THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

June 6, 2007

Mr. Ron Parker
Senior Assistant Deputy Minister
Strategic Policy Sector
and
Ms. Susan Bincoletto
Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street
Ottawa, ON K1A 0H5

Dear Mr. Parker and Ms. Bincoletto:

Re: Advantage Canada Report, *Investment Canada Act*

On behalf of the Competition Law Section of the Canadian Bar Association (the CBA Section), we thank you for meeting with representatives of our Foreign Investment Review Committee on March 8th to discuss the Advantage Canada Report and a possible review of the *Investment Canada Act* (ICA).

This letter provides a brief overview of the some of the key legal and administrative issues of our members with respect to the ICA. We understand that you are developing an appropriate consultation mechanism for a possible review of the ICA, and require a general overview of key issues only. Once a consultation process has been determined, the CBA Section would welcome the opportunity to provide a more detailed submission.

We have divided the draft discussion points into three parts. Appendix A lists general policy issues for consideration. Appendix B outlines issues that could possibly be addressed in guidelines or an interpretation bulletin. Appendix C outlines issues pertaining to sensitive sectors.

500 - 865 Carling, Ottawa, **ONTARIO** Canada K1S 5S8
Tel/Tél. : (613) 237-2925 **Toll free/Sans frais :** 1-800-267-8860 **Fax/Télécop. :** (613) 237-0185
Home Page/Page d'accueil : www.cba.org **E-Mail/Courriel :** info@cba.org

We would very much appreciate being consulted once a consultative mechanism has been established.

Yours very truly,

(Original signed by Tamra Thomson for James Musgrove)

James Musgrove
Chair
National Competition Law Section

cc. Julie Soloway
Sandy Walker

Appendix A — General Policy Issues

1. Aside from culture and perhaps national security, is there a legitimate purpose for the ICA? There has been a shift in Canada's economic framework since 1985 towards the recognition that economic benefits are derived from policies that foster open competition for capital. We further note that very few developed countries have a foreign investment screening regime applicable across all industry sectors.

2. While the agencies that enforce the ICA have never, to our knowledge, prohibited the implementation of an investment (other than in the cultural area), enforcement of the ICA has become a material regulatory hurdle, particularly as to transaction timing. This may negatively impact Canada's ability to attract foreign investment, and its reputation as a leading market economy. The ICA is perceived as being much more "FIRA-like" and investor-unfriendly in its application than it was in previous years and delays or the prospect of a delay can deter or thwart a proposed transaction. Is this a result of a change in the policy position of Industry Canada? The Government's approach to the application of the ICA appears to conflict in some respects with its own efforts to actively encourage both outward Canadian investment and inward foreign investment in Canada.

3. An example of the stricter enforcement of the ICA is the shift from the end of 1990s when undertakings on the part of a foreign investor used to be the exception, and not the norm, to the current practice of requiring undertakings in virtually all cases. A return to requiring undertakings only for transactions involving sensitive sectors should be considered. As well, guidelines to address circumstances in which undertakings will be required should be published to enhance transparency.

4. The *Competition Act* and sector specific statutes (such as those relating to financial services, transportation, uranium, telecommunications and broadcasting) are not the appropriate tools for ensuring "net benefit". The IRD policy not to seek Ministerial approval until Competition Bureau approval has been obtained should be reconsidered. If the Competition Bureau has concerns about a transaction, it can address them through the appropriate steps under its legislation, independent of the IRD. Delaying IRD approval until Competition Bureau sign-off is not contemplated in the legislation, and makes the checks and balances built into the Bureau's mechanisms to challenge a transaction irrelevant.

5. The ability of the IRD to unilaterally extend the initial 45 day period in the context of a public takeover bid or a return to the policy of utilizing s.16(2)(a) to allow such transactions to proceed before a review is complete should be reconsidered. Takeover bids may well be jeopardized unnecessarily because of an inability to clear the IRD sufficiently quickly, especially in the context of a multiple bid situation.

Appendix B — Issues for Guidelines/Interpretation Bulletin

1. Consider an interpretation bulletin addressing IRD's interpretation of the meaning of "net benefit", which would include an expanded articulation of the s. 20 factors. In particular, consider applying relative weights to the s. 20 factors (such as the impact of the investment on employment, capital expenditures, enhanced productivity and international competitiveness). For example, a transaction that will create a more efficient firm may also result in job losses. How will the Minister weigh those competing considerations? In addition, the interpretation bulletin should cover all matters where legal interpretation or advice has been provided to investors in the past.

2. As a regulatory agency dealing with matters that affect the capital markets and the Canadian economy, it is in the public interest for the IRD to apply a consistent and predictable approach to process, timing and substance in its review of foreign investments, and also to appear to do so. Guidelines setting out a clearly articulated, transparent and consistent approach to IRD's review of investments would assist private parties in predicting IRD's position and structure their transactions accordingly.

3. Similarly, IRD policy should reflect a consistent and predictable approach to undertakings. For example, on various occasions the IRD has advised that its approach and eventual settlement (in terms of undertakings) on an earlier transaction was not relevant to a later case because the earlier transaction took place several years ago. As the ICA has not been amended for several years, there is arguably little reason for the change in approach. Arguably, like investors should be treated the same.

4. Clarify the IRD's previous advice that the "hostile" nature of a bid is a negative factor in weighing net benefit to Canada. In our view, the basis for that advice is unclear. Generally, bids are "hostile" simply because the buyer and management of the target have not agreed on a price for the shares or because management's performance is a prime reason underlying the bid. Whether a bid is friendly or hostile should not have an impact the application of the net benefit test.

5. Consider returning to the practice of issuing synopses of opinions (with confidential information deleted) as occurred in the mid-1980s. The lack of transparency seriously undermines the ability to predict how the ICA will be applied. Industry Canada should, at the very least, be prepared to provide advice on legal positions it has taken

Appendix C — Issues Pertaining to Sensitive Sectors

1. Consider increasing the sensitive sectors thresholds. They have not been changed since 1985 and arguably should be increased to account for increases in Consumer Price Index.

2. Consider applying these thresholds to only that "sensitive" aspect of a transaction. That is, a very small transaction, with a tiny "sensitive" component – say a magazine kiosk – may be captured under the current rules

3. Where a transaction is reviewable only by virtue of involving a sensitive sector, the review of the transaction and the undertakings should be limited only to the sensitive sector aspect of that transaction.

4. Consider exempting from review under the ICA those transactions subject to review and approval by the Minister of Finance, since that approval is conclusive of net benefit. Several years ago, the IRD indicated that they recognized gaps in the *Bank Act* exemption, yet no efforts appear to have been made to close these gaps.