THE CANADIAN BAR ASSOCIATION
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November 17, 2014

Via email: banc@sen.parl.gc.ca; INDU@parl.gc.ca

The Honourable Senator Irving Gerstein
Chair, Banking, Trade and Commerce Committee
Senate of Canada
Ottawa, ON K1A 0A4

Mr. David Sweet, M.P.
Chair, Industry, Science and Technology Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Senator Gerstein and Mr. Sweet:

Re: Bill C-43 – Amendments to the *Investment Canada Act*

I am writing on behalf of the Canadian Bar Association's National Competition Law Section (CBA Section) in response to the amendments to the *Investment Canada Act* (ICA) proposed in Bill C-43, the *Economic Action Plan 2014 Act, No. 2*.

The CBA is a national association representing over 37,000 jurists, including lawyers, Québec notaries, law teachers and students across Canada. The Association's primary objectives include improvement 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, including direct experiences with transactions that are subject to the ICA.

Our comments focus primarily on the amendments to the ICA that would permit increased disclosure of information concerning national security reviews of foreign investments. In addition, we focus on the balancing between transparency for decisions made under the ICA and the importance of protecting legitimate commercial confidentiality interests.

The ICA generally requires a non-Canadian investor that directly acquires control of a Canadian corporation carrying on business in Canada to receive approval of the Minister of Industry if the total worldwide value of the assets of the Canadian business to be acquired exceeds C$330 million.

While the CBA Section supports efforts to increase transparency, some of the proposed amendments in Bill C-43 are concerning. We have three general concerns that warrant attention. Firstly, we do not believe that disclosure about the national security review process should be required prior to the investment being publically disclosed by the parties. Unwanted and

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premature disclosure may deter investors from approaching Industry Canada to proactively address national security issues, weakening the effectiveness of the process.

Secondly, we believe more disclosure about the frequency and outcomes of national security reviews are required to better inform the Canadian public, the business community and investors about how the broad powers to conduct national security reviews are being exercised. Industry Canada could make this information available in its annual report similar to the Committee on Foreign Investment in the United States (CFIUS).

Thirdly, no explanation or justification has been given for expanding the notification requirements under section 10 of the ICA. Our comments are organized to expand on these three points.

DISCLOSURE ABOUT THE NATIONAL SECURITY REVIEW PROCESS

The proposed amendments to subsection 36(4) of the ICA would permit the government to disclose when a foreign investment transaction reaches different stages of the national security review process. The amendments would also permit the disclosure of any information in an order of the Governor in Council regarding a transaction under national security review, unless the Minister is satisfied that communication or disclosure of that information would be prejudicial.

The business and legal communities in Canada and internationally have expressed uncertainty about the scope, nature and number of national security reviews of foreign investment under Part IV.1 of the ICA since these provisions came into force in 2009. The CBA Section believes that it is possible to make additional disclosure about the extent to which national security reviews are occurring, as well as the outcomes of these reviews, without giving rise to national security concerns. At the same time, it remains vitally important that disclosure does not prejudice parties dealing with potentially confidential and commercially sensitive transactions.

The increased disclosure permitted by the proposed amendments is helpful in addressing uncertainty about the national security review regime. However, where a transaction has not been announced by the parties involved, disclosure of any information about the transaction is likely to be prejudicial. We propose wording for an amendment in Appendix "A" to this letter that would address this deficiency.

The wording of disclosure provisions must reassure foreign investors and Canadian businesses that commercially sensitive information will remain confidential. This is particularly important where there are national security concerns and disclosure of information may have a negative impact on a potential investor or its target.

FREQUENCY AND OUTCOMES OF NATIONAL SECURITY REVIEWS

Pursuant to section 38.1 of the ICA, the Minister is required to publicize a report on the administration of the ICA. However, there is no requirement to do so for matters relating to national security. To date, the Minister has not reported on any national security reviews or their outcomes outside of the section 38.1 reporting process, although the statute does not preclude doing so.

In our view, providing aggregate data on reviews under Part IV.1 of the ICA would not be prejudicial to national security, and we encourage the Minister to include this information in the annual report. This information should form part of the public record. We request that the Committee consider amending section 38.1 to require the annual report to include aggregated data on national security reviews.

PROPOSED AMENDMENTS TO SECTION 10

The proposed amendments to section 10, particularly the addition of subsection 10(1.1), would expand the list of investments subject to the notification requirements of the ICA, which may increase the number of national security reviews. In light of current uncertainty about the national security review regime, it would be helpful to have an explanation and justification as to why these changes are thought to be necessary or desirable.

The CBA Section is grateful for the opportunity to comment on Bill C-43. We hope these comments are helpful to the study of the Bill and would be pleased to provide further assistance in any way possible.

Yours truly,

(original letter signed by Noah Arshinoff for R. Jay Holsten)

R. Jay Holsten
Chair, National Competition Law Section

Encls.

Cc: Mr. James Rajotte, M.P., Chair, House of Commons Finance Committee
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Appendix "A"

The CBA section recommends that subsection 36(4.1) and the proposed subsection 36(4.11) be reworded as follows:

> (4.1) The Minister shall inform the Canadian or non-Canadian before communicating or disclosing any financial, commercial scientific or technical information under paragraph (4)(*e*)(ii), (*e.1*), (*g*) or (*h*), and the Minister shall not communicate or disclose the information if they satisfy the Minister, without delay, that the communication or disclosure would prejudice them. Where a transaction has not been publicly disclosed by the investor or Canadian business, it is presumed, unless the Minister determines otherwise, that communication or disclosure of any information would be prejudicial.
>
> (4.11) The Minister shall inform the Canadian or non-Canadian before communicating or disclosing any information under paragraph (4)(*e*)(ii) or (*e.3*), and the Minister shall not communicate or disclose the information if they satisfy the Minister, without delay, that the communication or disclosure would prejudice them. Where a transaction has not been publicly disclosed by the investor or Canadian business, it is presumed, unless the Minister determines otherwise, that communication or disclosure of any information would be prejudicial.