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Via email: Paul.Halucha@canada.ca; Patricia.Brady@canada.ca

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Dear Mr. Halucha and Ms. Brady:

Re: *Investment Canada Act* – Issues Related to the Amended Regulations and Forms

We are writing on behalf of the Canadian Bar Association's Competition Law Section (CBA Section) to identify issues with the *Investment Canada Act* (Act) notification and application for review forms, and the Investment Canada Regulations (Regulations). The forms were released in April 2015 by the Investment Review Division in connection with amendments to the Act and Regulations. The issues we have identified are discussed in detail below.

The CBA is a national association of more than 36,000 Canadian lawyers, judges, notaries, law teachers and students. The CBA's primary objectives include improvement in the law and in the administration of justice. The CBA Section comprises more than 1,600 lawyers with expertise in competition law, foreign investment review, corporate law, criminal law and trade regulation.

The CBA Section is primarily concerned that the IRD is interpreting the Regulations in a manner that calls for the provision of personal information from directors and officers of investors contrary to the requirements of the *Privacy Act*. Accordingly, we request that the IRD clarify that it will not collect this information, or alternatively, that the Regulations and forms will be amended to comply with the *Privacy Act.*

In addition, the CBA Section is of the view that (i) investors are not required to provide residential addresses pursuant to the Act or the Regulations, and (ii) the forms are, in any event, not compliant with the *Privacy Act* because they do not disclose the purpose or reason why the IRD is collecting this and other personal information.

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The CBA Section has also identified other issues related to the amended Regulations and forms which can be addressed either through the issuance of guidelines or interpretation notes by the Minister under section 38 of the Act, or by revisions to the Regulations and the forms.

Request for Residential Address and Other Personal Information

(a) No Requirement under the Act and Regulations to Provide Residential Address

The Regulations require only that investors provide "local mailing addresses" of their directors and five highest paid officers. The Regulations do not specify what a "local mailing address" means – the term is not defined in the Act or Regulations. It is a well-known principle of statutory interpretation that the legislature is presumed to choose its words carefully and consistently, so use of "local mailing address" rather than "residential address" indicates that Parliament did not intend to require that residential addresses be provided. This presumption of consistent expression "applies not only within statutes but across statutes as well…"[1]

There may be many situations where individuals may be reachable by mailing correspondence to a local mailing address that is not their residential address; for example, directors often have business addresses separate from those of the investor. Furthermore, there is no mention in the Regulatory Impact Analysis Statement of any requirement to provide a residential address.

Had Parliament intended for the IRD to collect residential addresses in a notification or application, it would have been expected to use express language to that effect in the Regulations. Below are examples of terms in other statutes where Parliament expressly intended to capture residential or home addresses (as opposed to business addresses):

- "residential address" is used in the Canada Not-for-profit Corporations Regulations, SOR/2011-223;
- "civic address" in used in the *Regulation Adapting the Canada Elections Act for the Purposes of a Referendum,* SOR/2010-20; and
- "mailing address, if different from the business address" is used in the *Accounting for Imported Goods and Payment of Duties Regulations,* SOR/86-1062

(b) In Contravention of *Privacy Act* Requirements

The forms are inconsistent with the requirements under section 5 of the *Privacy Act*:

> 5. (1) A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates except where the individual authorizes otherwise or where personal information may be disclosed to the institution under subsection 8(2).[2]
>
> (2) A government institution shall inform any individual from whom the institution collects personal information about the individual of the purpose for which the information is being collected.

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1 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 217 [Sullivan].

2 Subsection 8(2) provides that personal information already under the control of a government institution may be disclosed in certain prescribed situations. This subsection does not apply to the gathering de novo of information from an individual.

(3) Subsections (1) and (2) do not apply where compliance therewith might

(a) result in the collection of inaccurate information; or

(b) defeat the purpose or prejudice the use for which information is collected.

The IRD collects information from the investor and does not collect personal information directly from individuals, which appears to be contrary to subsection 5(1) of the *Privacy Act*, since there is no obvious reason that the information cannot be collected from the individuals.

In addition, the forms do not provide information to investors or their directors or officers about the purpose of the collection of personal information,[3] such as dates of births and residential and email addresses, contrary to subsection 5(2) of the *Privacy Act*. To our knowledge, this information is not provided elsewhere.

Residential addresses, dates of birth and email addresses of directors and officers are not required to assess whether an investment is reviewable under Part IV of the Act, nor, in our view, is it necessary to determine if the investment is likely to be of net benefit to Canada in accordance with the factors for assessment set out in the statute.

A person's name, home address and date of birth, combined, can be used to facilitate identity theft. In light of recent high profile privacy breaches, including at Canadian government bodies,[4] institutions should not collect personal information without a proper authorized purpose. To the extent that information is necessary for a national security assessment (as we understand to be the unofficial reason to collect it), the Regulations should be amended to clearly indicate that residential addresses are being requested, and the forms themselves should specify the express purpose for the collection. In the interim, given the quasi-constitutional status of the *Privacy Act,*[5] the Regulations should be interpreted so as not to interfere with the operation of that law.[6]

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3 Each form merely states:

> All personal information created, held or collected by this department is protected under the Privacy Act. This means that you will be informed of the purpose for which it is being collected and how to exercise your right of access to that information.
>
> You will be asked for your consent where appropriate.

