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Investment Canada and Competition Law – 2012 in Review and Outlook for 2013

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I. INVESTMENT CANADA

STATE-OWNED ENTERPRISES UNDER SCRUTINY

The Investment Canada foreign investment regime was in the spotlight for much of 2012. Two high-profile and controversial takeovers of Canadian companies were reviewed and approved under the *Investment Canada Act*, Canada's foreign investment review legislation: the acquisition of oil and gas company Nexen by Chinese state-owned enterprise (SOE), CNOOC, and the acquisition of natural gas producer Progress Energy by Malaysian SOE, Petronas. At the same time, Canada announced a new and more stringent policy framework for the review of SOE investments in Canada. The new policy reflects the Government's limited tolerance for significant foreign government ownership in the Canadian economy.

CNOOC and Petronas Transactions Approved

The CNOOC deal was the subject of debate between those in favour of liberal investment rules, on the one hand, and on the other, opponents of foreign government "nationalization" of the oil sands and advocates of greater reciprocity – i.e., conditioning approval on greater market access of Canadian companies in China. The result was a delicate balancing act for Prime Minister Harper who had to address concerns of opponents while not undermining the significant progress in the Canada-China relationship achieved over the past three years.

For its part, CNOOC communicated early on and publicly its willingness to make significant commitments, including: establishing Calgary as

CNOOC's North and Central American headquarters; retaining Nexen's current management team and employees; enhancing capital expenditures on Nexen's assets; and listing CNOOC Limited shares on the TSX. As these commitments were offered at the beginning of the process, all of the final commitments made by CNOOC are not publicly available.

The Petronas transaction, while not attracting much public opposition, hit a major snag during the review process when Industry Minister initially rejected the deal, but Petronas was able to overturn that result, presumably by making additional concessions to address government concerns. As with the CNOOC transaction, the Petronas undertakings have not been made public.

SOEs under Scrutiny - Prohibition of SOE Takeovers in the Oil Sands

While announcing the approval of the CNOOC and Petronas deals, the Canadian government also banned further acquisitions of control of Canadian oil sands businesses except on an "exceptional" basis. In addition, the SOE guidelines have been revised to intensify scrutiny of SOE investments, especially in sectors where SOE influence in a particular industry is deemed significant.

To gain approval, SOEs will have to be more transparent, constrain state influence and operate according to free market principles. Moreover, the definition of SOEs has been broadened to include companies that are "influenced" by foreign governments not just those that are controlled or owned by foreign governments. This could potentially mean a much broader range of investors would be categorized as SOEs, depending on how the government views "influence".

SOE investments will also be subject to review and ministerial approval at a lower level than other foreign investments. While the review threshold for non-SOE investors is set to increase to $600 million in "enterprise value" upon issuance of an implementing regulation ($1 billion within four years), for SOEs it will remain at the current level subject to indexation (a target book value of assets of $344 million in 2013).

The vague scope of the SOE definition may cause uncertainty relating to the applicability of the guidelines and of the lower review threshold for SOEs. It is also anticipated that SOEs may increasingly invest through joint venture arrangements in order to minimize Investment Canada challenges.

II. COMPETITION ACT

2012 was a year of active enforcement for Canada's competition enforcement agency, the Competition Bureau (the "Bureau"). A number of significant mergers were approved, in some cases in reliance upon remedies sought by other authorities, and there were important developments in enforcement action against cartels and anti-competitive practices. 2013 will also see a number of decisions in ongoing cases.

MERGERS

The Bureau approved a number of significant mergers in 2012.

Maple/TMX

After a lengthy review, the takeover by Maple Group of Canada's biggest stock exchange operator, including TMX Group, Alpha Group and Canadian Depository Services, was allowed. While the Bureau initially had serious concerns, these were mitigated by the issuance by the Ontario Securities Commission of final recognition orders which altered the regulatory environment significantly.

United Technology/Goodrich

Another notable merger approved by the Bureau was United Technology Corporation's proposed acquisition of Goodrich Corporation. Both companies are engaged in the global aerospace industry, supplying various parts and components

to aircraft manufacturers. The Bureau worked with the U.S. Department of Justice's Antitrust Division and the European Commission in reviewing the international merger and concluded that remedial orders issued by U.S. and Europe antitrust authorities sufficiently mitigated these potential anti-competitive effects.

Glencore/Viterra

Another high profile international merger was Glencore International PLC's ("Glencore") acquisition of Canadian company Viterra Inc. ("Viterra"). Glencore, a Swiss commodities producer and trader with worldwide activities, received clearance from the Commissioner of Competition (the "Commissioner") in the form of a "no action letter" in May 2012. As part of the proposed transaction, Glencore struck side deals pursuant to which Winnipeg-based Richardson International Ltd. ("Richardson') would purchase a portion of former Viterra grain handling operations from Glencore, and Calgary-based Agrium Inc. would acquire the majority of Viterra's retail business.

