CANADA CONTINUES TO WELCOME FOREIGN INVESTMENT WITH *INVESTMENT CANADA ACT* CHANGES

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The Canadian Government continues to work towards implementing major increases in the reviews thresholds under the *Investment Canada Act* ("ICA"). It has also introduced three improvements to the process for reviewing foreign investments, two relating to transparency and one to compliance with undertakings.

reviewable transactions

The ICA requires that direct acquisitions of large Canadian businesses be reviewed under a "net benefit to Canada" test. The 2012 threshold for direct acquisitions (of assets or shares) of Canadian businesses is a book value of assets greater than C$330 million. (Smaller and indirect acquisitions may also be subject to review in the cultural industries or where the rare situations where the acquirer is not from a WTO-member country.)

In 2009, amendments were introduced to raise the thresholds to the review threshold will be raised to $600 million in enterprise value for two years, followed by an increase to $800 million for the next two years, reaching $1 billion after four years, and annually indexed to changes in GDP thereafter. These changes have been on hold pending the development of regulations to define enterprise value. The draft regulations were released in May 2012 and the government is now reviewing stakeholder comments. While the timing for the threshold increase has not yet been finalized, Canada remains on course to significantly liberalize its foreign investment regime.

The rejection of BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan in 2010 prompted a media clamour that Canada might have turned hostile towards foreign investment and that the ICA was non-transparent. However, BHP/PCS was only the third rejected transaction since the ICA was enacted in 1985. The suggestion that the Conservative Government — which was re-elected with a large Parliamentary majority in May 2011 — does not welcome investment is simply wrong. In addition to the threshold increases, it has an extensive track record of approving ICA applications in a wide range of sectors (prior to and since BHP/PCS), and has also demonstrated proactive commitment to negotiation of agreements which will expand inbound and outbound investment and trade with numerous countries. This includes a foreign investment protection agreement with China that was signed in September 2012 and is awaiting ratification.

transparency

The issue of transparency is not clear-cut, because there is a trade-off between the benefits (chiefly information for interested stakeholders and accountability of public decision-making) and the important need to respect the confidentiality of sensitive transactional and commercial information. The recent amendments fine-tune this balance by allowing the Minister to disclose information about transactions which have been approved and to provide reasons in the rare cases where an investment is determined not to be of net benefit. In the latter situation, the investor will receive an opportunity to make representations about confidentiality before the disclosure occurs. It will also have 30 days in which to address the reasons for the preliminary negative conclusion and seek to persuade the Minister that the net benefit test can be met (*e.g.* through negotiation of undertakings). These are positive changes.

Part of the transparency concern has included complaints that ICA decisions may be politically-influenced. It is important to recognize that the ICA was deliberately designed to place decision-making in the hands of an elected official (the Minister of Industry or, in cultural cases, the Minister of Heritage) in order to allow the broad list of economic factors that can be considered under the "net benefit" test to be evaluated in a substantive rather than an administrative way. Investors and their advisors can address the relevant factors and the relevant decision-makers/influencers in their regulatory clearance strategies. We expect that the government's flexibility to make reasons public will gradually increase the understanding of how key factors are applied.

compliance with undertakings

Another case which has generated noise about Canada's treatment of foreign investors is the Stelco compliance proceeding. The Canadian government took US Steel to court and sought sizeable penalties for alleged failures to adhere to its undertakings from its 2007 acquisition of Stelco (at that time one of Canada's largest steel producers). One compliance case in a quarter-century hardly signals hostility to foreign investment; it merely indicates that investors should assume that the Canadian government will expect them to follow through on written undertakings provided as part of securing a "net benefit" approval. The court challenge was ultimately settled with revised future commitments by US Steel.

The amendments contain one enhancement of the undertakings mechanism. The Minister may request security that can be used to provide assurance that undertakings will be honoured. In our view, security normally will not be necessary. We expect that the government will exercise this option in a reasonable manner and that it will not become a significant barrier to investors who want to implement transactions that are intended to meet the "net benefit" test.

In summary, the recent changes allow the foreign investment review process to operate more transparently and with stronger compliance incentives, but do not change Canada's "open for business" policy. This will be

reinforced by the substantial increase in the review thresholds.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.