# Canada

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## I. Introduction

This summary of selected legal developments in Canada during 2008 includes Canada's negotiation of free trade agreements and bilateral investment treaties, Canada-United States trade relations, developments in Canadian competition law and policy and foreign investment review, and newly proposed amendments to insolvency and bankruptcy legislation.

## II. Canada's Free Trade Agreements and Bilateral Investment Treaties**

Following the negotiation of several free trade agreements ("FTAs") and bilateral investment treaties ("BITs") in 2007, and in keeping with the Canadian government's economic plan released in November 2006 where the government committed to "develop a new approach to international trade policy through a comprehensive Global Commerce Strategy[1] to ensure that Canadian businesses can fully participate in global market opportunities," Canadian treaty negotiators were very busy in 2008.[2]

### A. FREE TRADE AGREEMENTS

#### 1. *The Americas*

With no reasonable prospects for the negotiation of the Free Trade Area of the Americas ("FTAA"), smaller sub-regional and bilateral FTAs are becoming the norm, resulting

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1. The Global Commerce Strategy articulated by the government in Advantage Canada included a commitment to pursue regional and bilateral trade, investment and science, and technology agreements, ideally together with Canada's NAFTA partners.

2. DEPARTMENT OF FINANCE CANADA, ADVANTAGE CANADA: BUILDING A STRONG ECONOMY FOR CANADIANS 86 (2006) *available at* http://www.fin.gc.ca/ec2006/pdf/plane.pdf.

in a complex network of agreements that cover not only the traditional goals of trade integration and investment protection, but have also expanded to include other areas.

Major players have been actively negotiating such agreements, with Canada's North American Free Trade Agreement ("NAFTA") partner, the United States, taking the lead. In the Americas alone, the United States has approved five deals with ten countries since 2001, most recently signing deals with Peru (April 2006), Colombia (November 2006), and Panama (June 2007). Consistent with its Global Commerce Strategy, Canada had identified the Andean Community countries (Colombia, Peru, Ecuador, and Bolivia) as being among its next FTA targets. Canada announced its reengagement in the Americas on June 7, 2007 and formally initiated trade negotiations with the Andean Community countries of Colombia and Peru.

The Canada-Peru and Canada-Columbia FTAs, signed in May and November of 2008 respectively, were the first deals Canada has endorsed in the Americas since negotiating an FTA with Costa Rica in 2001. Latin America and the Caribbean are an obvious priority for Canada. Canadian two-way merchandise trade with the region, excluding Mexico, reached over $20 billion in 2007, approximately doubling the trade volume of ten years ago. Canadian direct investment in these countries has grown even more dramatically, from $6 billion in 1990 to some $100 billion, several times the amount of Canadian investment in Asia.

Canada is also continuing its FTA negotiations in 2008 with the Dominican Republic and the Caribbean Community ("CARICOM"), both of which were launched in 2007. A successful inaugural round of negotiations toward an FTA with Panama took place in October 2008 in Ottawa. Negotiations also continue with the Central American Four (El Salvador, Guatemala, Honduras, and Nicaragua), which began in September of 2000.

The FTAs with Peru and Colombia are the second and third FTAs to be signed in 2008 and are Canada's fourth and fifth FTAs in the Americas (NAFTA, Chile, and Costa Rica are the others). The FTAs with Peru and Colombia, both with twenty-three chapters and side agreements on labor and the environment, are comprehensive agreements comparable in scope to NAFTA with chapters covering key areas such as bilateral investment protection, trade in services, and government procurement. In certain respects they are even broader in scope than NAFTA. For example, both contain a chapter on cooperation to facilitate trade-related capacity initiatives with the objective of strengthening the ability of Peru and Colombia to maximize the benefits of the FTAs. They also contain a chapter aimed at combating bribery and corruption and a chapter dealing with trade conducted by electronic means.

The Canada-Peru FTA is to enter into force on January 1, 2009, or the date when both parties have notified of their ratification according to necessary domestic procedures. The Canada-Colombia FTA will enter into force sixty days from the date when the parties have notified of their ratification according to necessary domestic procedures. In accordance with its Policy on Tabling of Treaties in Parliament, the Canadian government will table the agreements in the House of Commons for a period of twenty-one sitting days. During this twenty-one day sitting period, Members of Parliament are able to review, debate, vote on a motion, or send the agreements to committee for further review. Following this period, the government will then introduce legislation to implement the agreements aiming, in the case of Peru, for an entry into force date of January 1, 2009.

### 2. *The Rest of the World*

Unlike the comprehensive FTAs with Peru and Colombia, the year's earlier FTA signed between Canada and the States of the European Free Trade Association (EFTA) (Iceland, Liechtenstein, Norway, and Switzerland) can be described as a "first-generation" agreement limited to tariff elimination. Legislation was tabled in Parliament to implement EFTA on December 1, 2008. Similar to the EFTA, the Canada-Jordan FTA, with negotiations concluded in August of 2008, is limited to market access, although it is accompanied by side labor and environment agreements. Investment protections are provided in the Canada-Jordan BIT which was concluded in 2007. The texts of these agreements with Jordan are not yet available, as they are going through their final legal scrub prior to formal signature and ratification.

