expected to table for consultation draft regulations defining "enterprise value."

Elimination of Lower Thresholds for Sensitive Sectors Except Cultural Businesses

Bill C-10 eliminates the significantly lower review threshold for businesses engaged in transportation, financial services and uranium production. However, the lower $5 million review threshold (continued to be based on book value of assets and not enterprise value) for an investment in a "cultural business" has been retained.

Timelines for Issuing Opinions

Bill C-10 prescribes a maximum 45-day timeframe for the Minister to issue opinions. Until now, when a question arose as to whether an individual or entity is a "Canadian" for the purposes of an investment in a Canadian business and the parties have applied to the Minister for a written opinion, no prescribed timeframe governed the Minister's response. The same was true for an application to the Minister for an opinion on the applicability of any other provision of the *ICA* or regulations (a "non-status opinion"), although the decision to issue a non-status opinion is within the Minister's discretion. Bill C-10 prescribes a 45-day timeframe in which the Minister must provide his or her opinion after concluding that the information and evidence received is sufficient to reach an opinion. For non-status opinions, the 45-day timeframe is only applicable in the circumstance where the Minister has determined to provide an opinion.

Obligation for the Minister to Issue Reasons

As recommended by the Panel, Bill C-10 obligates the Minister to issue "reasons" in prescribed circumstances. Where, for example, the Minister determines that a proposed foreign investment is not likely to be of net benefit to Canada, the Minister is obligated to provide reasons for reaching such a determination. Pursuant to Bill C-10, the Minister is also permitted (but not obligated) to provide reasons for his or her decision that an investment is likely to be of net benefit to Canada. Until now, the Minister was not

statutorily permitted to provide his or her reasons – whether on a discretionary basis or otherwise. This amendment is intended to inject a degree of transparency into the foreign investment review process.

Bill C-10 amendments also require the Minister to publish annually a report on the administration of the *ICA*, with respect to national security.

AMENDMENTS TO THE *CANADA TRANSPORTATION ACT*

Bill C-10 loosens the foreign ownership restrictions on domestic air carriers in the *Canada Transportation Act*. Previously section 55(1) of the *Canada Transportation Act* limited foreign ownership of Canada's domestic air carriers to no more than 25% of voting equity or control. Bill C-10 empowers the Governor in Council to enact regulations setting new foreign ownership limits, to a maximum of 49% foreign ownership. At the Governor in Council's discretion, the new foreign ownership regulations may apply to all non-Canadians or, alternately, a specific class of non-Canadians identified in the regulations.

This liberalization of the foreign ownership limitations reflects the Panel's recommendation that the Minister of Transport should increase the limit on foreign ownership of air carriers to 49% of voting equity. Importantly, the Panel found such liberalization should occur on a reciprocal basis through bilateral negotiation with other countries. Should the federal government choose to proceed in such a manner, future ownership regulations are likely to be country- or region-specific in nature. Note, however, that the Bureau advocated a more aggressive approach to market liberalization in its submission to the Panel. While the Bureau acknowledged there are significant policy questions about whether rights of establishment or cabotage should be granted only on a reciprocal basis, the Bureau concluded that, on competitive grounds, a strong case exists for unilateral action in these areas.

At the current time, the federal government has not indicated whether a policy of broad market liberalization will be pursued in relation to foreign ownership restrictions or foreign air carrier access to Canadian markets or whether it will confine its approach to the negotiation of negotiated bilateral agreements.

FINAL COMMENT

Bill C-10 has fundamentally restructured Canadian competition law and introduced a national security regime into our foreign investment law. These changes are far-reaching and significantly impact the legal risk associated with certain business strategies and behaviour, as well as the timing and closing conditions for M&A transactions. Undoubtedly there will be a period of uncertainty until the publication of new regulations and guidelines which explain how certain of the amendments will be administered and enforced. Given the potential for significantly increased corporate and personal liability it is imperative that Canadian businesses as well as foreign companies doing business or investing in Canada take notice of these amendments and adjust their strategies and behaviour accordingly.

If you have any questions regarding the above please contact any of the following partners in our competition group.

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APPENDIX A

COMPETITION ACT

Amendment	Timing
Repeal of section 4.1 (travel agent exemption)	in force
Revision to section 45 and introduction of section 90.1 (dual-track regime applicable to agreements between competitors)	one year after Royal Assent
Amendments to section 47 (bid-rigging)	in force
Repeal of sections 50 and 51 (price discrimination, predatory pricing and promotional allowances)	in force
Amendments to section 52 (criminal false or misleading representations)	in force
Repeal of section 61 (criminal price maintenance), amendments to section 76 (repeal of consignment selling and replacement with civil provision for price maintenance)	in force
Amendments to section 64 (penalty provision for miscellaneous criminal offences)	in force
Amendments to Part VII.1 (reviewable matters governing deceptive marketing practices)	in force
Amendments to sections 78 and 79 (introduction of AMPs for abuse of dominance and elimination of airline specific provisions)	in force
Amendment to section 97 (decreasing the period in which completed mergers can be challenged from 3 years to 1 year)	in force
Repeal of section 104.1 (airline specific provisions)	in force
Amendments to section 110 (merger notification thresholds)	in force
Amendments to sections 114, 116 and 123 (two-stage merger regime)	in force
Introduction of section123.1 (failure to comply with merger notification regime)	in force

INVESTMENT CANADA ACT

Amendment	Timing
Amendments to subsection 14.1(1) (review thresholds for WTO investors)	upon a date to be fixed by the Governor in Council
Amendments to subsection 14.1(5) (elimination of lower review thresholds for businesses engaged in transportation, financial services and uranium production)	in force
Addition of section 23.1 (Minister's reasons for determining that an investment is not likely to be of net benefit to Canada)	in force
Amendments to sections 2, 10, 21 to 22, 26 to 35 and addition of sections 25.1 to 25.6 (relating to the new national security regime)	in force as of Feb. 6, 2009 (ss. 2, 10, 25.1 to 25.6, & 26 to 35) in force (ss. 21 & 22)
Amendments to subsections 36(1) to 36(4)(e)(iii) and 36(4)(g) to 36(4.2) (privileged information)	in force as of Feb. 6, 2009 (ss. 36(1) to 36(4)(e)(iii)) in force (ss. 36(4)(g) to 36 (4.2))
Addition of subsections 37(1.1) and 37(2.1) (timeline for Minister to provide written opinions)	in force
Addition of subsections 38.1 (Minister's annual report)	in force
Amendments to section 39 to 40 (remedies, offences and punishment)	in force as of Feb. 6, 2009