STIKEMAN ELLIOTT

National Champions -

Canadian Competition & Industrial Policy

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Introduction

Every two years, the nations of the world unite in celebration of The Olympic Games. Citizens from all corners of the globe cheer in support of their national sports champions as work comes to a standstill in eager anticipation of "the big game". Notwithstanding the stellar displays of athletic ability and sportsmanship throughout the two weeks, what matters most for many when the lights fade and the stands empty is the ever-present medal count - the total number of gold, silver and bronze medals collected by a nation's athletes and the country's ranking in comparison with rival nations.

Considering the strong nationalist sentiments surrounding international sporting competitions, it is perhaps not surprising that many also feel strongly about "national champions" in the economic sense. Large world-renowned enterprises or industries, globally diversified and efficient with top international competitive positions, frequently inspire pride in the citizenry of the countries which they call "home" and a desire to ensure their continued flourishing in the face of competition from "foreign" competitors. This can be so despite the reality that economic interests of the enterprise may diverge sharply from those of the home citizenry in the drive to maximize profitability and shareholder value.

This paper examines Canada's policy toward, and treatment of, national champions in the context of merger review as well as restrictions on, and review of, the foreign ownership of Canadian firms. It concludes, consistent with experiences in other jurisdictions, that national champions, and firms seeking to become national champions, are not and have not (generally speaking) been afforded special treatment under Canadian merger review. Rather, it is the restrictions placed on foreign investment in Canadian firms active in certain "sensitive" economic sectors, such as aviation, banking and telecommunications, where Canada's industrial policy has been most protectionist. This sectoral protectionism, while increasingly under attack, has been joined recently by calls to take geopolitical factors into account when determining when foreign investment in the Canadian economy should be permitted.

National Champions Industrial Policy – A Brief Overview

Three broad approaches toward industrial policy exist: pro-market, propping up lame ducks, and promotion of strategic sectors to create national champions.[2] Pro-market policies are typically associated with free trade and vigorous competition policy, while propping up lame ducks involves "supporting large, ailing companies to avoid the social consequences of large industrial bankruptcies or major restructuring", typically through subsidies and trade protection measures (*e.g.*, tariffs, duties).[3]

Advocates of the third approach, that of promoting strategic sectors to create national champions, typically advance three arguments in support of their position.[4] First, it is argued that as markets increasingly become globalized (and commoditized), the only source of competitive advantage

between firms in different countries is lower prices, which requires economies of scale and scope beyond those that can be obtained by firms confined to the national market. Second, and following from the first point, it is suggested that firms must grow to a certain critical mass in order to be competitive at home and abroad.[5] Finally, it is argued that the state must support certain strategically important sectors (such as telecommunications, banking, transportation, *etc.*) for its own strategic interests.

A lot of criticism has been levelled at arguments favouring the promotion of national champions. In summary, the criticisms are both theoretical and practical in nature. For example, in response to the critical mass and economies of scale arguments, Maincent and Navarro argue that "the presence of economies of scale does not justify intervention" because "if entry or capacity expansions are profitable … a rational firm will invest and grow to the efficient size, with or without government support."[6] Further, firms can benefit from economies of scale through joint ventures or other arrangements short of common ownership and control.

In addition, a practical difficulty exists in terms of deciding which sectors and firms to develop into national champions and ensuring that government support is actually used to that end. As the German Monopolies Commission states:

> How does a policy maker know which sectors or companies are suitable subjects of strategic foreign trade policy? How does he know which technologies need to be developed and who is suited best to do this? How can he assure that the companies that receive funding or enjoy protection from competition do not use these benefits as an incentive to relax and fall back in the development of new products and production processes?[7]

The German Monopolies Commission also questions the notion that a country requires national champions to prosper: "What really counts is that [a nation] effectively uses its own resources, increases its productivity through innovation and supplies goods which are geared to its strengths in the quid pro quo of international exchange of goods and services, without "national champions"."[8] More generally, widely implemented national champions policies can also lead to a sort of prisoner's dilemma – if each country supports national champions in the same sector and to the same extent, their competitive position will not be changed significantly.[9]

Notwithstanding criticisms of the rationale for a national champions policy, the standard arguments advanced in support of such policies are raised by several industries in Canada. For example, the Forest Products Association of Canada (FPAC) complains that Canada's "[f]ederal competition policy … [is] preventing market-based adjustments that could give some producers greatly increased economies of scale".[10] As such, FPAC calls for a policy environment that allows for industry consolidation:

> As part of this policy approach, it is essential that governments allow Canadian firms to make business decisions, including the decision to consolidate, that will support their long-term competitiveness. This means:
>
> - Recognizing that consolidation is a legitimate option for Canadian firms seeking to improve their competitive position.
>
> - Implementing competition policy in a way that recognizes the specific characteristics of markets for forest products – that they are integrated through free trade, with prices that are globally determined, and with limited barriers to entry.

- Modernizing the Competition Act to better recognize the global nature of Canadian export markets and to reflect a balanced set of policy objectives, including efficiency and competitiveness.[11]

In the banking sector, the Canadian Imperial Bank of Commerce, for example, echoes calls for consolidation, claiming that "[l]arger financial institutions with improved scale … can better meet the needs of consumers and act as partners to Canadian businesses that compete abroad".[12]

Assuming the desirability of a national champions industrial policy, such a policy can be implemented by a variety of mechanisms, which vary in their degree of direct economic intervention. More direct measures can include legislation, such as that limiting foreign ownership in domestic industries or exemptions from competition laws. Other measures that may have as one of their goals or effects the promotion or protection of national champions include: subsidies; government loans at below-market rates or with lenient repayment terms; targeted public procurement; trade protection measures; and lax enforcement of competition laws.[13] Lax enforcement of competition laws and the absence of strict competition laws are two distinct means by which national champions may be protected or promoted. Under the latter approach, national champions are permitted to grow owing to the absence of anti-merger legislation, while under the former approach, laws prohibiting mergers with anti-competitive effects may exist, but are not enforced with respect to certain firms or industries so as to allow the development of national champions.

A decision to preserve Canadian ownership and control of a sector for political reasons is, of course, the prerogative of Parliament. Claims that consolidation will promote greater efficiency in an industry are frequently made in support of many mergers; the question in terms of national champions is whether the nationality of the merging parties should matter. We turn now to look at the experience in Canada and elsewhere of national champions in merger review, followed by a look at the role that foreign investment restrictions have played in several sectors of the Canadian economy.