FTA negotiations continue with South Korea and Singapore. Canada has also undertaken joint studies with Japan and the European Union (EU) regarding potential FTAs. On October 17, 2008, at the Canada-European Union Summit in Quebec City, it was announced that Canada and the European Union have agreed to prepare formal mandates with a view to launching negotiations on an economic partnership as early as possible in 2009.

## B. Bilateral Investment Treaties

As do the investment chapters of Canada's FTAs, BITs enable investors to seek monetary damages from a foreign government by bringing a claim before an independent arbitral tribunal in the event of a dispute stemming from harmful government action such as discriminatory or unfair treatment or expropriation without compensation.

Although negotiations for BITs with Jordan and India concluded in 2007, as they have yet to be formally signed and ratified by the parties, the texts remain unavailable. Nevertheless, they are based on the 2004 Model Foreign Investment Promotion and Protection Agreement ("FIPA") and are expected to be similar to the Peruvian BIT.

In 2008 Canada concluded negotiations for a BIT with Madagascar and, at the present time, continues to actively negotiate BITs with Tanzania, Indonesia, Vietnam, Kuwait, Mongolia, and China.

# III. Canada–United States Trade Relations*

During 2008, there were several key developments in Canada's trading relationship with the United States, included those related to softwood lumber, NAFTA negotiations and amendments, and mutual recognition in the area of trade security.

## A. Softwood Lumber Agreement

The 2006 Softwood Lumber Agreement ("SLA") was intended to bring an end to the disputes regarding softwood lumber trade between the United States and Canada. Instead, 2008 saw new disputes arise.

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The London Court of International Arbitration, which makes binding decisions to settle disagreements between the United States and Canada arising out of the SLA, issued a ruling in March on the United States' first request for arbitration under the SLA. The United States alleged in August 2007 that Canada violated the terms of the SLA by failing to impose agreed-upon export charges and failing to limit the volume of exports in a timely manner.[3] The SLA requires that Canada adjust its export measures based upon U.S. lumber demand. At issue in the case was whether Canada adjusted its calculations quickly enough in response to reduced lumber demand in the United States that was a result of the poor housing market in the United States. The London Court of International Arbitration held hearings in December 2007 and issued a ruling on March 3, 2008 that softwood lumber producers in British Columbia and Alberta did not violate the SLA. However, the Court did find that Québec, Ontario, Manitoba, and Saskatchewan violated the SLA by not cutting back on exports in early 2007.[4]

The United States and Canada had agreed that the first phase of this arbitration proceeding would be restricted to the issue of liability, while the second phase would deal with possible remedies. The London Court of International Arbitration has not yet issued a ruling regarding remedies. The United States argued in May that Canada should compensate the United States by imposing an additional charge on lumber exports. Canada has argued that the SLA is a prospective remedy, and that it cannot be used to impose a punishment for past actions, only to remedy future actions.[5] A decision on remedies is expected by the end of the year.

In January 2008, the United States filed a second request for arbitration, alleging that certain benefit programs in Quebec and Ontario violated the SLA by offsetting or reducing export measures imposed upon producers and exporters of Canadian softwood lumber products.[6] In particular, the United States alleged that these benefit programs provide grants, loans, loan guarantees, tax credits, and other financial incentives that benefit Canadian softwood lumber producers and exporters.[7] Canada filed its response in February. This case is still pending before the London Court of International Arbitration and no decision has been issued yet.

The U.S. Farm Bill, passed in May 2008, also had important implications for the SLA. Canada expressed disappointment and concern about the Softwood Lumber Act of 2008, which was a last minute addition to the U.S. Farm Bill and added new reporting requirements for U.S. importers of softwood lumber. Government officials in Canada have said

3. *See* U.S. Request for Arbitration, Softwood Lumber Agreement (U.S. v. Can.), London Ct. of Int'l Arbitration (Aug. 13, 2007), *available at* http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/13082007-RequestforArbitration.pdf.

4. *See* ECONOMIST INTELLIGENCE UNIT, *Canada: Trade Regulations* (Sept. 23, 2008); *see also* Softwood Lumber Agreement (U.S. v. Can.), London Ct. of Int'l Arbitration (Mar. 3, 2008), *available at* http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/Award03-03-2008.pdf.

5. *See* FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *FactSheet: Softwood Lumber Agreement (SLA) Arbitration Process: Canada's Position* (2008), http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/notices-avis/canada.aspx?lang=eng.

6. U.S. Request for Arbitration, Softwood Lumber Agreement (U.S. v. Can.), London Ct. of Int'l Arbitration (Jan. 18, 2008), *available at* http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/jan18-ArbitrationRequest.pdf.

