

Competition Law

RECENT DEVELOPMENTS OF IMPORTANCE

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In March 2009, significant amendments to Canada's *Competition Act* and *Investment Canada Act* were passed, with important implications for the regulatory review of mergers and acquisitions. The *Competition Act* is Canada's competition/antitrust law, and includes provisions dealing with the review and approval of mergers and acquisitions. The *Investment Canada Act* is Canada's primary foreign investment control law, and also includes provisions dealing with the review and approval of mergers and acquisitions.

Merger Control – Competition Act

Following the March 2009 amendments, Canada now has a “two-stage” merger review process. The merits and demerits of this new regime were never thoroughly debated amongst competition law practitioners or in Parliament, because the amendments were included in a budget implementation bill drafted in response to the global economic crisis of 2008. The bill moved through the legislative process in a matter of weeks, with the clear focus of parliamentary debate being on economic stimulus measures, rather than amendments to the *Competition Act* and other statutes. In any event, the new merger review process shares many similarities with the US process under the *Hart-Scott-Rodino Act*.¹ More particularly, the submission of the required notification filings by the purchaser and the target company triggers a 30-calendar-day waiting period during which the transaction may not proceed, unless the Commissioner of Competition (the “Commissioner”) issues a positive clearance for the transaction and/or terminates the waiting period. If the 30-calendar-day waiting period expires without the issuance by the Commissioner of a supplementary information request (a

“SIR”), then there is no legal impediment to the parties closing the transaction. However, if the Commissioner issues a SIR within the 30-calendar-day waiting period, the transaction may not close until 30 days after the parties have complied with the SIR, unless the Commissioner issues a positive clearance for the transaction and/or terminates the waiting period.

To those familiar with US antitrust law, the above-outlined structure of the new Canadian regime clearly bears a close resemblance to the structure of US merger control law under the *Hart-Scott-Rodino Act*. However, two key differences between the Canadian and US regimes are that: a) it is possible in Canada, and even common, for parties to seek and obtain clearance for substantively simple transactions via an “advance ruling certificate” process, removing the need to make formal notification filings in the first place; and b) the expiry of the 30-calendar-day waiting period in Canada does not amount to substantive comfort that the Commissioner has concluded that a transaction does not raise competition issues.

Since the new law came into force in March 2009, the rate at which the Commissioner and the Competition Bureau (the “Bureau”) have obtained negotiated remedies increased dramatically in 2009 and 2010, compared to historical levels, although it slowed somewhat in 2011.² Indeed, between July 2009 and September 2010, (a 14-month period), the Bureau obtained Canadian competition law remedies in approximately 10 transactions, including numerous international transactions. Whether this is due to an increased number of strategic transactions and/or the new law is open to debate. Although it is impossible to say whether the Bureau could have obtained divestitures in respect of this number of transactions under the previous merger control regime, it is clear that this rate was considerably higher than in recent years

where there were typically two or three merger remedies per year.

Looking more closely at the transactions for which divestitures have been required, they vary greatly in terms of their Canadian elements. Some (Suncor/Petrocan, Clean Harbours/Everready and IESI-BFC/Waste Services) exclusively or almost exclusively raised competition issues in Canada, and not in any foreign jurisdictions. In these situations, the Bureau obtained divestitures entirely independently from any foreign competition law regulators. Others (Pfizer/Wyeth, Merck/Schering Plough, Novartis/Alcon) were very much international mergers with relatively small Canadian components, and where international cooperation would have been significant in arriving at conclusions. Others still were international mergers, but with relatively large Canadian components (e.g., Agrium/CF Industries) with international cooperation again likely being significant. However, even where international cooperation was an important component of the Bureau's review, the divestitures obtained have frequently had Canada-specific elements, demonstrating that Canadian remedies are not merely an exact reiteration of any foreign remedies.

Prior to the March 2009 amendments, merging parties had the ability to force the Commissioner to litigate to prevent closing on the expiry of the 42-day period after pre-notification filings were submitted. Although such litigation was, in practice, a rare occurrence because parties wanted to obtain positive clearance from the Commissioner, the bargaining dynamic that existed between the Commissioner and the parties was nevertheless generally more favorable to the parties than is the case today. More particularly, for transactions the review of which lasted longer than 42 days, which captures the significant majority of mergers that are substantively complicated from a competition law perspective, the

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Commissioner had an incentive to negotiate to avoid litigation.

