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Competition Policy Review Panel
280 Albert Street, 10th Floor
Ottawa, ON K1A 0H5
Dear Panel Members:

I am writing on behalf of Computershare Trust Company of Canada ("Computershare") with respect to an aspect of the *Investment Canada Act* (the "ICA") that can have significant implications for Computershare and our customers in Canada.

Background

Computershare is a Canadian trust company regulated by the Office of the Superintendent of Financial Institutions ("OSFI"). Computershare entered the Canadian marketplace in June, 2000 with its acquisition of the corporate trust, transfer agency and plans business of Montreal Trust Company of Canada, which was one of the oldest existing trust companies having acted as trustee on bond issues since 1889. With offices in six cities throughout Canada, a capacity rating from DBRS and over \$768 billion of debt under administration, Computershare is one of the leading and largest corporate trust providers in Canada. Computershare is ultimately owned by Computershare Limited, which is a publicly traded company on the Australian Stock Exchange. Additional information about the Computershare group of companies can be found at www.computershare.com.

Among other things, Computershare provides trust company services in a number of contexts, including acting as trustee for income trusts, unit trusts and mutual fund trusts.

An income trust, for example, is a special-purpose investment vehicle that sells equity to the public in the form of units in the trust and uses the proceeds to purchase an operating company that holds income-generating assets. Typically, an income trust will hold mature assets or businesses that require little ongoing capital expenditure and provide a stable and long-term stream of cash flow. This cash flow is then distributed to unitholders in the form of interest income, dividend payments and a return of equity.

Each trust unit represents a fractional undivided beneficial interest in the trust and each owner of the trust units is entitled to exercise voting rights at any meetings of the unitholders on the basis of one vote for each trust unit held.

A Trustee May Have Limited Influence Over the Trust

In many cases where Computershare acts as a trustee, it has little or no discretion or influence over the business operations of the trust. It is often the unitholders and manager or administrator of the trust that make operational decisions. Typically, a trust indenture and related management or administration agreement will specify the powers of the manager/administrator and limit the role of the trustee to carrying out such tasks as:

- i. reviewing and accepting subscriptions for units of the trust and issuing trust units subscribed for;
- ii. maintaining records and providing timely reports to the unitholders; and
- iii. distributing cash flow from the trust.

Unitholders typically have the power to remove a trustee, among other things.

Many Trust Companies Are Not "Canadian" Controlled

Computershare is ultimately controlled by "non-Canadians" and is therefore a "non-Canadian" for the purposes of the ICA. We believe that many (if not most) of our major competitors who provide similar trust services in Canada are also "non-Canadians" for the purposes of the ICA. The issue we wish to draw to the Panel's attention is that the current "Canadian" status rules of the ICA in some circumstances may inappropriately deem the trust itself to be a non-Canadian if the trustee is a non-Canadian, even in circumstances where the trustee has no significant influence over the business or operations of the trust.

This outcome has several results that are inconsistent with the purposes of the ICA. First, a trust that would otherwise qualify as a "Canadian" and is controlled in fact by "Canadians" (e.g., a trust with a majority of "Canadian" unitholders and a "Canadian" manager/administrator) may be concerned about utilizing the services of a "non-Canadian" trust company because, if the trust is thereby deemed to be "non-Canadian" for the purposes of the ICA, future acquisitions by the trust may be reviewable under the ICA, placing the trust at a competitive disadvantage to prospective "Canadian" purchasers by adding transaction timing delay and requiring the trust to provide undertakings to obtain ICA approval. In that case, competition for trust services in Canada would be limited to only "Canadian" firms, potentially raising the costs for such trust services to Canadian trusts. Creating an artificial competitive advantage for "Canadian" trust companies in the marketplace is not consistent with the objectives of the ICA. As stated in section 2 of the ICA, the purposes of the ICA are to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities, and to provide for the review of significant investments in Canada by non-Canadians to ensure such benefit to Canada. The ICA is not intended to make it more difficult for Canadian businesses to retain the services of firms controlled by non-Canadians.

Also, if the "Canadian" status of a trust for the purpose of the ICA is determined by reference to the trustee, a trust that would otherwise be a "non-Canadian" and is controlled in fact by "non-Canadians" (e.g., a majority of "non-Canadian" unitholders and a "non-Canadian" manager/administrator) could avoid the application of the ICA to future acquisitions of Canadian businesses by the trust simply by utilizing a "Canadian" trust company as its trustee.

Recommendation

In our view, the ICA should be amended to make it clear that the "Canadian" or "non-Canadian" status of a trustee that has no significant operational control over the trust, should not determine the status of the trust. Rather, the status should be determined by either the manager/administrator or the unitholders in such circumstances.

Relevant Provisions of the Investment Canada Act

While the relevant provisions of the ICA are complex, the following briefly explains how, in certain instances, the "Canadian" or "non-Canadian" status of a trust for the purposes of the ICA can be determined by the status of the trustee, even where the trustee has no significant influence over the operating business of the trust.

First, section 3 the ICA defines a "voting interest" in the context of a trust to mean an ownership interest in the assets of the trust that entitles the owner to receive a share of the profits and to share in the assets on dissolution. If a unitholder in a trust has only a right to receive a share of profits, or only a right to share in the assets on dissolution, the unitholder has no "voting interest".

Second, sections 26 and 27 of the ICA set out the Canadian status rules under the ICA. Under the general rule in section 26(1), if trust units are voting interests and a majority of the unitholders of a widely-held trust are "Canadians" (i.e., Canadian citizens or entities controlled by Canadian citizens), the trust is a "Canadian", assuming that the trust is not controlled in fact through the ownership of its voting interests by

a "non-Canadian" (or a voting group, a majority of whom are "non-Canadians"). However, section 26(2) specifically provides that, if a trust is not controlled in fact through the ownership of its voting interests, subsection 26(1) does not apply and the trust is a "Canadian" where two-thirds of its trustees are Canadians. (Typically, Computershare acts as the sole trustee.) Presumably, if less than two-thirds of its trustees are "Canadians", the trust is a "non-Canadian".

Accordingly, given the complexity and ambiguity of the relevant provisions of the ICA, and the limited public guidance from Industry Canada on its interpretation of the ICA, administrators and unitholders may be concerned that the "Canadian" status of the trust could be determined on the basis of the status of the trustee (even if the trustee has no control in fact) if either:

- i. the unitholders' rights do not technically constitute "voting interests";
- ii. the trust units are so widely held that no one controls the trust through the ownership of voting interests; or
- iii. control in fact is considered to reside in the manager/administrator of the trust rather than the unitholders.

In each of those cases, there is a risk that the trust would be considered to be "not controlled in fact through the ownership of its voting interests", in which case the status of the trustee determines the status of the trust.

Suggested Amendment

There are numerous ways in which this unfortunate ambiguity in the ICA could be addressed. One way could be to amend section 26(2) to provide that, if the trustee is a federally regulated trust company (and therefore regulated by OSFI), the trustee's status as a "Canadian" or "non-Canadian" should not affect the "Canadian" status of the trust itself unless the trustee exercises control in fact over the business of the trust. Otherwise, the "Canadian" status of a trust with a trustee that is a federally regulated trust company should be determined on the basis of the "Canadian" or "non-Canadian" status of the beneficiaries and/or the administrator/manager of the trust.

We would be pleased to amplify on our concerns or meet with the Panel if that would be helpful.

Sincerely,



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