7. *Id.*

that the new provisions likely violate the SLA.[8] The new provisions require proof of payment of export taxes and include enforcement measures, such as intrusive company audits, penalties, and fines. Canadians fear that the legislation "will wrap lumber exports in red tape."[9]

## B. NAFTA

The North American Free Trade Agreement ("NAFTA") was very much at the forefront of the 2008 U.S. presidential election. The debate regarding renegotiating NAFTA first arose during the primaries when Barack Obama and Hillary Clinton tried to outdo each other on who liked NAFTA least. President Obama has said that he would like to renegotiate NAFTA, and in particular, update the agreement to include provisions for labor rights and environmental protections. Renegotiating NAFTA has met with support from labor unions in the United States and in Canada. Canada's United Steelworkers union has urged Prime Minister Stephen Harper to raise concerns regarding NAFTA's chapter 11, which allows corporations to launch private lawsuits to overturn government actions taken in the public interest, and to change provisions in NAFTA that forbid Canada from reducing shipments of oil and natural gas to the United States.[10] The Union Steelworkers represents 280,000 workers across Canada.

In April 2008, the United States, Canada, and Mexico amended the rules of procedure for Article 1904 binational panel reviews.[11] Chapter 19 of NAFTA establishes a mechanism for replacing judicial review of final antidumping and countervailing duty determinations involving imports from Canada, Mexico, or the United States, with review by an independent binational panel. The amendments, published in April, changed certain rules for commencing, conducting, and completing panel reviews. The most significant of the amendments relates to a requirement that all participants other than individuals and corporate persons be represented by a counsel of record. Other amendments include updates to reflect changes in the Canadian and Mexican governments, an amendment regarding what documents shall be forwarded by the responsible Secretary to the other involved Secretary in a case, and amendments regarding certain filing requirements.[12]

Certain discussions started in 2007 stalled in 2008. NAFTA Trade Ministers had announced in August 2007 that they wanted to boost trade and remove non-tariff barriers under NAFTA for swine, steel, consumer electronics, and chemicals. NAFTA Trade Ministers were expected to meet in May 2008 to agree to specific work plans for these four sectoral initiatives. According to officials in February, the three countries were very close to finishing the plans. However, a lack of concrete deadlines and the need to make deci-

8. *See* Gordon Hamilton, *Ottawa Protests U.S. Lumber Law, B.C. Forest Minister Likens New Bill to a 'Small Poke in the Eye' at Canada*, VICTORIA TIMES COLONIST, May 16, 2008 (Final Edition).

9. *Id.*

10. *See Steelworkers to Prime Minister Harper: Meet with President-Elect Obama to Seek Changes to NAFTA*, CANADA NEWSWIRE, Nov. 13, 2008.

11. *See North American Free Trade Agreement: Amendments to Rules of Procedure for Article 1904 Binational Panel Reviews*, 73 FED. REG. 19,458 (Apr. 10, 2008).

12. *See id.* at 19,458-19,459.

sions on a trilateral basis slowed progress this year[13] and it appears that this issue will not be resolved in 2008.[14]

### C. Mutual Recognition Agreement Between U.S. and Canada for Customs-Trade Security

Canada and the United States entered into a mutual recognition agreement on June 28, 2008, recognizing the compatibility between the United States' Customs-Trade Partnership Against Terrorism ("C-TPAT") program and Canada's Partners in Protection ("PIP") program. The agreement was concluded after extensive collaboration between Canada's Border Security Agency ("CBSA") and U.S. Customs and Border Protection ("Customs"), and after a detailed comparison of the cargo security programs of the two countries.

The arrangement recognizes that both countries apply similar security standards and perform similar site validations when approving companies for membership in their respective cargo security programs.[15] The mutual recognition agreement is intended to streamline the flow of commerce between Canada and the United States. Although separate applications are still required for membership in each program, the agreement is intended to make it easier for a company that is a participant in one program to become a participant in the other. Benefits of the mutual recognition arrangement to industry include: (1) easier eligibility for those who wish to belong to both the C-TPAT and PIP programs, (2) the possibility of needing only one site validation for applicants to both programs, and (3) members being eligible to use Free and Secure Trade (FAST) lanes in both directions in order to benefit from expedited border clearance.[16]

Businesses have said that they view this mutual recognition agreement as a mere "first step" toward integration of the two countries' cargo security programs, and hope that eventually businesses enrolled in one program automatically will be enrolled in the other.[17]

## IV. Competition Law and Policy*

The most significant developments in Canadian competition law and policy over the past year included proposals for amending the *Competition Act*, beer merger battles, and court decisions on class action certifications.

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13. *See NAFTA Ministers Could Adopt Sectoral Work Plans To Boost Trade*, 26 Inside U.S. Trade 9, Feb. 29, 2008.

14. *See NAFTA Trade Ministers on Sectoral Works Plans Postponed*, 26 Inside U.S. Trade 18, May 2, 2008.