Air Canada/United Continental

The Commissioner also reached an agreement with Air Canada and United Continental Holdings, Inc. ("United Continental") regarding the proposed joint venture between these two airlines as well as existing coordination agreements. The Commissioner had alleged in its application with the Competition Tribunal that: (1) the proposed joint venture would result in the reduction of passenger service competition between Air Canada and United Continental for 19 transborder (Canada/US) routes; and (2) the existing agreements between Air Canada and United Continental would reinforce the potential anti-competitive effects of the proposed joint venture by allowing the parties to coordinate price, inventory, marketing and scheduling across their networks, share net revenues, and provide reciprocal access to each of their respective frequent flyer programs. This was the first time that the Commissioner brought an application before the Competition Tribunal under the Competition Act's new civil provision (section 90.1) directed at agreements between competitors. Under the terms of the consent agreement, Air Canada and United Continental have agreed not to implement their joint venture or to coordinate through their coordination agreements on 14 of the 19 air passenger routes between Canada and the U.S.

CCS/Complete Environmental

In May 2012, the Competition Tribunal ruled in favour of the Commissioner in her challenge of the completed acquisition by CCS Corporation ("CCS") of Complete Environmental Inc. ("Complete"). The Tribunal found that the merger would likely prevent competition substantially in the market for the supply of landfill services for solid hazardous oil and gas waste and ordered CCS to divest itself of Complete's hazardous waste landfill site, on the basis that it would likely have become a competitor to CCS had the acquisition not been completed.

The outcome of this case is significant as the theory of harm was founded on a likely "prevention" of competition. Furthermore, the transaction was closed at the time the Commissioner had filed an application to the Competition Tribunal, and the value of the transaction was far below the merger notification threshold.

The parties have appealed the Tribunal's decision and the Federal Court of Appeal granted a stay of the divestiture orders conditional on the preservation of the hazardous waste site. The final determination of the appeal has not yet been made.

CARTELS AND BID-RIGGING

The Bureau continued to actively pursue domestic cartel activity as well as bid-rigging in the construction industry. Additional fines have also been imposed in relation to the retail gasoline price fixing conspiracy in Quebec, in which guilty charges have, to date, resulted in the imposition

of fines totaling over $3 million and prison sentences totaling 54 months.

In January 2012, the Bureau obtained its first conviction under Canada's amended conspiracy law by obtaining a guilty plea from two companies involved in a price-fixing cartel for polyurethane foam. This guilty plea was the first conviction under Canada's amended conspiracy law and a fine of $12.5 million was imposed on the involved parties.

PRICE MAINTENANCE

Visa/MasterCard

The hearing of the challenge by the Commissioner of Visa and MasterCard's so-called "merchant restrictions" (including the "no-surcharge" and "honor all cards" rules) under the price maintenance provision of the Competition Act took place in May and June. The Commissioner first filed an application with the Competition Tribunal in December 2010, alleging that the rules that Visa and MasterCard were imposing on merchants who accept their credit cards effectively eliminated competition between Visa and MasterCard, and led to increased costs to businesses and consumers. The Competition Tribunal has not yet issued a decision but it will be closely watched given the starkly different interpretations of the price maintenance provision presented by the parties at the Tribunal proceeding. The pending decision on this case will be significant as it is the first civil price maintenance case to be heard by the Competition Tribunal following amendments to the Competition Act in 2009 which repealed the former criminal price maintenance offence.

Fairview Donut

An Ontario court dismissed claims asserted by franchisees against a franchisor under the price maintenance provision of the Competition Act, alleging that the prices at which the franchisor was selling its ingredients to the franchisees were too high. The court concluded that the price maintenance rule does not apply to prohibit a supplier from increasing its price to a reseller who is free to sell the product at whatever price it chooses. The franchisees appealed this decision, albeit not on the grounds that there was contravention of the Competition Act, but the appeal was dismissed.

ABUSE OF DOMINANCE

Following the Commissioner's abuse of dominance case against the Canadian Real Estate Association in 2010 (which was settled), the hearing of the Commissioner's challenge of the conduct of another real estate organization, the Toronto Real Estate Board ("TREB"), took place in September 2012. The Commissioner had filed an application with the Competition Tribunal in May 2011, alleging that TREB was abusing its dominant position in the supply of residential real estate brokerage services in the Greater Toronto Area by implementing allegedly restrictive rules and policies respecting brokers' use of its Multiple Listing Service.

COMPETITION BUREAU GUIDANCE

Merger Review Process Guidelines

The Bureau published revised Merger Review Process Guidelines in January 2012 (the "MRP Guidelines"). The MRP Guidelines have been updated to reflect current Bureau practices with respect to the supplementary information request ("SIR") issuance process. The MRP Guidelines also clarify how timing agreements may be used to address to obtain additional information or address timing concerns (including in a hostile transaction context).

Abuse of Dominance Guidelines

The Bureau has issued updated Enforcement Guidelines on the Abuse of Dominance Provisions (the "Abuse Guidelines"). These guidelines have been roundly criticized for being considerably less detailed and therefore less helpful in providing guidance than predecessor versions of the guidelines. They are also notable for stating that

certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose. This interpretation potentially expands the scope for finding that a dominant firm's conduct constitutes an abuse of dominance.

Draft Interpretation Guidelines

In 2012 the Bureau released a number of draft interpretation guidelines for consultation regarding pre-merger notification. None of these has yet been finalized.

Increase in Merger Notification Thresholds

On January 8, 2013, the Bureau announced an increase in the "size of transaction" monetary threshold for pre-merger notification for 2013, from $77 million Canadian to $80 million Canadian. If the Canadian assets of a business involved in a transaction exceed $80 million, and the assets in Canada or gross revenues from sales in, from or into Canada of the parties and their affiliates exceed $400 million, the parties to the transaction must notify the Bureau of the transaction before closing.

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