Approach to National Champions Under Canadian Merger Review

Accommodation of a national champions industrial policy in merger review has been rejected uniformly by competition authorities around the world, including Canada's Competition Bureau. Indeed, Canada's former Commissioner of Competition, and present Chair of the Canadian Radio-television and Telecommunications Commission, Konrad von Finckenstein, identified "retain[ing] competitive markets in Canada and resist[ing] the call for creating 'national champions'" as one of the "most pressing issues facing competition in Canada".[14] This sentiment was repeated in a submission by the Government of Canada to a World Trade Organization working group:

> Competition policy has a dual role to play in relation to industrial policy. On the one hand, it contributes directly to an effective industrial policy through the maintenance of inter-firm rivalry. Specific aspects of competition law, such as the treatment of efficiency gains and R&D joint ventures, can also contribute to efficient structural adjustment. On the other hand, a key role of competition policy in a modern economy is to challenge industrial policy interventions that restrict competition without a sound efficiency-related basis.
>
> In general terms, antitrust law and enforcement should not become enmeshed in picking winners or buttressing the prospects of national champion firms. The competition policy

> focus needs to be on maintaining the competitive process rather than ensuring a privileged position for incumbents or dividing the market among a fixed number of players.[15]

In Europe, Philip Lowe, Director General of Competition for the European Commission, explains that DG Competition is opposed to national champions policies, but will not block a transaction involving a national champion provided the transaction does not undermine competition:

> <u>The national champion logic of artificially sheltering European undertakings from competition is, and always has been, flawed</u>. Domestic monopoly power has never helped firms become successful internationally.
>
> *****
>
> At the same time, <u>EC merger control does not stop the creation of national or European champions if this enhances competition rather than undermines it</u>. In some cases, size may even lead to efficiencies which are (positively) factored into the assessment.[16]

These views are shared by Neelie Kroes, European Commissioner for Competition,[17] and her predecessor, Mario Monti.[18]

Elsewhere in Europe, competition authorities in Germany, Denmark and Ireland, for example, similarly oppose loosening competition rules to allow for the creation or maintenance of national champions. As the German Monopolies Commission states:

> In Germany, the *Bundesregierung* (Federal Government) is increasingly promoting an industrial policy that directly influences economic developments by actively supporting individual enterprises or industries. Special emphasis is placed on the promotion of so-called "national champions", large German enterprises which are hoped will take on top positions in the "world league" of the "global players", provided they are "strong" enough. … Thus, industrial policy interests are put before competition policy interests. … The Monopolies Commission opposes these developments.[19]

The United States has long been on record as opposing accommodation of national champions policies in merger review. For example, in a statement regarding its analysis of the proposed acquisition of McDonnell Douglas by Boeing, the Federal Trade Commission strongly dismissed allegations that its approval of the transaction was based on national champion considerations.[20]

Academic theory regarding the interaction of competition and industrial policies is firmly on-side with the refusal of competition authorities to take national champion considerations into account in merger review. For example, Paul Geroski, former Chairman of the U.K. Competition Commission, argues that it would be "nonsense" for competition authorities to relax the application of competition laws by defining markets as global, when they are not, so as to support a particular national champion.[21] Geroski goes on to argue that "the notion that there is an inherent tension between industrial policy and competition policy is basically wrong", as competition policy properly applied will create the kinds of competitive markets that allow champions to emerge.[22] Accordingly, as another commentator states plainly: "Nations should not allow "national champion" interests to trump competition interests."[23]

Evidence to date suggests that national champions, and firms seeking to become national champions, are not afforded special treatment under Canada's merger review regime. In large part, we would argue, this is because the *Competition Act's*[24] merger provisions already require the Commissioner of Competition (who heads the Competition Bureau) to take a dynamic view of competition, and to permit transactions which are truly efficiency-enhancing to proceed.

Canada's *Competition Act* permits the Commissioner to challenge before the Competition Tribunal (a specialized tribunal tasked with deciding applications under the legislation's civil provisions) a merger that prevents or lessens, or is likely to prevent or lessen, competition substantially.[25] In determining whether the substantial prevention or lessening of competition test is met, the legislation prescribes several factors that may be considered, including barriers to entry, whether one of the businesses is failing, the extent to which effective competition would remain, whether the merger would remove a vigorous and effective competitor, and the nature and extent of change and innovation in the relevant market.[26] Significantly, under the statute's so-called "efficiencies defence", a merger cannot be prohibited if it is "likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition" resulting from the merger and the efficiency gains would not likely be attained if the merger (or a part thereof) were prohibited.[27]

Given the arguments advanced in support of a national champions policy – in particular the importance of economies of scale and achieving a critical size in global markets – one would expect the efficiencies defence to be applied frequently in Canada if competition authorities were bowing to national champion considerations. This is not the case, however. In fact, in only one challenged merger – the acquisition of ICG Propane Inc. by Superior Propane Inc. – has a transaction been saved by the efficiencies defence where a substantial lessening or prevention of competition was likely to occur, and in this case the Competition Bureau vigorously litigated against the application of the defence.[28] Indeed, the previous Commissioner had publicly vowed never to clear a transaction on the basis of efficiencies – suggesting, if anything, a bias the other way.[29]

Advocates, such as FPAC, of the application of competition policy in a manner which, if not lenient in order to create national champions, at least takes concrete note of dynamic and efficiency-enhancing features of globalization when assessing the competitive impact of a proposed transaction, wonder if the current Commissioner will be more amenable to their position. The current Commissioner recently announced a change in approach to the efficiencies defence, stating that the Competition Bureau would not necessarily resort to litigation where the defence is clearly applicable on the facts.[30] Whether this change in approach will ultimately lead to greater application of the efficiencies defence, and whether such application would be to the advantage of national champions, remains to be seen. Indeed, FPAC, consistent with the position of national champions advocates, strongly criticizes the Competition Bureau for applying too narrow geographic market definitions and failing to fully appreciate the impact of global competitive forces.[31]

Rightly or wrongly, therefore, to the extent that Canadian industrial policy has favoured national champions, such policy has not been advanced through a relaxation of competition laws. Rather, as examined below, foreign ownership restrictions have encouraged domestic consolidation in several sectors. To date, the *Investment Canada Act*[32] does not appear to have been used to protect Canadian ownership of "national champions" in other sectors – but calls are mounting for increased nationalism.

Canadian Foreign Investment Review and Restrictions

In contrast to its neutral (some would even argue antagonistic) stance toward national champion considerations in competition policy, Canada has a long history of interventionist industrial policy when it comes to reviewing and restricting foreign investments in certain Canadian businesses.

A. Foreign Ownership Restrictions – The Case of Airlines, Banks and Telecom

Numerous pieces of legislation are in place in Canada restricting foreign equity ownership in certain types of Canadian businesses, ensuring that such businesses, whether national champions or otherwise, do not fall under the control of non-Canadians. While a fulsome discussion of all of these restrictions is far beyond the scope of this paper,[33] an examination of restrictions applicable to the airline, banking and telecommunications industries will serve to highlight the debate surrounding foreign ownership restrictions in Canada, and the role such restrictions have played (or not) in creating "national champions" in those sectors.