15. *See Canada, U.S. to Sign Mutual Recognition Pact on Cargo Security*, International Trade Daily, July 1, 2008.

16. *See* FedEx, *PIP/C-TPAT Security Arrangement Signed*, July 10, 2008 http://ftn.fedex.com/news/NewsBulletinDisplay.jsp?url=071008&lang=en.

17. *See Business Wants Better C-TPAT Canada Deal; Mexico Pilot Program Underway*, 26 Inside U.S Trade 28, July 11, 2008.

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### A. Conservative Election Platform Proposes Changes to Canada's Competition Act

The reelection of the minority Harper Government may result in significant amendments to the Competition Act (the "Act"). The Conservative Party election platform (the "Platform") promised to implement many of the significant changes to Canada's competition and foreign investment laws recommended by the Government-appointed Competition Policy Review Panel (the "Panel") in its report released in June 2008, including:

- **The introduction of per se liability for hard core price fixing**–The Platform proposes to make "hard core" cartel activity, such as price fixing, illegal per se, i.e., without proof of a negative effect on competition. This would move Canadian law closer to the U.S. approach, and would make it easier for the Crown to successfully prosecute price-fixing cartels. It may also make it easier for civil plaintiffs to prove liability in follow-on class actions in Canada.
- **Increased Penalties for Conspiracy and Bid-rigging**–The Platform proposes to increase the maximum fines for conspiracy and bid-rigging to C$25 million and the maximum prison terms for both offenses from five years to fourteen years (although individuals are rarely imprisoned for such offenses in Canada).
- **Fines for Abuse of Dominance Cases**–The Platform would provide for fines of up to C$10 million (and up to C$15 million for repeat offenders) for persons found to have engaged in abuse of dominance. This goes beyond the Panel recommendation of "modest" administrative monetary penalties ("AMPs") of up to C$5 million for abuse of a dominant position. The Act currently provides for AMPs of up to C$15 million, but only against dominant air carriers. This new provision would apply across all industries.

Although the Platform adopted many of the Panel's recommendations, it was silent on several other recommendations, including significant proposed changes to Canada's merger review process and the decriminalization of certain pricing offenses.

With respect to mergers, the Panel endorsed Canada's substantive merger provisions, but recommended changing Canada's merger review process to closely resemble the U.S. "second request" model. This would be a significant change to the existing process, under which the Bureau has up to forty-two days to review a merger, following which the parties are free to close unless the Bureau obtains an order from the Competition Tribunal prohibiting them from doing so.

The Panel also recommended decriminalizing price maintenance, price discrimination, promotional allowances, and predatory pricing. These activities would be addressed under the Act's civil abuse of dominance provisions, or new standalone civil provisions.

### B. The Labatt/Lakeport Merger

In January 2008, the Commissioner suffered two losses in court battles related to the acquisition of Lakeport by Labatt.

First, the Federal Court of Appeal ("FCA") dismissed the Commissioner's appeal of a March 2007 Tribunal order that denied the Commissioner an interim order to delay closing of Labatt's acquisition of Lakeport Brewing for thirty days to permit the Commis-

sioner to complete her review.[18] Section 100 of the Act provides a mechanism for the Commissioner to seek an interim order where, "in the Commissioner's opinion, more time is required to complete the inquiry," and where, in the absence of an order, an action could be taken that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger. While the Commissioner lost the appeal, the FCA expressly confirmed that the Commissioner need not demonstrate that the proposed transaction will lead to a substantial lessening of competition in order to be granted an interim order to delay closing under section 100 of the Act. Rather, the Commissioner need only demonstrate that, without an interim order, the Tribunal's remedial powers would be substantially impaired.

The Commissioner's second loss came when the Federal Court struck down orders for the production of documents and information issued under section 11 of the Act against Moosehead and Labatt/Lakeport, finding that representations made by the Commissioner in her ex parte application had been "misleading, inaccurate and incomplete in several material respects."[19]

Following the Federal Court's reasons, the Commissioner and deputy Minister of Justice appointed a special advisor to review the standard of disclosure required in ex parte applications and the Bureau's section 11 process. However, the special advisor's report, released in August 2008, is unlikely to change the Commissioner of Competition's use of ex parte process to obtain orders for the production of documents and information issued under section 11 of the Competition Act. The report largely commends the Commissioner's approach to section 11 orders. It also says the Court's findings in Labatt were unwarranted, even though the Commissioner did not appeal the Court's findings or include a review of the decision as part of the special advisor's terms of reference.

### C. Class Certification in Canada - Dynamic Random Access Memory (DRAM)

In May and June 2008 respectively, defendants in price-fixing class actions in British Columbia and Québec were successful in resisting certification of class actions involving DRAM products, memory chips used in personal computers, and a variety of other "tech" products. The defendants had been found guilty of price-fixing in the United States and had paid significant amounts to settle U.S. class actions brought on behalf of direct purchasers of DRAM products. Although the result in these two cases was the same, the approach of the two courts with respect to what constitutes a common issue indicates a potentially significant divergence in these two provinces in proposed class actions involving allegations of price-fixing. Both decisions are currently under appeal.