Under the new regime, this dynamic is often not present, as the Commissioner's review of substantively complicated transactions occurs largely, or even exclusively, during a period in which the parties are not able to close. Parties can only put themselves in a legal position to close by complying with an SIR (or the terms of a timing agreement), but the very act of complying with a SIR is a time-consuming, resource-intensive process, and results in the parties providing, under oath, the internal data and documents that the Commissioner would use to support a merger challenge. Parties can and do agree to pull and refile their merger filing such that the waiting period recommences and the Commissioner need not issue a SIR to prevent closing.

While information regarding the timing of parties' compliance with SIRs (or timing agreements) for specific transactions is not publicly available, it is very likely that at least some of the recent divestitures contained in consent agreements obtained by the Commissioner were negotiated in situations where the parties were not in a legal position to close. This was never or virtually never the case under the old regime, where the parties would often be in a legal position to close during the negotiation of any remedy. One of the implications of the new regime for merging businesses where there is some competitive overlap is that if a relatively short interim period between signing and closing is contemplated, the parties will very likely arrive at their intended closing date in a situation where they require positive clearance from the Commissioner to close, meaning that their bargaining position in negotiating a consent agreement may be relatively weak.

Finally, it is notable that although the Commissioner has obtained merger remedies at an increased rate since the implementation of the March 2009 amendments, the Commissioner has only

brought two formal merger challenges at the Competition Tribunal, continuing a trend that dates back a number of years. Furthermore, one of the mergers in question was "non-notifiable," in the sense that it was not large enough to trigger a mandatory *Competition Act* filing. The new SIR process and the enhanced leverage of the Commissioner would therefore have been an irrelevant consideration in the review of this merger.

It is unclear whether there will be much in the way of an increased number of contested merger proceedings in the future. On the one hand, the enhanced information gathering powers of the Commissioner, which operate to extend the waiting period, suggest that the Commissioner may be in a better position than before to prepare for a contested merger challenge. On the other hand, parties to a transaction, recognizing the enhanced power of the Commissioner, may be more inclined to arrive at a negotiated settlement by way of consent agreement relating to the problematic portions of the transaction, in order to permit a relatively expeditious closing. It may take several years before the impact of the March 2009 amendments on merger investigation and litigation in Canada is fully understood. It would seem, however, that consent agreements will continue to occupy a significant position in the Canadian competition law landscape at least so long as the current strategic merger activity continues and, consequently, that case law under the *Competition Act's* substantive merger review provisions will remain sparse.

Foreign Investment Review — *Investment Canada Act*

The *Investment Canada Act* provides for the pre-closing review and ministerial approval of certain investments in Canadian businesses, with such approval granted where the Minister determines that an investment is of "net benefit to Canada." Prior to March 2009, the

Investment Canada Act did not contain any explicit "national security" review mechanism. We provide below a brief overview of Canada's new "national security" review regime under the *Investment Canada Act*. Certain other technical amendments to the *Investment Canada Act* were made in March 2009, but are not discussed in any detail herein.

National Security — Overview

A national security review may be launched where the Government regards a foreign investment as potentially "injurious to national security". If it concludes that there is a potential threat, the Government can prohibit or attach conditions to a foreign investment, whether an investment in an existing Canadian business or the establishment of a new Canadian business. If the investment is already completed, the Government's powers include the ability to order the divestiture of a Canadian business. It is important to note that this mechanism for national security review is separate from the existing economic review process.

The national security amendments to the *ICA* raise a number of issues, including the following.

National Security is Undefined

The *ICA* does not define "national security". The Government has not provided any meaningful guidance on the factors it will consider when determining whether there is a national security issue. The concern that national security could be interpreted expansively (beyond obvious defense-related concerns) is heightened by the large and varied group of governmental departments and agencies listed in the National Security Review of Investments Regulations (the "National Security Regulations") including the Department of Canadian Heritage, the Department of Natural Resources, the Department of Transport, the Canada Revenue Agency, the Department of Public Works and Governmental Services and the

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Department of Finance, in addition to the more obvious agencies such as the Department of National Defence and the Canadian Security Intelligence Service.

Small Transactions and Other Investments are Subject to the New Law

Unlike the case in economic reviews under the *ICA*, the new national security review law applies to minority investments. Also, under the new law, the government may order a review if the business in question carries on any part of its operations in Canada and has any of: a place of operations in Canada; one or more individuals who are employed or self-employed in connection with the operations; or assets in Canada used in carrying on the operations. There is no minimum asset or transaction size threshold, with the result that a national security review is possible even with respect to small transactions.