1. Airlines

Legislation in the airline sector prohibits non-Canadians from owning more than 25% of a Canadian airline or from otherwise exercising *de facto* control over a Canadian airline. The *Canada Transportation Act*[34] provides that only a "Canadian" may obtain a licence to operate a domestic air service and a non-scheduled international air service (unless, in the case of the latter, the non-Canadian holds an equivalent licence from its own government and meets certain other requirements).[35] A "Canadian" is defined as including a Canadian citizen or permanent resident or an "entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent … of the voting interests are owned and controlled by Canadians".[36] It should be noted that the statute also contains provisions governing review of mergers and acquisitions that prohibit a person from completing a transaction involving an air transportation undertaking unless the Canadian Transportation Agency determines that the transaction would result in an air transportation undertaking that is "Canadian" and the transaction is approved by the Governor in Council, on recommendation of the Minister of Transport, as in the public interest.[37]

Air Canada, Canada's largest airline and formerly a state-owned enterprise, is also subject to the *Air Canada Public Participation Act*,[38] which requires that Air Canada's articles of continuance contain provisions "to prevent non-residents from holding, beneficially owning or controlling, directly or indirectly, otherwise than by way of security only, in the aggregate voting shares to which are attached more than 25% … of the votes that may ordinarily be cast to elect directors of the Corporation".[39] Air Canada complies with the non-resident shareholding requirement through the use of multiple share classes with different (and variable) voting rights, which ensure that non-Canadians in the aggregate cannot exercise more than 25% of the votes.[40]

One can legitimately question the degree to which such restrictions on foreign investment result in efficient national champions, particularly in the airline industry. The prohibition on foreign acquisitions essentially left Air Canada as the only potential acquiror of Canadian Airlines Limited in 1999. Undeniably, competition has strongly emerged, to the point where Air Canada is far from dominant on many domestic routes. Still, one wonders what Canadian air service would look like in the absence of such restrictions, and if Canada were to enter into open skies agreements enabling true competition in respect of aviation markets globally.

As to the former, in a 2001 review of the *Canada Transportation Act*, an expert panel recommended that "the limit on the voting shares of Canadian airlines that can be held by foreigners be raised to 49%" in order to "facilitate access to foreign funds."[41] This is consistent with the views of Canada's Competition Bureau, which "continues to support the eventual removal of all restrictions on the ownership and control of Canadian air carriers" to permit new entrants and established airlines to "benefit from greater access to foreign capital".[42] The Canadian Chamber of Commerce shares this position, noting that the present foreign ownership restrictions limit the competitiveness of Canadian airlines by restricting their access to capital:

> A major issue facing the domestic air industry is the allowed level of foreign ownership. The air industry is capital intensive, thus the industry requires access to a large pool of capital. With regard to the current foreign ownership limit of 25% on air carriers, the Canadian Chamber does not see the rationale or the benefits of retaining foreign ownership restrictions on Canadian passenger airlines. The Canadian Chamber believes that foreign ownership restrictions on domestic passenger airlines should be removed; this would allow domestic passenger air carriers to seek capital from a larger investment pool. The removal of ownership restrictions would lower the cost of capital to air carriers, making them more competitive, and allow passenger air carriers to seek additional expansion opportunities. Further, the removal of ownership restrictions would increase the possibilities of new passenger airline start-ups since experienced airline investors from around the world would have an opportunity to invest in a new domestic operation.[43]

Not surprisingly, however, other industry participants oppose any changes to the foreign ownership restrictions. For example, the Air Line Pilots Association has invoked nationalist sentiments to resist calls to "trade control of Canada's airline infrastructure to foreign interests."[44] Although a recent Parliamentary committee report continues to note that "Canadian carriers are currently constrained in their ability to attract capital because of foreign ownership restrictions,"[45] there is no indication that the Canadian government intends to change the foreign ownership restrictions – or that open skies discussions will yield significant fruit – anytime soon. The result is the continued protection of Canadian airlines in their domestic markets, while at the same time limiting their access to foreign capital.

2. Banks

The *Bank Act*'s[46] complex set of ownership rules operate independently of the citizenship or residency of shareholders and do not directly prohibit foreign ownership of Canadian banks (or foreign control, in the case of small and medium banks). That said, certain corporate governance and taxation rules seek to maintain Canadian operational influence.

Banks are grouped by size under the *Bank Act* based on their equity: large banks, with equity of more than $5 billion; medium banks, with equity between $1 billion and $5 billion; and small banks, with equity less than $1 billion. Regardless of size, approval of the Minister of Finance is required whenever a single shareholder, whether Canadian or foreign, seeks to purchase more than 10% of any class of a bank's issued shares.[47]

With respect to large banks, and subject to certain exceptions, "[n]o person may be a major shareholder of a bank with equity of five billion dollars or more."[48] A person is a "major shareholder" if the person or entities controlled by the person beneficially owns more than 20% of any class of voting shares, or more than 30% of any class of non-voting shares.[49] The *Bank Act* permits a person, whether Canadian or non-Canadian, to acquire control of small and medium banks with prior approval of the Minister of Finance.[50] However, in the case of medium-sized banks, ownership is capped at 65% of voting shares, with the remaining 35% to be publicly listed on a Canadian stock exchange and held by persons that are not "major shareholders" in the bank.[51]

Even if a majority of a bank's shares are held by non-Canadians, the bank's operations remain subject to Canadian influence under the *Bank Act*. For example, shareholders' meetings must be held in Canada.[52] Significantly, two-thirds of a bank's directors must be resident Canadians[53] and the chief executive officer must be ordinarily resident in Canada.[54] Amendments to the bank's letters patent also require Ministerial approval.[55] One must also note that the application of with-holding tax to remittances to foreign financial institutions severely limits the ability of non-Canadian banks to do business in Canada directly.

Although the "widely held" rule under the *Bank Act* – which prohibits any single entity from owning more than 20% of a large bank's voting shares – does not preclude majority foreign ownership, there have nevertheless been calls "for further relaxation of the widely held rule in Canadian banking as a means of increasing the system's competitiveness."[56] Nevertheless, a recent Parliamentary committee report concluded that "the Canadian financial system must be characterized by domestic control" and so recommended "that the widely held ownership provisions which preclude foreign control continue".[57] The Canadian government appears to be heeding this recommendation in its November 2006 long-term economic plan, which makes no mention of changing ownership restrictions in the banking sector. The government has pledged, however, that "[t]o help foster a leading-edge financial system", it will "allow Canadian financial institutions to add more foreign experts to their boards, so long as the majority of directors remain Canadian residents."[58]

Arguably, a policy that has shielded Canada's largest banks from foreign competition at home has served the ostensible policy goals of promoting national champions. Canadian banks such as Scotiabank and RBC have made forays into U.S. and other foreign banking sectors, even while they earn record profits in Canada.[59] One can legitimately question, however, whether exposing them to increased competition from abroad and to increased foreign ownership would stand in the way of continued expansion and, more importantly, efficiency in domestic operations.