#### 1. *The B.C. Decision*

In *Pro-Sys Consultants Ltd. v. Infineon Technologies*,[20] the plaintiffs sought to certify a class predominantly made up of indirect purchasers of products containing DRAM. They did

18. Canada (Commissioner of Competition) v. Labatt Brewing Co., [2007] C.C.T.D. No. 5 (Comp. Trib.) at 61, *appeal dism'd*, [2008] 289 D.L.R. 4th 500 (Fed. C.A.) (Can.).

19. Canada (Commissioner of Competition) v. Labatt Brewing Co., [2008] F.C.J. No. 127 (Can.).

20. Pro-Sys Consultants Ltd. v. Infineon Technologies AG, [2008] B.C.J. No. 831 (B.C.S.C.) (Can.).

not buy DRAM chips from any of the defendants. Rather, they bought computers and other products that contained DRAM chips sold to others higher up the distribution chain. The court declined to certify the case as a class action because the plaintiff failed to establish that liability to the class members was a common issue. Specifically, the plaintiff did not demonstrate a "class-wide basis of establishing that an overcharge filtered down to and was borne by direct and indirect purchaser of DRAM products in British Columbia."[21] The court also found that Pro-Sys would not be a suitable representative plaintiff, not only because it could not show a class-wide basis for establishing liability, but also because it was in a conflict of interest with other class members at different levels of the distribution chain.

The *Pro-Sys* decision highlights the difficulties faced by plaintiffs seeking to certify price-fixing class actions on behalf of indirect purchasers. Because the class members did not purchase directly from the defendants, establishing liability requires common proof that prices were increased to direct purchasers and that those increases were passed on throughout the distribution chain.

### 2. *The Québec Decision*

On June 17, 2008, the Québec Superior Court also denied certification in *Option Consommateurs v. Infineon Technologies*,[22] but on different grounds. The defendants moved to dismiss the certification motion on the grounds that Québec courts lack jurisdiction to hear the case; these motions were heard at the same time as the certification motion. The court granted the jurisdictional motion, essentially because the plaintiff did not allege sufficient facts to establish that a "prejudice was suffered in Québec" (among other things), a necessary threshold for Québec courts to assume jurisdiction over foreign defendants. In his reasons, Mr. Justice Mongeau held that all the relevant facts occurred outside Québec. Although the court dismissed the action for lack of jurisdiction, it also assessed the criteria for certification, which it viewed differently than the B.C. Court had in *Pro-Sys*. The Québec Superior Court held that there were sufficient common issues, even though the class comprises direct and indirect purchasers, and even though suppliers used various distribution chains for the different products they manufactured. The Québec Court indicated that it would have denied certification on the basis that the plaintiff had not established a cause of action under Canadian law because guilty pleas in the United States were not sufficient to establish a violation of the Canadian Competition Act. The Canadian Competition Act, unlike section one of the Sherman Act in the United States, requires proof that a conspiracy led (or would lead to) an "undue" lessening of competition. The Québec Court also found, as did the B.C. Court, that the proposed representative plaintiff was in a conflict of interest in representing the interests of direct and indirect purchasers.

21. *Id.* ¶ 149.

22. Option Consommateurs v. Infineon Technologies AG, 2008 Q.C.C.S. 2781 (Superior Court of Québec, District of Montréal) (Can.).

## V. Foreign Investment Review*

Release of a panel's report on Canadian foreign investment policy and the minority Conservative government's proposed implementation of these and other changes were the leading developments in Canadian foreign investment review during 2008.

### A. Review Panel Releases Report

On June 26, 2008, the Competition Policy Review Panel released its report on Canada's foreign investment and competition policies, entitled "Compete to Win".[23] The Panel was created in July 2007 by the Conservative minority government with the mandate of examining the impact of Canada's foreign investment and competition laws on the domestic and international competitiveness of the Canadian economy.

The Panel offered several far-reaching proposals to amend Canadian foreign investment review laws, including the principal piece of legislation in this regard, the Investment Canada Act ("ICA").[24] These proposed changes affect the review threshold and foreign ownership restrictions.

#### 1. *Recommendations to Amend the Investment Canada Act*

The Panel's recommendations are designed to limit the application of the ICA and to make it more difficult for the Minister to refuse approval to those transactions that would be caught.

Under the current regime, apart from certain specified sectors, the general review threshold for most direct acquisitions of Canadian businesses is $295 million, based on the book value of the assets of the relevant company. Acquiring parties whose transactions are subject to review under the ICA must persuade the responsible Minister that the acquisition will be of "net benefit to Canada." In almost all cases, this requires the foreign investor to provide the Minister with binding undertakings, setting out the specific steps it will take to improve the Canadian business.