No Process for Voluntary Pre-Clearance

The *ICA* does not provide a pre-clearance process for national security issues. However, in some cases the National Security Regulations provide for a statutory limitation on the Minister's ability to act after a certain date. In some cases it may be possible to have the limitation period expire before closing. If this is not possible, there will be some (in most cases minimal) risk of a post-closing national security review.

State-Owned Enterprises (SOEs)

It is generally thought that the genesis of the national security law was the proposed acquisition of Canadian nickel miner Noranda Inc. by China Minmetals in 2004. Although that transaction did not proceed, it did generate debate about the role of national security considerations under the *ICA*.

In December 2007 the government issued guidelines on how it will apply the

“net benefit to Canada” test to investments by SOEs that were being reviewed under the economic review provisions of the *ICA* (not the new national security law that was not then in force). In addition to the factors that the Minister of Industry typically considers in deciding whether to approve reviewable investments, the SOE Guidelines indicate that the governance and commercial orientation of SOEs will be considered.

With respect to governance, the SOE Guidelines state that the SOE's adherence to Canadian standards of corporate governance will be assessed, including any commitments to transparency and disclosure, independent directors, audit committees and equitable treatment of shareholders, as well as compliance with Canadian laws and practices. The Minister will also consider how and to what extent the investor is controlled by a state.

With respect to the commercial orientation, the SOE Guidelines state that the following will be relevant: (i) destinations of exports from Canada, (ii) whether processing will occur in Canada or elsewhere, (iii) the extent of participation of Canadians in Canadian and foreign operations (iv) the support of ongoing innovation, research and development; and (v) planned capital expenditures in Canada.

Finally, the SOE Guidelines outline the types of binding commitments or undertakings an SOE may be required to provide to pass the “net benefit” test. While many of these include commitments required by any foreign purchaser, of particular interest is the potential for a requirement to list the shares of the acquiring company or the target Canadian business on a Canadian stock exchange.

Mitigating Considerations

Despite the uncertainty generated by the introduction of the national security review process in Canada, foreign investors should in most cases not be overly concerned for a number of reasons.

Experience with National Security Reviews to Date

As at the date of writing, there has apparently only been a single national security notice (not a full review) since the new law came into force a year ago. Moreover, as at the date of writing, even under the “net benefit to Canada” test that is applicable to economic reviews, there have only been two non-cultural investments rejected in the quarter century since the *ICA* came into force (the ATK/MDA aerospace transaction and the BHP Billiton/PotashCorp transaction, both described below).

Canada has an Open Economy

Canada's economy has historically been open to foreign investment. In 2009 (not a particularly active year for global foreign investment) 22 transactions were approved by the Minister of Industry under the economic review provisions of the *ICA* including at least three significant investments by SOEs: (i) China National Petroleum Corporation's acquisition of control of Athabasca Oil Sands Corp, (ii) Korea National Oil Corporation's acquisition of Harvest Energy Trust and (iii) Abu Dhabi's International Petroleum Investment Co's acquisition of NOVA Chemicals Corporation. Also, China Investment Corporation's acquisition of a 17 per cent interest in Teck Resources Limited was successfully completed in 2009, and, in 2010, Sinopec's acquisition of an interest in Syncrude received approval under the *ICA*. To date, no SOE transactions have been formally rejected.

Investment Canada Developments in Recent Months

The most significant *Investment Canada Act* development in recent months was the rejection of BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan (PotashCorp) in November 2010. This rejection, combined with other foreign investment controversies, has drawn

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considerable attention to the *Investment Canada Act*, and has generated widespread debate within the Canadian foreign investment bar, corporate Canada, policymakers and academia as to the appropriate role of government in screening, imposing conditions on, and approving foreign investment in Canada. A brief summary of the PotashCorp situation follows.

BHP's hostile takeover bid for Saskatchewan's PotashCorp, an iconic world-class producer of a key Canadian natural resource, attracted massive political and media attention from the moment of its launch in mid-August 2010.³

The Premier of the Province of Saskatchewan vigorously argued that the federal government should refuse the proposed bid, concerned amongst other things, about potentially significant negative tax consequences for the Province of Saskatchewan and the loss of a public company Canadian head office.

