THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 17, 2013

Via email: indu@parl.gc.ca

David Sweet, MP
Chair
Industry, Science and Technology Committee
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
National Finance Committee
Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Day and Mr. Sweet:

Re: Bill C-60, Part 3, Division 6 — *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 proposed amendments to the *Investment Canada Act* (ICA) in Part 3, Division 6 of Bill C-60, the *Economic Action Plan 2013 Act, No. 1*. 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.

The CBA Section believes the proposed amendments will create uncertainty in the application of the ICA, which could have the unintended effect of chilling foreign direct investment. We urge Parliament to remove Part 3, Division 6 from Bill C-60 and consider the amendments in more detail in a stand-alone bill. We also recommend that procedures and guidelines be put in place to give investors general guidance and, in appropriate cases, timely and binding opinions under section 37 of the ICA.

The CBA Section's primary concerns with the proposed amendments are three-fold:

1. The definition of state-owned enterprise (SOE) is unclear and, in conjunction with new powers that allow the Minister to deem an entity an SOE, make it difficult to ascertain whether an entity will be treated as an SOE under the ICA. As drafted, even Canadian companies could be subject to the SOE review provisions. The broad reach of the SOE definition engenders uncertainty for all investors.
2. The Minister will have broad powers to deem an "acquisition of control" of a Canadian business by an SOE even if it is only a minority investment or joint venture. This will make it difficult to know whether an investment is subject to "net benefit" review. In addition, the Minister could potentially exercise this deeming discretion long after a transaction has closed.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

3. Notwithstanding the lower monetary threshold applicable to SOE investors, because of the way those thresholds are calculated ("enterprise value" for non-SOE WTO investors and "book value" for SOE WTO investors), an SOE investor could fall under the threshold for "net benefit" review while a non-SOE WTO investor could be subject to a review for the same proposed transaction. The CBA Section does not believe this to be the Government's intention.

If Part 3, Division 6 is not removed from the bill for further study, the CBA Section recommends that these concerns be addressed as follows:

- The Minister should issue policy guidelines or interpretation notes on the concepts of "control," "control in fact", "influence" and "direction" and include specific examples of situations where a foreign government would be determined to have sufficient influence or direction over an entity to make it an SOE.
- Part 3, Division 6 should be modified to subject investments by SOE investors to review, where either the current book value assets threshold or the enterprise value threshold is met. Alternatively, a single standard could be adopted for WTO SOE and non-SOE investors, based on enterprise value, with a lower monetary enterprise value threshold applicable to WTO SOE investors.
- Part 3, Division 6 should be modified to require the Minister to issue an opinion under section 37 of the ICA as to whether an entity is Canadian or would be considered an SOE; and
- Part 3, Division 6 should be modified to impose a fixed time limit in the ICA during which time the Minister can review an acquisition on the basis that it is an acquisition of control in fact by an SOE investor.

We elaborate on these concerns below.

Definition of SOE creates uncertainty and potential overreach

In addition to foreign governments and their agencies, the proposed SOE definition captures entities controlled or influenced, directly or indirectly, by a foreign government or agency. The definition also captures "an individual who is acting under the direction of" or "who is acting under the influence of" the foreign government or agency. The terms "control", "influence" and "direction" as used in the definition of SOE have not been defined in the ICA or in guidance documents.

The proposed amendments will give the Minister authority to deem an investor an SOE that is otherwise a Canadian-controlled entity (and satisfies the Canadian status rules set out in the ICA) if the Minister believes the SOE exercises "control in fact" over the investor. This could extend the net benefit review provisions to acquisitions of Canadian businesses by Canadian-controlled entities. For example, a Canadian entity "influenced" by an SOE would be an SOE under the ICA. If a subsidiary of that entity were to acquire another Canadian company, the Minister could determine that the subsidiary is non-Canadian because it is controlled in fact by an SOE (even though the SOE is simply its Canadian parent). Given the potential scope of this deeming provision, the amendments create uncertainty and appear contrary to the purpose of the ICA — to provide a mechanism to review investments by non-Canadians.

Collectively, the proposed amendments will make it difficult for an investor to know whether it would be treated as an SOE under the ICA. If applied reciprocally by foreign governments, the amendments could result in Canadian businesses with minority government shareholders or possibly even arm's length investment-only pension funds being treated as SOEs.