The Panel recommended changing the current regime in two crucial ways. First, there would be a substantially higher threshold for review ($1 billion), meaning that far fewer transactions would require approval. Second, rather than investors having to justify that their transactions are of "net benefit" to Canada, the Minister would instead have the onus of demonstrating why the transaction should not proceed.

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23. Competition Policy Review Panel, *Compete to Win: Competition Policy Review Panel Releases Report* (2008), www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home.

24. Investment Canada Act, R.S.C, ch. 28 (1st Supp.) (1985).

2. *Recommendations to Amend Sectoral Foreign Ownership Restrictions*

a. Financial Services

The Panel commented that since 1998, when the Minister of Finance declined to approve two separate proposed mergers of major Canadian banks,[25] there has been a de facto prohibition on mergers between large financial institutions in Canada. The Panel noted the relative decline in the size of Canadian banks on a global scale since that time and commented that this has prevented Canadian-based financial institutions from competing more effectively in international markets. At the same time, the Panel noted that allowing greater international competition, as well as more competition between bank and non-bank lending institutions in Canada, would benefit both the financial services sector and the public interest in competitive and efficient markets. Accordingly, the Panel recommended that the Minister of Finance should remove the de facto prohibition on bank, insurance, and cross-pillar mergers of large financial institutions subject to regulatory safeguards, enforced and administered by the Office of the Superintendent of Financial Institutions and the Competition Bureau.

b. Air Transport

Canada currently limits foreign ownership of Canadian air carriers to twenty-five percent of voting equity.[26] In the Panel's view, increasing the level of foreign investment permitted in the air transportation sector would enhance sustainable competition in the Canadian industry without necessarily impairing service. The Panel recommended that the Minister of Transport increase the limit on foreign ownership of air carriers to forty-nine percent of voting equity on a reciprocal basis through bilateral negotiation, and complete "Open Skies" negotiations with the European Union as quickly as possible to be more competitive with the U.S. industry. The Panel also recommended that the Minister issue a policy statement by December 2009 on whether foreign investors should be permitted to establish separate Canadian-incorporated domestic air carriers using Canadian facilities and labor.

c. Telecommunications and Broadcasting

The Panel noted the significant and continuing product innovation in the telecommunications and broadcasting sector, where current rules limit the holding of voting shares by non-Canadians to twenty percent at the operating company level and 33.3% at the holding company level.[27] The Panel concluded that liberalizing foreign investment restrictions would bring demonstrable economic benefits by increasing competitive pressures on all participants in the market. Consistent with a recent federal government telecommunications policy review panel, the Panel recommended a two-phased approach

25. *See* Press Release, Department of Finance Canada, Statement by The Honourable Paul Martin, Minister of Finance, on the Bank Merger Proposals (Dec. 14, 1998), *available at* http://www.collectionscanada.gc.ca/webarchives/20071122063125/http://www.fin.gc.ca/news98/98-124e.html.

26. CANADA TRANSPORTATION ACT, 1996 S.C., c. 10 § 61. A "Canadian" is defined in § 55(1) as, inter alia, "a corporation. . .of which at least seventy-five percent. . .of the voting interests are owned and controlled by Canadians."

27. Telecommunications Act, 1993 S.C., c. 38 § 16. The term "Canadian" is defined in § 2(2) of the Canadian Telecommunications Common Carrier Ownership and Control Regulations, SOR/94-667 (Can.).

to foreign participation in the industry. In the first phase, foreign companies would be permitted to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to ten percent of the telecommunications market in Canada. The second phase would follow a review of broadcasting and cultural policies, with the goal of liberalizing the sector in a manner that would be competitively neutral for telecommunications and broadcasting companies.

d. Uranium

The Panel recommended that the Minister of Natural Resources issue a policy directive to liberalize the non-resident ownership policy on uranium mining, subject to (i) new national security legislation coming into force, and (ii) Canada securing commensurate market access benefits allowing for Canadian participation in the development of uranium resources outside Canada or access to uranium processing technologies for the production of fuel for nuclear power plants.

## B. Conservative Party Proposals

During the 2008 federal election campaign, the Conservative party announced that, if elected, it would implement many of the Panel's recommendations in respect of the ICA, as well as take other steps with regard to foreign investment in Canada.[28] Specifically, the Conservatives promised to:

- amend the ICA to increase the threshold for foreign investment reviews from the current level of $295 million in gross asset value to $1 billion in enterprise value, with the increase to be phased in over four years;
- ensure greater transparency in the ICA process by requiring the responsible Minister to give reasons if an investment is disallowed;
- establish a new national security review mechanism in the ICA to ensure that foreign investments cannot jeopardize Canada's national security;
- work with Canada's trading partners to ensure that foreign investment is a "two-way street" and that Canadian companies also receive increased access to investment opportunities abroad;
- increase the permissible level of foreign investment in domestic airlines from 25 percent to 49 percent through bilateral negotiations with Canada's major partners such as Europe and the United States that would also secure increased access to international flight routes and landing rights through Open Skies agreements; and
- revise the Non-Resident Ownership Policy for uranium mining and development provided that Canada is able to negotiate reciprocal benefits with potential investor nations and that any foreign investments in this sector meet the national security test.