3. Telecommunications

Legislation in the telecommunications sector prohibits non-Canadians from owning more than 20% of a Canadian telecommunications carrier directly and more than 33.3% of a holding company that owns a Canadian carrier, with the result that foreign direct and indirect investment is effectively capped at 46.7%. The *Telecommunications Act*[60] provides that only a "Canadian carrier" that is a "Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province" may own or operate a transmission facility to provide telecommunications services to the public.[61] A corporation is "Canadian-owned and controlled" if: (i) not less than 80% of the members of its board of directors are individual Canadians; (ii) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security, not less than 80% of the corporation's issued and outstanding voting shares; and (iii) the corporation is not otherwise controlled by persons that are not Canadians.[62] A "Canadian" is in turn defined in the *Canadian Telecommunications Common Carrier Ownership and Control Regulations*[63] as including:

- a Canadian citizen or permanent resident;
- a corporation without share capital where a majority of its directors or officers are appointed or designated by a federal or provincial government;
- a corporation in which Canadians beneficially own and control, in the aggregate and otherwise than by way of security, not less than two-thirds of the issued and outstanding voting shares, and which is not otherwise controlled by non-Canadians;
- a trust in which Canadians have not less than two-thirds of the beneficial interest and of which a majority of the trustees are Canadian; and
- a partnership in which Canadian partners beneficially own and control not less than two-thirds of the beneficial interest and which is not otherwise controlled by non-Canadians.[64]

Proposals to reduce or eliminate foreign ownership restrictions in the telecommunications sector

generate strong reaction. For example, some argue that "trade negotiations to promote more foreign involvement in the provision of telecom services, including foreign ownership, threaten our cultural expression."[65] Nevertheless, a recent comprehensive review of Canada's telecommunications industry by an expert panel concluded that reducing foreign ownership restrictions is merited:

> The Panel concludes that liberalization of the restrictions on foreign investment in Canadian telecommunications common carriers would increase the competitiveness of the telecommunications industry, improve the productivity of Canadian telecommunications markets, and be generally more consistent with Canada's open trade and investment policies.
>
> *****
>
> [I]t would be preferable to amend the *Telecommunications Act* to permit the foreign acquisition of a Canadian telecommunications common carrier, if it is in the public interest to do so.[66]

There are indications that Canada may be moving toward reducing telecommunications foreign ownership restrictions. In its November 2006 economic plan, the government pledged to take further steps to ensure that Canadians can benefit more fully from increased competition in the telecommunications sector".[67] Moreover, it has been reported that Canada, along with 10 other countries as part of the World Trade Organization Doha round negotiations, has co-sponsored a plurilateral request that certain WTO members expand their coverage of telecommunications under the General Agreement on Trade in Services. The request, of which Canada is a "deemed recipient", reportedly stipulates that "no limits on nationality or residency [should be permitted] and majority foreign capital participation and effective control [is] to be allowed".[68] Were the request to be accepted, Canada would be required to repeal its legislative restrictions on foreign ownership in the telecommunications sector, a process which would be sure to generate strong debate in Canada.

Again, however, one can legitimately question the degree to which protection from foreign ownership and foreign competition has really benefited Canadian interests. Such questions are all the more germane in light of recent calls for the use of the *Investment Canada Act* to directly prevent the acquisition of Canadian national champions by foreign interests – especially by foreign governments – the topic to which we now turn.

B. Investment Canada Act

Subject to limited exceptions, the *Investment Canada Act* subjects every "acquisition of control" by a "non-Canadian" of a "Canadian business" either to government notification (essentially an administrative formality), or detailed review by the Minister of Industry (and/or, for "cultural" businesses, the Department of Canadian Heritage) to determine whether the investment, as proposed or subject to conditions, will be of "net benefit" to Canada. For direct acquisitions, Ministerial approval is a pre-requisite to closing. Whether a foreign investment is subject to notification or to review depends upon the transaction structure, whether the acquisition involves certain "sensitive" industries (including uranium production, financial services, transportation services and cultural industries), and whether certain financial thresholds are exceeded.[69]

In determining whether a reviewable investment, as initially proposed or subject to conditions in the form of binding undertakings from the investor, will be of "net benefit" to Canada, the legislation requires the Minister to take into account several broad factors, including the effect of the investment on the level and nature of economic activity in Canada, the degree and significance of participation

by Canadians in the Canadian business, the effect of the investment on productivity, industrial efficiency, and technological development, and the contribution of the investment to Canada's ability to compete in world markets.[70] A direct reviewable investment generally cannot be implemented prior to receipt of a favourable ruling by the Minister of Industry.[71]

Accordingly, the *Investment Canada Act*, on its face, could be used by the federal government (which consults with affected provinces) to prevent the acquisition of Canadian national champions by non-Canadian investors. In practice, however, foreign acquisitions (in non-sensitive industries) are rarely prohibited, the legislation operating mainly to permit foreign acquisitions to proceed only on terms and conditions negotiated with the Canadian government. For example, in 2006 Industry Canada approved the foreign takeover of two of Canada's largest and oldest mining companies, Falconbridge Limited and Inco Limited. Both arguably could have been viewed as "national champions", or of strategic importance to their local and the Canadian economies. With respect to the Falconbridge acquisition, and as a condition of receiving government approval, Xstrata plc was required to undertake, among other commitments, to establish a stand-alone nickel business headquartered in Canada and managed by Canadians with responsibility for Xstrata's worldwide nickel operations.[72] Similarly, Companhia Vale do Rio Doce (CVRD), as a condition of receiving Industry Canada approval for its acquisition of Inco, agreed, among other things, to establish and locate its global nickel business in Canada, to be managed by a majority of Canadians.[73]

Considering that foreign acquisitions of non-sensitive Canadian businesses and national champions are routinely approved under the *Investment Canada Act*, albeit subject to conditions intended to retain a degree of Canadian influence over operation of the business, it is perhaps not surprising that the future of the legislation has been called into question. As part of a long-term economic plan released in November 2006, the Canadian government stated that "[p]olicy restrictions on foreign investment in Canada have contributed to our economy's relative decline in foreign direct investment flows."[74] Recognizing that "[b]oth inward and outward foreign direct investment bring substantial benefits to Canada," the government has committed to "increase foreign investment in Canada by reviewing its foreign investment policy framework, including the Investment Canada Act".[75] Some commentators have gone further, suggesting that the legislation as it currently operates should be scrapped.[76]

