Competition Law

RECENT DEVELOPMENTS OF IMPORTANCE

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Canada's New Merger Control and Foreign Investment Regimes

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 very 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 Commissioner and the Competition Bureau (the "Bureau") have obtained negotiated remedies has increased dramatically in 2009 and 2010, as compared to historical levels. Indeed, between July 2009 and September 2010, (a 14 month period), the Bureau has 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 is 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 /Eveready 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 majors, 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

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competition law perspective, the 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 a 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 in order that they not need comply with a SIR and the Commissioner need not commence proceedings 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 unprecedented rate since the implementation of the March 2009 amendments, the Commissioner has not brought a formal merger challenge at the Competition Tribunal in respect of any merger, continuing a trend that dates back a number of years. It is unclear whether there will be much in the way of contested merger proceedings in the future. On the one hand, the enhanced information gathering powers of the Commissioner at a slower pace suggests that the Commissioner may be in a better position than before to initiate merger challenges. 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 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.

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 such 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 *Investment Canada Act* raise a number of issues, including the following.

National Security is Undefined

The *Investment Canada Act* 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 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 *Investment Canada Act*, the new

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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.

No Process for Voluntary Pre-Clearance

The *Investment Canada Act* 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 *Investment Canada Act*.

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 *Investment Canada Act* (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 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 has only been one non-cultural investment rejected in the quarter century since the *Investment Canada Act* came into force (the ATK - MDA aerospace transaction).

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 *Investment Canada Act* including 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 Dubai'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. Furthermore, in 2010, Sinopec's acquisition of a nine per cent interest in Syncrude received approval under the *Investment Canada Act*. ■

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*.

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Partner in the Toronto office of Stikeman Elliott LLP. His practice focuses on regulatory reviews of transactions under the *Competition Act* and the *Investment Canada Act*, and counselling in respect of competitive conduct issues such as competitor collaboration and abuse of dominance. Recent notable mandates include having led the regulatory teams for Coca-Cola Enterprises in the sale of its North American bottling business to The Coca-Cola Company, Teck Limited in its acquisition of Fording Canadian Coal Trust and Lakeport Brewing Income Fund in its acquisition by Labatt Brewing Limited (where the Commissioner of Competition failed to get an order delaying closing). He has advised on many public and private transactions where he has advocated client's positions with federal agencies, negotiated Investment Canada undertakings and merger remedies. He has litigated a contested merger case in the Competition Tribunal and the Federal Court of Appeal. He has written and spoken extensively on competition and investment review issues including merger remedies, amendments to the conspiracy provisions of the *Competition Act*, limits on the ability of dominant firms to compete, acquisitions by state-owned enterprises and the treatment of inbound capital under the *Investment Canada Act*. Member of the British Columbia (1988) and Ontario Bars (2000).

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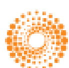
Michael Kilby is an associate in the competition law group in Stikeman Elliott's Toronto office. He regularly advises on all matters relating to Canadian competition and foreign investment laws, with wide-ranging experience in areas, including merger review, unilateral conduct and foreign investment approvals. He has advised clients in industries including, for example, pharmaceuticals, chemicals, mining, oil & gas, technology and in numerous manufacturing, distribution and retail industries. He has been involved on regulatory teams in numerous high-profile matters in Canada including: Vale's acquisition of Inco; Nucor's acquisition of Harris Steel; PaperlinX's acquisition of Cascades Resources; Lakeport's acquisition by Labatt Brewing; Yahoo!'s services agreement with Microsoft; Wyeth's acquisition by Pfizer; Stanley Works' acquisition of Black & Decker; and Ratiopharm's acquisition by Teva. Mr. Kilby is a member of the Canadian Bar Association and The Law Society of Upper Canada. He has a master's degree in economics.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