Following the vote on October 14, 2008, the Conservatives once again obtained a plurality (but not a majority) of seats in the House of Commons. It remains to be seen whether, or how quickly, they intend to proceed with the proposed amendments described above, having only secured minority government status. Further, given political develop-

28. *See* Stand Up for Canada, Leadership for a Canada the Competes (Sept. 12, 2008), http://www.conservative.ca/EN/1091/104789.

ments in Canada at the end of 2008, there is the possibility that a coalition of other parties will form the government early in 2009. If such a change occurs, it is highly unlikely that the proposed amendments will be made. If enacted, however, these proposed changes would significantly reduce the current limitations on foreign investment in Canada. For example, the application of the ICA would largely be limited to circumstances where "national security" interests are implicated.[29]

## VI. Coming into Force of the Wage Earner Protection Program Act and Certain Amendments to the Bankruptcy and Insolvency Act

Canada is currently engaged in a process that will reform the Canadian insolvency regime. Rather than engaging in a wholesale amendment to the applicable legislation, Canada is adopting a "staged approach" to the reforms. The process began in 1992 and will continue into the foreseeable future with regular Parliamentary reviews of the applicable legislation. The following describes the insolvency reforms that began in 2005 and came into force in 2008.

*An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act, and the Companies' Creditors Arrangement Act, and to make consequential amendments to other Acts* (the "Insolvency Reform Act 2005") was introduced in the House of Commons on June 3, 2005 and received Royal Assent on November 25, 2005. At the time the Insolvency Reform Act 2005 was passed, stakeholders recognized that there were issues with the legislation, and subsequent to the legislation receiving Royal Assent. A process was undertaken to determine what additional amendments ought to be made to address stakeholder concerns. On October 29, 2007, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act, and chapter 47 of the Statutes of Canada 2005* (the "Insolvency Reform Act 2007") was introduced and it received Royal Assent on December 14, 2007.[30]

The substantive amendments made by the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007* come into force on proclamation and July 7, 2008 was established as the date that certain, but not all, of the provisions of the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007* came into force.

### A. Wage Earner Protection Program Act

The insolvency reforms that came into force in 2008 include the enactment of a new piece of legislation called the *Wage Earner Protection Program Act* (the "WEPPA"). The

29. In May 2008, the Conservative Minister of Industry relied on "national security" considerations to deny approval to the proposed acquisition by Alliant Techsystems Inc. of the space division of MacDonald, Detwiller and Associates Ltd. The Minister was concerned that this acquisition would result in the transfer to U.S. control of satellite technology used by the Canadian Government to monitor Canada's Artic interests. The decision was notable because it marked the first time in the ICA's twenty-three year history that a non-cultural transaction had been denied approval. The decision also indicates the type of "national security" concerns that may result in non-approval, at least under a Conservative government. *See* Letter from Jim Prentice, Minister of Industry Canada, to Keith Ross, Senior VP Alliant Techsystems Inc. (Apr. 8, 2008), *available at* http://www.cbc.ca/bc/news/bc-080410-MDA-letter.pdf.

30. The Insolvency Reform Act of 2007 was originally introduced earlier in 2007, but died on the order paper when Parliament was prorogued in September 2007.

WEPPA establishes a government-administered program, the Wage Earner Protection Program, ("WEPP") to provide compensation for wages and other remuneration owing to employees in the case of the bankruptcy or receivership of their employer. The WEPP provides coverage for unpaid salaries, commissions, vacation pay, gratuities, bonuses, and shift premiums for most employees. The maximum amount of the claim that can be paid out to an employee under the WEPP is the greater of $3,000 or an amount equal to four times the employee's maximum insurable earning under the Employment Insurance Act. The WEPP does not provide coverage for termination or severance pay.

The WEPP applies in respect of amounts owing by an employer: (a) who becomes bankrupt on or after July 7, 2007; or (b) whose property comes into the possession or under control of a receiver on or after July 7, 2008.

### B. Employee Remuneration Charge[31]

The BIA was amended to create a priority charge in respect of unpaid employee remuneration up to a maximum of $2,000 in respect of wages, salaries, commissions or compensation for services rendered (but not severance or termination), and up to $1,000 in respect of disbursements owing to traveling salespeople, during the period: (a) beginning six months before the date of the initial bankruptcy event and ending on the date of bankruptcy; or (b) six months prior to the first date a receiver within the meaning of section 243(2) of the BIA was appointed in respect of a debtor. The priority regime in the BIA was also amended to create a preferred claim: (a) for any unpaid amounts subject to the employee remuneration charge; and (b) to reflect the impact of the employee remuneration charge on the claims of secured creditors.