At the same time, however, there are increasing calls for the *Investment Canada Act* to be amended to grant the government even greater discretion to prohibit the acquisition of Canadian national champions, under the guise of "national interest" or "national security" considerations. Unease with foreign acquisitions perhaps reached its height in Canada in 2004 with announcement of the potential acquisition of Noranda Inc. (a large Canadian mining company later acquired by Falconbridge, which in turn was acquired by Xstrata) by China Minmetals Corporation, a Chinese state-owned enterprise.[77] Parliamentarians expressed concern "about the sale of Noranda Inc. to a foreign government that has human rights abuses"[78] and that the Chinese government would gain control of "strategically vital deposits of zinc, nickel, copper and other minerals" used in the defence industry.[79] Although Canada's then Minister of Industry, responsible for administering the *Investment Canada Act*, stated that foreign investment review is "a qualitatively different matter when enterprises are state owned",[80] he nevertheless went on to say that the potential transaction would be reviewed "in due course".[81] The potential transaction led to calls from some, including Derek Burney, chairman of CanWest Global Communications Corp. and former Canadian ambassador to the United States, for the *Investment Canada Act* to be amended to allow for review, and rejection, of acquisitions of Canadian businesses by government-controlled foreign entities.[82]

Canada's predecessor federal government, motivated in part by "[i]ncreased foreign interest in Canadian resource companies",[83] introduced legislation in 2005 (Bill C-59) that would amend the *Investment Canada Act* to empower the Governor in Council (effectively the federal cabinet) to review and disallow foreign investments in Canadian businesses that "could be injurious to national security", with "national security" left undefined.[84] Discretionary "national security" reviews were to have been independent of the existing "net benefit" review and not subject to financial thresholds. While Bill C-59 died on the Order Paper when a general federal election was called in late 2005, a private member of Parliament recently introduced amending legislation with substantially similar effect.[85] It should be noted, however, that this bill uses the undefined and potentially broader concept of "national interest", rather than "national security". Although this bill, consistent with Bill C-59, would permit the Governor-in-Council to conduct a "national interest" review at its discretion, unlike the previous draft amending legislation, this bill would also require a mandatory "national interest" review wherever the value of the assets of the Canadian business being acquired equals or exceeds $1 billion. The new amending legislation has yet to be referred to a committee for in-depth analysis, such that its prospects for enactment are uncertain.

Clearly, however – and perhaps not surprisingly given the broad scope of review under similar grounds which is afforded to the U.S. government by virtue of the CFIUS legislation[86] – calls for direct limitation of foreign investment in Canada's largest home-grown companies appear to enjoy broad political support. In fact, the Canadian government's November economic plan states that any review of the *Investment Canada Act* must "retain our ability to protect national interests" because, for example, "foreign investment by large state-owned enterprises with non-commercial objectives and unclear corporate governance and reporting may not be beneficial to Canadians."[87]

Conclusion

As we can see, legislative amendments aimed at protecting Canada's national champions are in stark contrast to the view of competition authorities that nationality ought not to play a role in merger review. Competition authorities around the world, including the Competition Bureau, have soundly rejected preservation or creation of national champions as a legitimate consideration to be taken into account in merger review. Rather, a focus in Canada has been on applying merger review policy — regardless of nationalities — in a way that adequately credits innovation, dynamic competition and the competitive pressures of global market forces along with enhanced efficiency – forward-looking factors which may be difficult to quantify but are nonetheless crucial if Canada and its companies are to continue to succeed.

Although Canada continues to have an interventionist industrial policy when it comes to restrictions on foreign investment in certain Canadian businesses, the tide may be turning toward permitting increased non-Canadian involvement. Moreover, in a world where corporations have globally-diversified shareholders and management owes a fiduciary duty to maximize shareholder value, the idea that large businesses have a particular "nationality" based on the state in which they originated is increasingly anachronistic. The challenge going forward is to ensure that the economic benefits of a more open economy are not lost in a retreat to protectionism (and potentially xenophobia) under the guise of national security and national interest considerations, while at the same time recognizing that not all foreign investors are run by and for the benefit of profit-hungry, efficiency-seeking shareholders, and occasionally legitimate public policy concerns may come to the fore.

ENDNOTES

1. The views expressed in this paper are those of the authors alone, as are any errors or omissions.

2. See Emmanuelle Maincent & Lluis Navarro, "A Policy for Industrial Champions: From picking winners to fostering excellence and the growth of firms," Industrial Policy and Economic Reforms Papers No. 2, European Commission, DG Enterprise and Industry, April 2006, at 8 and 9.

3. *Id*.

4. See Paul A. Geroski, former Chairman of the U.K Competition Commission, "Competition Policy and National Champions," 8 March 2005, at 2.

5. See Maincent and Navarro, *supra*, at 16:

> One of the most popular reasons invoked to support domestic champions is the link between a firm's size and its capacity to compete. In the presence of economies of scale – increasing returns associated with high fixed costs and low marginal costs – large companies produce more efficiently than smaller competitors. ... Large companies can also benefit from economies of scope, associated with the possibility to combine the production, research or distribution of similar products and services.

6. *Id*.

7. Monopolkcomission (Monopolies Commission), Germany, *Competition Policy Under Shadow of "National Champions": The Fifteenth Biennial Report 2002/2003*, at para. 17. See also Maincent and Navarro, at 20:

> Pro-champions policies are discredited by their dangerous potential to make a bad judgment [*sic*] about which sectors or companies to favour. There are innumerable factors contributing to the success or failure of a specific company or sector that cannot be controlled. ... If there is no guarantee of governments making a good judgment on which sectors to favour, this fact is a strong argument to the discredit of strategic policies.

8. Monopolkcomission, *supra*, at para. 9.

9. Geroski, *supra*, at 5-6:

> Support for national champions can look like a positive (or "win-win") sum game (a win for the firm, and a win for the host country) from a national point of view, but it almost always leads to a prisoners dilemma when viewed globally. That is, when every national champion attracts support from its host government, nothing is altered between the champions in the market (their relative positions have not changed) but tax payers the world over have been made worse off. It is hard to describe this as value for money spending.

10. Forest Products Association of Canada, *2005 Annual Review*, at 7.

11. Forest Products Association of Canada, "Competition and Consolidation in Canada's Forest Products Industry," August 2005, at 2.

12. Canadian Imperial Bank of Commerce, "CIBC's Submission to the Department of Finance on Matters Raised in the Response of the Government to Large Bank Mergers in Canada," 31 December 2003, at Executive Summary:

> Canadian banks operate in a globally competitive financial services industry. ... The most prominent competitors to the Canadian banks are foreign global conglomerates with world reach and superior scale. CIBC believes that domestic consolidation, whether in the form of a bank-bank merger, and or bank-insurance merger, which results in larger-scaled financial institutions, acts in the public interest of Canadians. Larger financial institutions with improved scale provide a wider array of capital markets options for small and large businesses alike. National champions, with global expertise, can better meet the needs of consumers and act as partners to Canadian businesses that compete abroad, providing them with a wider array of capital options as they grow. A larger balance sheet allows a bank to provide more capital without putting the financial institution at prudential risk. Finally, a strong financial services institution would represent a strong base for Canadian-based employment with Canadian headquartered institutions to better service Canadian consumers. In the long run, larger national champions would be better able to resist foreign takeovers, should ownership limits applied to Canadian financial institutions change in the future.