4 See, for example, Steven Chase, "Cyberattack deals crippling blow to Canadian government websites" *The Globe and Mail* (June 17, 2015), online: http://www.theglobeandmail.com/news/national/canadian-government-websites-appear-to-have-been-attacked/article24997399/: "Over a couple of hours, the e-mail accounts of government employees stopped working and the Canadian government's presence on the Internet temporarily disappeared. Dozens of websites for major federal departments were rendered inaccessible, from Industry, to Natural Resources, to Justice, to Foreign Affairs, Trade and Development."

"Mr. Clement said Ottawa is constantly bombarded by computer attacks. "There are incursions practically every day of every year. Usually, those incursions are unsuccessful … and so we always have to continue to make our sites and our information as impervious to attack as possible. Usually, that works. Sometimes, it doesn't, and today was a day when it didn't work," he said."

5 See *Lavigne v. Canada (Office of the Commissioner of Official Languages*), 2002 SCC 53 at paras 24-25: "The *Privacy Act* is also fundamental in the Canadian legal system … In view of the quasi-constitutional mission of that Act, the courts have recognized its special nature."

6 See Sullivan *supra* note 1 at 337, regarding the presumption of coherence that applies to the body of legislation enacted by a legislature such that each provision is capable of operating without coming into conflict with any other. See also *Friends of Oldman River Society v Canada (Minister of Transport),* [1992] S.C.J. No 1 at para 42: "there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments".

Accordingly, until there is statutory authority to collect residential addresses, the CBA Section asks that the IRD stop soliciting this information from investors, especially as the purpose for the collection of the personal information has not been stated, contrary to the *Privacy Act*. For personal information that is expressly required by the Regulation, the purpose for the collection should be provided.

Other Issues

Below are other issues that CBA Section members have identified that could be addressed either through the issuance of Ministerial guidance under section 38 of the Act, or through revisions to the forms and Regulations.

(a) Ministerial Guidance

- Clarification of the distinction between a "state-owned enterprise" and ownership or voting interest of a "foreign state" (used in the forms in questions 12 – 18 of the Notification – Acquisition form; questions 11-17 of the Notification – New Business form; and questions 12 – 18 of the Application for Review form) as only the former is defined in the Act.
- Guidance on the level of detail required in the forms about the sources of funding for an investment. The Regulations only ask, in a general manner, for "Sources of funding for the investment;" however, the forms ask the investor to list any and all individuals or entities that have or will provide any financial contribution to the investment and the amount of the contribution (see question 22 of the Notification – Acquisition form and question 23 of the Application for Review form). CBA Section members have received differing responses from the IRD when seeking guidance about the scope of this question. Ministerial guidance on this matter would help to reduce further questions to the IRD and avoid unnecessary delays in certifying applications. For example, if the source of funding is a loan syndicate, it should suffice to provide the approximate total of the funds to be borrowed and, at best, identify the lead bank.
- Clarification on how post-closing earn outs are to be dealt with in the context of an asset transaction under section 3.5 of the Regulations. Subsection 3.5(3) does not contain equivalent language to subsection 3.4(3) and, in situations where the total consideration payable is not quantified at the time the investment is made, the Regulations provide no mechanism to determine the portion of the total consideration that may become payable post-closing.

(b) Revisions to the Regulations and Forms

- Amend the forms and confirm whether the investor can skip questions 13-15 of the forms, if the answer to question 12 ("does a foreign state have any direct or indirect ownership interest in the investor") is "No".
- Include a "Not Applicable" option in the forms, given the introductory clause of question 15 ("If a foreign state has an ownership interest or voting interest in the investor…").
- Revise the Regulations or provide guidance on enterprise value information required for indirect acquisitions of control by WTO investors. Indirect acquisitions of control by WTO investors are not subject to review; however, the flow of questions in the Value section of the forms requires investors to provide the enterprise value of the Canadian business. This is unduly burdensome given that such indirect transactions are not subject to review. We understand that the IRD has accepted notifications that do not provide the enterprise value for indirect acquisitions of control. Either the form should be revised, or guidance provided so that all potential investors and their advisors know

that this information does not need to be provided for indirect acquisitions of control by a WTO investor.

- Consider deleting the requirement to provide a fax number, as most businesses no longer use fax machines on a regular basis and it is not a necessary piece of information for the IRD to have.
- Since the calculation of enterprise value in section 3.3 and 3.4 of the Regulations refer to quarterly financial statements, consider revising the Regulations to provide that where quarterly financial statements are not prepared, the most recent annual financial statements will be acceptable.
- Where it is evident that the direct acquisition of a Canadian business will not be reviewable because the enterprise value threshold will not be exceeded (e.g., where the acquisition value is so far below the threshold that adjusting for liabilities or any unknown portion of the consideration will be immaterial to the reviewability determination), consider whether it is necessary for an "authorized body" to determine the fair market value of any voting interests unknown at the time of acquisition. It is unlikely in practice that an "authorized body" (as defined in the Regulations to include a board of directors or committee thereof) will have taken the time to consider this issue in smaller transactions, and the requirement to do so can impose a disproportionate burden relative to the benefit.

On behalf of the CBA Section, thank you for your consideration of these issues. We would be pleased to discuss these submissions or any questions you may have with you or your colleagues.

Yours truly,

(original letter signed by Gillian Carter for Susan M. Hutton)

Susan M. Hutton
Chair, CBA Competition Law Section

cc. Neil Campbell, Joshua Krane and Kevin Ackhurst, Foreign Investment Review Committee