These new provisions will apply where: (a) the debtor becomes bankrupt on or after July 7, 2008 or a bankruptcy results from proposal proceedings commenced on or after July 7, 2008; or (b) a receiver or an interim receiver is appointed on or after July 7, 2008.

### C. Pension Charge

The amendments to the BIA create priority charges with respect to: (a) any unremitted employee pension contributions, in respect of a defined benefit pension plan; (b) any unpaid normal costs as required by the applicable pension legislation; and, in respect of defined contribution pension plans; and (c) any unpaid employer contributions, also came into force in 2008. These amendments also create a preferred claim that parallels the preferred claim created in connection with the employee remuneration charge. These new provisions will apply where: (a) the debtor becomes bankrupt on or after July 7, 2008 or a bankruptcy results from proposal proceedings commenced after July 7, 2008; or (b) a receiver or an interim receiver is appointed on or after July 7, 2008.

31. The definition of "current assets" has not been brought into force. This definition is key to the application of the employee remuneration charge because the employee remuneration charge attaches only to the debtor's current assets, which is (intended to be) defined as "cash, cash equivalents – including negotiable instruments and demand deposits – inventory or accounts receivable, or the proceeds from any dealing with those assets".

## D. Initial Bankruptcy Event–Commencement of CCAA Proceedings

The definition of "initial bankruptcy event" in the BIA was amended to add the commencement of a proceeding under the Companies' Creditors Arrangement Act (the "CCAA") to the list of initial bankruptcy events. This means that the commencement of proceedings under the CCAA will, among other things, act as a trigger for avoidance transactions if the CCAA reorganization fails and the debtor becomes bankrupt as a result. The amendment will apply in respect of a debtor who becomes bankrupt on or after July 7, 2008, or in respect of whom proposal proceedings under the BIA are commenced on or after July 7, 2008, notwithstanding when the CCAA proceedings in respect of the debtor were commenced.

## E. Equity Claim–Definitions

Definitions of "equity claim," "equity interest," and "shareholder" were added to the BIA and will apply in respect of a debtor who becomes bankrupt on or after July 7, 2008 or in respect of whom proposal proceedings are commenced on or after July 7, 2008. It should be noted that most of the amendments to the BIA in respect of which these new definitions are applicable are not yet in force. The definitions are, however, relevant to the amendment to the BIA respecting the non-dischargeability of debts or liabilities for obtaining property and services by false pretences or fraudulent misrepresentation (see below).

## F. Aircraft Objects–BIA

The amendments to the BIA that are intended to complete the implementation of the insolvency remedies contained in the *Convention on International Interests in Mobile Equipment* (the "Cape Town Convention") and, specifically, the *Protocol on Matters Specific to Aircraft Equipment* ("Aircraft Protocol") in connection with proceedings under the BIA were brought into force in respect of a debtor who becomes bankrupt on or after July 7, 2008 or in respect of whom proposal proceedings are commenced on or after July 7, 2008. It should be noted that the provisions amending the CCAA to complete the implementation of the insolvency remedies provided for by Aircraft Protocol in CCAA proceedings are not yet in force.

## G. Non-dischargeable Debt–Obtaining Property or Services

The amendment to the BIA dealing with the discharge of debt to provide that an order of discharge does not release a bankrupt from any debt or liability for obtaining property and services by false pretences or fraudulent misrepresentation other than a debt or liability that arises from an equity claim was brought into force in 2008. This amendment will apply in respect of a debtor who becomes bankrupt on or after July 7, 2008 or where the bankruptcy resulted from proposal proceedings commenced on or after July 7, 2008.

## H. Non-dischargeable Debt–Student Loan Debt

The amendments to the BIA reducing the period of time a student must wait after ceasing to be a full or part-time student before a discharge order will release a debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act*, or any enactment of a province that provides for loans or guarantees of loans to students from ten down to seven years came into force in 2008. The new provisions apply where the debtor obtains his or her discharge on or after July 7, 2008.

The amendment reducing to five years the period a bankrupt will have to wait to make a "hardship" application to have student loan debt or obligation discharged is also now in force. This amendment applies to all debtors notwithstanding when the bankruptcy or the process that results in the bankruptcy is initiated.

## I. Property of the Bankrupt

The BIA was amended in 2008 to provide that property in a Registered Retirement Savings Plan or a Registered Retirement Income Fund, other than property contributed in the twelve months before the date of the bankruptcy, will not be available for distribution among a bankrupt's creditors. Amendments were also made to the regulations under the BIA to include property in a deferred profit sharing plan, other than property contributed in the twelve months before the date of the bankruptcy, in the property that will not be available for distribution among a bankrupt's creditors. These provisions will apply where the debtor becomes bankrupt on or after July 7, 2008 or a bankruptcy resulted from proposal proceedings commenced on or after July 7, 2008.

## J. Remaining Amendments

It is expected that the remaining provisions of the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007* will be proclaimed into force in early 2009.