13. See Andrew Scott, "National Champions and the Two-Thirds Rule in EC Merger Control," Economic & Social Research Council Centre for Competition Policy Working Paper 06-6, April 2006, at 10-11. See also Maincent and Navarro, *supra*, at 10-11.

14. Statement by Konrad von Finckenstein, former Commissioner of Competition, Competition Bureau, "Role of the Commissioner of Competition – University of Toronto Round Table," 13 December 2002.

15. Communication from Canada, World Trade Organization, Working Group on the Interaction between Trade and Competition Policy, 19 April 2002, at 3.

16. Philip Lowe, Director General, DG Competition, European Commission, "Preserving and Promoting Competition: a European Response," St. Gallen Competition Law Forum, 11 May 2006, at 5 and 6 (original emphasis).

17. See European Parliament Hearings, Answers to Questionnaire for Commissioner-Designate Ms. Neelie Kroes (Competition), 2004, at 3:

> As far as the creation of "national champions" is concerned, there is in principle nothing wrong in European companies growing to a sufficient scale to compete globally and becoming "champions" in their own right. However, I do not think that citizens would accept that such developments would take place to the detriment of their interests. There are sectors where markets are still national in scope, and it would be wrong for a merger to protect a national champion from competition in its home market. This would expose consumers on domestic markets to risks of price increases, less choice and less innovation, etc. European Merger rules do not allow for disregarding such harm to consumers on the basis of misguided concepts of industrial policy.
>
> More generally, it seems very questionable to me whether the idea of protecting companies from competition in their home markets would actually increase their competitiveness. In my view, it is competitive pressure at home that creates strong, innovative and successful undertakings, and not the absence of it.

See also Neelie Kroes, quoted in EUbusiness, "National champions 'outdated': EU antitrust chief," 7 March 2006; and Neelie Kroes, "Building a Competitive Europe – Competition

Policy and the Relaunch of the Lisbon Strategy, " address to a conference at Bocconi University, Milan, 7 February 2005.

18. Mario Monti, quoted in "Fall 2004 Antitrust Symposium: The New European Antitrust Regime: Implications for Multinationals," 2005, 13 *Geo. Mason L. Rev.* 269 at 275: "The Volvo prohibition … confirmed a clear policy against the creation of national champions. I should say more precisely, not against the creation of national champions, but against tilting the competition rules in order to asymmetrically favor the creation of national champions."

19. Monopolkcomission, *supra*, at paras. 1, 2 and 4. See also, with respect to Denmark, OECD Global Forum on Competition, Competition Policy in Small Economies, Note submitted by Denmark, 15 January 2003, at 2:

> The Danish Competition Authority does not support national champions, as it would have an adverse effect on domestic consumers if the necessary remedies were not applied. Instead, the Authority is pursuing a more open economy both through concrete action and through advocacy. Lowering barriers to trade, FRI, mobility of workers etc. enhance competition and lead to broader markets that can support larger firms.

See also, with respect to Ireland, OECD Global Forum on Competition, Competition Policy in Small Economies, Note submitted by Ireland, 15 January 2003, at 3: "[A]rguments supporting the suspension of competition law to encourage national champions are weak. There are almost certainly better policy instruments available to encourage national champions than exemptions and protection from domestic competition."

20. Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the matter of The Boeing Company/McDonnell Douglas Corporation, Federal Trade Commission, 1997:

> There has been speculation in the press and elsewhere that the United States antitrust authorities might allow [The Boeing Company's proposed acquisition of McDonnell Douglas Corporation] to go forward – particularly the portion of the transaction dealing with the manufacture of commercial aircraft – because aircraft manufacturing occurs in a global market, and the United States, in order to compete in that market, needs a single powerful firm to serve as its "national champion." A powerful United States firm is all the more important, the argument proceeds, because that firm's success contributes much to improving the United States' balance of trade and to providing jobs for U.S. workers.
>
> The national champion argument does not explain today's decision. …
>
> We do not have the discretion to authorize anticompetitive but "good" mergers because they may be thought to advance the United States' trade interests. If that were thought to be a wise approach, only Congress could implement it. In any event, the "national champion" argument is almost certainly a delusion. In reality, the best way to boost the United States' exports, address concerns about the balance of trade, and create jobs is to require United States' firms to compete vigorously at home and abroad.

See also R. Hewitt Pate, Former Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Securing the Benefits of Global Competition," 10 September 2004.

21. Geroski, *supra*, at 6.

22. *Id*., at 7:

> It seems to me that the notion that there is an inherent tension between industrial policy and competition policy is basically wrong. For anti-trust authorities, "competitiveness" is about rivalry, about markets where firms actively try to gain the advantage on each other, trying a variety of different tactics and never ceasing to search for yet more tactics. Markets that are competitive in this way usually deliver prices close to costs, but they also deliver a lot more. The continual striving to out do rivals leads to innovations which are truly radical. Even when the innovations produced in competitive markets are incremental, they usually occur frequently enough to lead to large cumulative effects. And when either type of innovation occurs, the firms in such markets often pull ahead of their rivals in other, less competitive markets. Firms who do this should be a source of national pride – and indeed, they really are champions. The important point, however, is that it is competitive markets that produce such champions, not national governments.

See also *id*., at 2.

23. Eleanor M. Fox, "Antitrust Regulation Across National Borders: The United States of Boeing Versus the European Union of Airbus," *The Brookings Review*, Winter 1998, Vol. 16, No. 1.

24. R.S.C. 1985, c. C-34.

25. *Id*., s. 92.

26. *Id*., s. 93.

27. *Id*., s. 96.

28. See *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Comp. Trib); *rev'd* (2001), 11 C.P.R. (4th) 289 (F.C.A.); re-determined, (2002), 18 C.P.R. (4th) 417 (Comp. Trib.); *aff'd*, (2003), 23 C.P.R. (4th) 316 (F.C.A.).

29. See Konrad von Finckenstein, Q.C., former Commissioner of Competition, Speaking Notes for an Address to the Canadian Bar Association Competition Law Section Annual Meeting, 30 September 1999:

> The proposed merger of Superior Propane and ICG Propane is currently before the Competition Tribunal, with the hearing on the matter having commenced in Calgary on September 22. This is an extremely important case, in which the issue of efficiencies is central. The hearing offers an opportunity for the Tribunal to create useful jurisprudence on the efficiencies exception provided in section 96.
>
> In this case, on the basis of our submissions with respect to product and geographic market definition, the merger will result in a monopoly in a large number of markets. In our pleadings, we have also argued two fundamental principles. First, the overriding purpose of the Act is to maintain a competitive system. It is not the role of the Bureau to sanction monopolies. Second, in our view, no merger to monopoly could ever, by definition, bring about gains in efficiency that offset the effects of the merger on competition.