On November 3, 2010, the Minister issued a preliminary decision rejecting BHP's bid on the basis that it failed to satisfy the "net benefit to Canada" test. Although the law provided BHP with a 30-day period within which further submissions could be made to try to

change the Minister's view, BHP apparently chose not to do so, officially withdrawing its application on November 14, 2010. BHP issued a detailed press release following the failure of the bid, outlining numerous specific commitments it had been prepared to make.⁴ Undertakings would apparently have included a five-year commitment to remain in a Canadian potash export group, significant spending on infrastructure, increased investment in BHP's already planned Jansen mine (also located in Saskatchewan), commitments to forgo certain tax benefits and to apply for a listing on the Toronto Stock Exchange. Other proposed undertakings apparently related to employment increases, spending on community and education programs, and an unprecedented US\$250 million performance bond to ensure the company fulfilled its undertakings.⁵

Following the decision, some commentators noted suggestions by Minister of Agriculture Gerry Ritz that BHP's bid had been refused because potash is a "strategic resource" for Canada.⁶ This is not an explicit factor for consideration under the *Investment Canada Act*. However, other countries have, in the

context of foreign investment review, taken measures to protect their most valuable resources or companies.⁷

The *Investment Canada Act* certainly provides the Minister with significant discretion and the PotashCorp decision has led to calls for clarification of Canada's foreign investment rules from businesspeople, investors and politicians across the political spectrum. Critics have cited a lack of transparency and a lack of predictability as factors affecting the efficacy of foreign investment review. While the current approach gives the Minister significant flexibility to assess proposed investments on a case-by-case basis, it is also true that perceived unpredictability might complicate the risk assessments undertaken by foreign acquirers and conceivably deter investment in Canada. Nevertheless, the PotashCorp decision had numerous unique features, including the opposition of the Premier of Saskatchewan to the transaction, suggesting that, other than the obvious need for formulating governmental relations strategies for potentially sensitive transactions, it would be incorrect to draw any broader conclusions regarding Canada's approach to foreign investment from this apparently unique transaction. ■

1. There had been no groundswell of support in Canada for the adoption of a US-style merger review process. The recommendation was included in the final June 2008 report of the *Competition Policy Review Panel*, a panel formed in July 2007 with a mandate to review Canada's competition and foreign investment policies, and make recommendations to the federal government for making Canada more globally competitive. This recommendation was somewhat surprising given that none of more than 100 written submissions to the panel called for the adoption of US-style process, and indeed such a recommendation seemed beyond the terms of reference of the panel. Furthermore, the recommendation was also contained in the final report of Brian Gover, following his review of the exercise of the Commissioner's powers under section 11 of the *Competition Act*.
2. The final months of 2010 and first half of 2011 were a relatively quieter period for the Competition Bureau in terms of merger remedies. Although numerous remedy sale processes were completed, these related to remedies that had been previously announced. Notable transactions cleared during this timeframe included Shaw / Canwest, BCE / CTVglobemedia and XM Canada / Sirius Canada. The Bureau did, however, bring two merger challenges in 2011.
3. Stikeman Elliott LLP acted as counsel to PotashCorp.
4. BHP Billiton, 'BHP Billiton Withdraws Its Offer to Acquire PotashCorp and Reactivates its Buy-back Program' (Press Release, 15 November 2010), <<http://www.bhpbilliton.com/bb/investorsMedia/news/2010/bhpbillitonWithdrawsItsOfferToAcquirePotashcorpAndReactivatesItsBuybackProgram.jsp>>, accessed 18 January 2011.
5. *Ibid.*
6. Steven Chase et al., 'Potash takeover failure blamed on billion dollar pledge requirement', *The Globe and Mail* (15 November 2010), <<http://www.theglobeandmail.com/news/politics/potash-takeover-failure-blamed-on-billion-dollar-pledge-requirement/article1800044/>> accessed 18 January 2011.
7. In fact, Australia itself has been known to protect key industries and, at the same time that BHP was making a bid for PotashCorp, Australian authorities were engaged in a detailed review of the takeover bid for the Australian Stock Exchange by Singapore Exchange Ltd. Indeed, the very existence of BHP and the other Australian mining supermajor, Rio Tinto, as Australian companies, is due, in no small part, to the existence of stringent Australian foreign investment rules that played a major role in previous transactions involving BHP and Rio Tinto.



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