The CBA Section recommends that the Minister issue policy guidelines or interpretation notes on the concepts of "control," "control in fact", "influence" and "direction" and include specific examples of situations where a foreign government would be determined to have sufficient influence or direction over an entity to make it an SOE. The Minister can draw on guidance issued by Industry Canada in other contexts, as well as other departments including Transport Canada and the Canada Revenue Agency.

The CBA Section also recommends that Part 3, Division 6 be modified to require the Minister to issue an opinion under section 37 of the ICA as to whether an entity is a Canadian or would be considered an SOE. As presently proposed, Bill C-60 eliminates the requirement for the Minister to issue an opinion on the Canadian status of an investor, leaving it to the Minister's discretion.

Amendments could chill minority interests and joint ventures

Under the proposed amendments, acquisition of an interest in a Canadian business that falls below the current bright line rules (less than one-third of the voting shares of a corporation; less than a majority of the voting interests of a partnership, trust or joint venture) could still be deemed by the Minister to be an acquisition of control in fact by the SOE. There will be no fixed time period in the ICA where the Minister would be permitted to make a control in fact determination, making it possible for the Minister to determine that an SOE investment is reviewable long after a transaction closed. This would create a high degree of uncertainty for potential investors.

The proposed amendments deprive investors of the certainty of the long-standing "acquisition of control" rules that govern the application of the ICA. Instead, they import an uncertain control in fact test, because SOE investors will not know for certain whether a minority investment can proceed without being reviewed (or in the future, challenged). By creating uncertainty, the proposed amendments have the effect of chilling inbound investment at a time when investment is critically needed to promote growth, job development, innovation and productivity of the Canadian economy.

To address this uncertainty, the CBA Section recommends that the Minister issue policy guidelines or interpretation notes on the control in fact analysis. The CBA Section also recommends an amendment to Part 3, Division 6 to impose a fixed time limit in the ICA during which time the Minister can review an acquisition on the basis that it is an acquisition of control in fact by an SOE investor. That approach is taken with cultural businesses and national security reviews. The CBA Section also recommends that Part 3, Division 6 be modified to require the Minister to issue an opinion under section 37 of the ICA as to whether a proposed investment by an SOE constitutes an acquisition of control.

Proposed amendments do not achieve Government's purpose of subjecting SOE investors to lower review threshold

The proposed subsection 14.1(1.1) does not refer to "enterprise value" but instead to "value calculated in the manner prescribed." On the understanding that the SOE investor threshold will be calculated in reference to the current "book value of assets" standard in the regulations (as opposed to enterprise value), it is possible that an SOE WTO investor could avoid a net benefit review while a non-SOE WTO investor could not avoid a review for an acquisition of the same Canadian business. An example of this scenario is the acquisition of a technology company with a small book value of assets, but a large enterprise value (as was the case in Nortel Networks). The playing field in a competitive bid scenario would be tilted against private sector investors and in favour of SOE investors.

The Competition Policy Review Panel's 2008 Report, *Compete to Win* notes:

> The use of gross assets as the standard in the ICA for measuring the significance of Canadian businesses subject to foreign investment proposals is out of date. The concept of enterprise value better reflects the increasing importance to our modern economy of service and knowledge-based industries in which much of the value of an enterprise is not recorded on its balance sheet because it resides in people, know-how, intellectual property and other intangible assets not recognized in a balance sheet by current accounting methods.[1]

To address this problem and to ensure that the amendments do not inadvertently favour SOE investors, the proposed amendments ought to be revised to subject investments by SOE investors to review where either the current book value assets threshold or the enterprise value threshold is met. Alternatively, a single standard could be adopted for WTO SOE and non-SOE investors, based on enterprise value for the reasons outlined above, with a lower monetary enterprise value threshold applicable to WTO SOE investors.

We trust our comments will be of value to the Parliamentary Committees in reviewing the proposed legislation. We would be pleased to respond to any questions you might have.

Yours very truly,

(original signed by Tamra Thomson for Brian A. Facey)

Brian A. Facey
Chair, National Competition Law Section

cc. James Rajotte, M.P.
Chair, House of Commons Finance Committee
Via email: FINA@parl.gc.ca

[1] http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf at p. 31