30. See Sheridan Scott, Commissioner of Competition, Speaking Notes for Address to Canadian Bar Association Annual Fall Conference on Competition Law, 28 September 2006, at 13:

> We would not necessarily require recourse to the [Competition] Tribunal in a case where the efficiencies resulting from the merger would clearly be greater than and offset any anti-competitive effects; rather, while our experience suggests that such cases are rare, we could, if sufficiently satisfied on the evidence, make our own independent assessment of efficiencies, and clear the merger on that basis.

31. Forest Products Association of Canada, "Competition and Consolidation in Canada's Forest Products Industry," August 2005, at 16:

> Determinations of the Competition Bureau can have serious implications for Canadian competitiveness, as well as for the affected market participants. It would be a lost opportunity if Canadians moving towards further efficiency-enhancing consolidation were frustrated by an inaccurate appreciation of global forces. In the forest products industry, markets are globally integrated, large players can be national champions, prices are set globally, and consolidation can be a critical success factor for Canadian companies.

32. R.S.C. 1985, c. 28 (1st Supp.).

33. Foreign ownership restrictions are in place in respect of certain industry sectors, such as publishing, broadcasting, duty-free retailing and radiocommunications, as well as in respect of specific corporations, including the Canada Development Corporation, Petro-Canada, and Canadian National Railway Company.

34. S.C. 1996, c. 10.

35. *Id.*, ss. 57 and 73(1). A domestic service is an "air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country", while a non-scheduled international service is an "air service between Canada and a point in the territory of another country" that is not scheduled. *Id.*, s. 55(1).

36. *Id.*, s. 55(1).

37. *Id.*, s. 56.2(1). Bill C-11 would, if enacted, extend the public interest merger review provision to all modes of transportation, although the Canadian ownership requirement would remain limited to air transportation undertakings. Bill C-11, *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts*, 39th Parl., 1st Sess., at s. 13.

38. R.S.C. 1985, c. C-35 (4th Supp.).

39. *Id.*, s. 6(1)(b).

40. See ACE Aviation Holdings Inc., *Notice of Special Meeting of Shareholders and Management Proxy Circular*, 31 August 2006, at 16-17:

> Each Class A variable voting share confers the right to one vote unless (i) the number of Class A variable voting shares outstanding (including the preferred shares, on an as-converted basis, if they are held, beneficially owned or controlled by persons who are not Canadians), as a percentage of the total number of voting shares outstanding of ACE Aviation exceeds 25%, or (ii) the total number of votes cast by or on behalf of holders of Class A variable voting shares (including the preferred shares, on an as-converted basis, if they are held, beneficially owned or controlled by persons who are not Canadians) at any

meeting exceeds 25% of the total number of votes that may be cast at such meeting. If either of the above noted thresholds would otherwise be surpassed at any time, the vote attached to each Class A variable voting share will decrease proportionately such that (i) the Class A variable voting shares as a class (including the preferred shares, on an as-converted basis, if they are held, beneficially owned or controlled by persons who are not Canadians) do not carry more than 25% of the aggregate votes attached to all issued and outstanding voting shares of ACE Aviation, and (ii) the total number of votes cast by or on behalf of holders of Class A variable voting shares (including the preferred shares, on an as-converted basis, if they are held, beneficially owned and controlled by persons who are not Canadians) at any meeting does not exceed 25% of the votes that may be cast at such meeting.

41. *Canada Transportation Act* Review Panel, *Vision and Balance*, June 2001, at 125.

42. Sheridan Scott, Commissioner of Competition, Competition Bureau, Speaking Notes, "Air Liberalization and the Canadian Airports System: Remarks to the House of Commons Standing Committee on Transport," 4 May 2005, at 7.

43. Canadian Chamber of Commerce, "Presentation to the House of Commons Standing Committee on Transport: Air Liberalization and the Canadian Airports System", 9 May 2005, at 2.

44. Air Line Pilots Association International Canada, "Submission to the House of Commons Standing Committee on Transport Regarding Air Liberalization and the Canadian Airports System," 2 May 2005.

45. House of Commons Standing Committee on Transport, *Air Liberalization and the Canadian Airports System: Interim Report*, 38th Parl., 18 May 2005, at 10.

46. S.C. 1991, c. 46.

47. *Id.*, s. 373(1).

48. *Id.*, s. 374(1).

49. *Id.*, s. 2.2.

50. *Id.*, s. 377.1.

51. *Id.*, s. 385(1).

52. *Id.*, s. 136.

53. *Id.*, s. 159(2).

54. *Id.*, s. 196(1).

55. *Id.*, s. 216(1).

56. David Laidler, "Grasping the Nettles: Clearing the Path to Financial Services Reform in Canada," C.D. Howe Institute Commentary, No. 238, September 2006, at 16. Laidler states, however, that "any measures taken to relax further the widely held rule need to be carefully designed" because foreign ownership could complicate the day-to-day implementation of monetary policy and the government's ability to call on large banks to preserve financial security in a crisis. *Id.*

57. House of Commons Canada, Report of the Standing Committee on Finance, *Large Bank Mergers in Canada: Safeguarding the Public Interest for Canadians and Canadian Businesses*, March 2003, at 29. The Committee suggested that domestic control of Canada's banks is required to maintain the health of the financial system from a regulatory and prudential perspective and to ensure continued access to the system for Canadian customers.

58. Canada, Department of Finance, *Advantage Canada: Building a Strong Economy for Canadians*, November 2006, at 84.

59. Scotiabank provides a full range of financial services to approximately 5 million customers in the Caribbean and Central America, Mexico, Latin America and Asia. In 2006, Scotiabank completed a US$330 million acquisition of Peru's Banco Sudamericano and Banco Wiese Sudameris (BWS), increasing its market share in that country from 2% to 17%. Net income of CAD$1.054 billion in 2006 from its international operations represented approximately 30% of Scotiabank's total 2006 net income of CAD$3.549 billion. See Scotiabank, *2006 Annual Report*, at 15-16.

    RBC provides financial services to customers in the United States, Caribbean, Europe, Asia-Pacific and Australia. Net income of CAD$444 million in 2006 from its U.S. and international operations represented only approximately 9% of RBC's total 2006 net income of CAD$4.728 billion. See Royal Bank of Canada, *2006 Annual Report*, at 55-57.

60. S.C. 1993, c. 38.

61. *Id.*, s. 16(1).

62. *Id.*, s. 16(3).

63. SOR/94-667.

64. *Id.*, s. 2.

