THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 29, 2012

Via email: FINA@parl.gc.ca

James Rajotte, M.P.
Chair
Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Via email: nffn@sen.parl.gc.ca

The Honourable Joseph A. Day, Senator
Chair
Senate Committee on National Finance
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Day and Mr. Rajotte,

Re: Bill C-38, Part 4, Division 28 – *Investment Canada Act* amendments

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section) to comment on Part 4, Division 28, amending the *Investment Canada Act* (ICA).. The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of competition law and foreign investment review.

Bill C-38, Part 4, Division 28 proposes two changes the ICA. First, it would authorize the federal government to accept security for payment for certain penalties that may be imposed under the ICA, including where the investor is found by a court to be in breach of its undertakings to the government. Second, it would authorize the Minister of Industry (or the Minister of Canadian Heritage for investments pertaining to cultural businesses) to make public disclosure in additional circumstances for notices issued by the Minister under the ICA.

The Canadian Bar Association has stated before its objection to the omnibus style of legislation employed in Bill C-38. The significant impact and sweeping nature of the changes, and the quick timeframe for its passage, militate against meaningful comment or debate. The result is that CBA Sections are commenting only on certain portions of the Bill, although we have significant concerns about others.[1]

[1] See also letters from CBA Criminal Justice Section on Part 4, Division 37 and from CBA Immigration Law Section on Part 4, Division 54.

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A. Security Payments

Pursuant to the ICA, certain acquisitions of control of Canadian businesses by non-Canadians and certain other investments are subject to review and approval by the Minister pursuant to a "net benefit to Canada" test. To support a finding that the proposed investment is of net benefit to Canada and secure the Minister's approval, investors frequently provide undertakings to the government on aspects of the Canadian business being acquired and their investment.

The stated purpose of the amendment allowing security payments is "to promote compliance with undertakings". For example, where undertakings are breached, the government must first apply for a court order in respect of the breach and if the court order includes a penalty, the government may find it necessary to sue the non-Canadian to recover the penalty. With the appropriate security, the government may (subject to the terms of the security) simply realize under the security once a court has imposed a penalty on the foreign investor.

The CBA Section has two concerns with the proposed amendment. First, it is not clear that taking security for payment of penalties that may be imposed by a court will achieve increased compliance with undertakings. Taking security would not materially expedite the enforcement process. Even with security in place, the government must still first apply for a court order where undertakings are allegedly breached and, following a hearing on the merits, await an order that includes a penalty prior to realizing on security. We have also considered the possibility that the taking of security may be address a potential concern that the government may have to bring suit against a non-Canadian to recover a penalty ordered by a court and may ultimately have difficulty recovering the penalty. However, it is not clear that security is needed to enhance the likelihood of recovering penalties for non-compliance. Leaving aside the fact that failure to comply with a court order under ICA section 40 carries serious consequences as a contempt of court, the reality is that the foreign investor will invariably have assets in Canada (including the acquired Canadian business that was the subject of the relevant undertakings) to backstop any penalties.

Second, we have concerns about the absence of limitations or guidance in Bill C-38 on the circumstances in which security may be taken and the nature and quantum of the security. Canada competes in a global market for foreign investment. Only requirements truly necessary to achieve net benefit to Canada should be imposed on foreign investors.

> **The CBA Section recommends that, if the proposed amendment on taking security is enacted, implementation of the amendment take effect only when regulations outlining these details have been promulgated following an appropriate period of public comment.**

B. Disclosure

The ICA stipulates that, subject to some exceptions, information obtained by the Minister in the course of administering or enforcing the ICA is privileged and must not be disclosed. One exception permits (but does not require) disclosure of notices confirming the Minister is satisfied (or not) that an investment is likely to be of net benefit to Canada. Bill C-38 would expand the circumstances in which the Minister may make public disclosure. Most importantly, it would authorize the Minister to publicly disclose a preliminary notice sent to an investor indicating that the Minister is not satisfied the investment is likely to be of net benefit to Canada and advising the investor of its right to make representations and submit undertakings. The Minister would also be authorized to publicly disclose accepting security from an investor.

The proposed amendment may be viewed as an attempt by the Government to fulfill its commitment (in the wake of the interim rejection of the proposed acquisition by BHP Billiton Plc of

Potash Corp.) to provide more clarity in its decisions to refuse investments. In the proposed acquisition of Potash Corp., the Minister's preliminary notice resulted in BHP Billiton Plc abandoning the proposed purchase and hence amounted to a final decision.

In our view, the proposed disclosure represents a positive but inadequate improvement to the *status quo*. The proposed authority to disclose is permissive only and does not require the Minister to disclose. The ICA already permits the Minister to disclose final notices sent to investors indicating whether the Minister is or is not satisfied that the investment is likely to be of net benefit to Canada, along with reasons of the finding. The Minister is also permitted to disclose undertakings by an investor to the government. In practice, however, this authority to disclose is rarely invoked by the Minister. It remains to be seen whether and in what circumstances the Minister would be prepared to disclose the reasons for finding that an acquisition is unlikely to be of net benefit to Canada on a preliminary basis.

The bill also does not address other aspects of the ICA that generate uncertainty for investors due to inadequate disclosure. For example, the rationale for approvals and disapprovals is rarely communicated. At present, the ICA requires Ministerial decisions to be given only for rejected investments, and only permits (not requires) the Minister to publicly disclose the reasons for decision. The Minister need not issue reasons for approved investments and where reasons are issued the Minister need not disclose them publicly.

> **The CBA Section recommends a requirement to give reasons for Ministerial decisions and to make those public where the Minister approves or rejects an investment. Issuing reasons in all cases would establish a body of decisions to assist foreign investors in understanding the rules for investing in Canada and demonstrate (and help ensure) that decisions are made on a principled basis. Of course, all publicly communicated reasons should first be purged of commercially-sensitive information.**

The ability for the Minister to issue opinions is already in the ICA but there is no requirement to disclose the opinions. These opinions – purged of commercially-sensitive information – could form a body of helpful guidance and ensure consistency in the government's interpretation and enforcement of the *Act*. There is precedent for this: ICA opinion summaries were issued in the 1980s.

Our recommendations are consistent with those of the Competition Policy Review Panel, that the ICA review process should be predictable, timely and transparent. We trust they will be of value to the Parliamentary Committees in reviewing the proposed legislation.

Yours truly,

(original signed by Tamra L. Thomson for Donald B. Houston)

Donald B. Houston
Chair, National Competition Law Section