65. Julie White, Canadian Centre for Policy Alternatives, "Losing Canadian Culture: The Danger of Foreign Ownership of Telecom," Briefing Paper, Trade and Investment Series, Vol. 6, No. 3, 31 October 2005, at 1.

66. Telecommunications Policy Review Panel, *Final Report*, March 2006, at 14 and 11-26.

67. *Advantage Canada*, *supra*, at 81.

68. Scott Sinclair, Canadian Centre for Policy Alternatives, "The GATS Negotiations and Canadian Telecommunications Foreign Ownership Limits," Briefing Paper, Trade and Investment Series, Vol. 7, No. 1, 27 March 2006.

69. Different review thresholds apply depending upon the type of investor and the type of Canadian business being acquired. Assuming a purchaser is a "WTO Investor" within the meaning of the statute, a review application is required for direct acquisitions if the value of the assets of the Canadian business(es), and all other entities in Canada the control of which is being acquired, exceed(s) Cdn. $281 million (2007 - this dollar threshold is revised annually). Indirect acquisitions (*i.e.*, the acquisition of a Canadian business by consequence of the acquisition of an entity outside Canada that controls the Canadian business) are exempt from review if either the purchaser or the vendor is WTO-controlled. For non-WTO investors, the review threshold is Cdn. $5 million for a direct acquisition

and Cdn. $50 million for an indirect acquisition; the $5 million threshold will apply, however, for an indirect acquisition if the asset value of the Canadian business(es) being acquired exceeds 50% of the asset value of the global transaction. It should be noted that the review thresholds for non-WTO investors apply to WTO investors (*i.e.*, the 2007 Cdn. $281 million threshold in respect of direct acquisitions by WTO investors is reduced to Cdn. $5 million, and indirect acquisitions by WTO investors are reviewable where the value of the assets of the Canadian business(es), and all other entities in Canada the control of which is being acquired, exceed(s) Cdn. $50 million) in respect of investments in certain "sensitive" industries, including uranium production, financial services, transportation services and "cultural" industries.

70. *Investment Canada Act*, *supra*, s. 20.

71. *Id.*, s. 16(1). Where a transaction is not reviewable but notifiable, parties are free to close the transaction, however the investor must file a notification of the investment within 30 days of closing. *Id.*, s. 12.

72. Xstrata plc, News Release, "Xstrata Receives Investment Canada Act Approval," 25 July 2006.

73. Companhia Vale do Rio Doce, News Release, "CVRD obtains Investment Canada Act approval," 19 October 2006.

74. *Advantage Canada*, *supra*, at 87.

75. *Id.*, at 87 and 88.

76. See Eric Reguly, "Investment Canada just a waste of space," *The Globe and Mail*, 10 August 2006: "What is the point of Investment Canada? If it's a perpetual rubber-stamp machine, that is useless; why not save the taxpayer a few bucks and sink it in the Ottawa River? Failing that, why not make it do what it's supposed to do, which is ensure that takeovers are truly to the "net benefit" of Canada?"

77. See Noranda Inc., News Release, "Noranda and China Minmetals Enter Into Exclusive Negotiations," 24 September 2004.

78. House of Commons Debates, 13 October 2004, at 1445.

79. House of Commons Debates, 8 February 2005, at 1940:

> Noranda controls strategically vital deposits of zinc, nickel, copper and other minerals. Nickel, particularly, is involved in the hardening of the armour of the side of warships, intercontinental ballistic missiles and space technology.

80. Quoted by Brian Laghi, "PM Lauds Chinese Takeover of Noranda," *The Globe and Mail*, 22 October 2004, at A1.

81. House of Commons Debates, 22 October 2004, at 1145. See also House of Commons Debates, 14 October 2004, at 1440:

> [W]e do not at this time have an application to review under the Investment Canada Act. When we do, we will review whether that acquisition of a Canadian company [Noranda Inc. by China Minmetals Corporation] is in the interests of Canadians, whether it generates net benefits to Canadians and whether it is consistent with the industrial and economic policies of Canada.

82. Richard Blackwell, "Burney seeks new foreign M&A rules: CanWest chairman says Ottawa must be able to reject state-owned buyers," *The Globe and Mail*, 18 January 2007.

83. Andrew Kitching, Law and Government Division, Parliament of Canada, Legislative Summary of Bill C59, An Act to amend the Investment Canada Act, 14 October 2005.

84. Bill C-59, *An Act to amend the Investment Canada Act*, 38th Parl., 1st Sess.

85. Bill C-386, *An Act to amend the Investment Canada Act (foreign investments)*, 39th Parl., 1st Sess.

86. The Exon-Florio amendment to the U.S. *War and National Defense Production Act of 1950* (50 U.S.C. §2170) provides authority to the President of the United States to suspend or prohibit any foreign acquisition, merger or takeover of a U.S. corporation that is determined to threaten the national security of the United States.

87. *Advantage Canada, supra*, at 87 and 88.

STIKEMAN ELLIOTT

National Champions -

Canadian Competition & Industrial Policy

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> Lexpert, the Canadian legal directory, as a "repeatedly recommended" practitioner in the area of Competition Law. Featured by Lexpert magazine in the September 2003 issue as one of the 15 top legal "Women to Watch" in Canada;

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Ms. Hutton worked in the field of economic research including econometric modelling with the Bank of Canada prior to entering law. She has worked in Bangkok and Singapore, has advised the Government of Vietnam regarding the development of its competition law, and is a member of Stikeman Elliott's China Task Force.

Professional Activities

Ms. Hutton was Chair of the organizing committee for the 2006 annual fall conference of the Competition Law Section of the CBA, and is a member of the Communications Law and Internet Committees of the Section of Antitrust Law of the ABA. She is a member of the Legal Affairs Forum of the Information Technology Association of Canada and the IBA Competition Law Section.

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> Hutton and Collins, Chapter 11: Canada, in "The International Comparative Legal Guide to Merger Control 2007" (London: Global Legal Group, 2006).

> Hutton, Larson and Kilby, Canada – Chapter in the "Intellectual Property & Antitrust 2007" (London: Global Competition Review, 2006; Susan M. Hutton, contributing editor).

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> "The Role of Economics in Competition Law", presentation to visiting Government of Vietnam delegation, Ottawa, May 3, 2001; gave instruction in "Fundamentals of Competition Law Enforcement" to Vietnamese officials, Halong City, Vietnam, June 2002.

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- Rushton and Hutton, "Brave Vision: China's Evolving Competition Law Regime", paper prepared for Insight Conference *International Competition Law*, Toronto, May 15-16, 2006.
- Co-Author, "The *Aspen Skiing* Case from a Canadian Competition Law Perspective," in the *Antitrust Law Journal* (2005).
- Rushton and Hutton, "Information Exchange in Cross-Border Investigations: Safeguarding Confidentiality?", paper presented at the International Bar Association Annual Conference, Auckland, New Zealand, October 24-29, 2004.

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