SENATE SÉNAT

CANADA

Subject-matter of those elements contained in Divisions 1, 3, 6 and 14 of Part 4 of Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures

Report of the
Standing Senate Committee on
Banking, Trade and Commerce

The Honourable Irving Gerstein, Chair
The Honourable Céline Hervieux-Payette, P.C., Deputy Chair

NOVEMBER 2012

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The Honourable Senator Céline Hervieux-Payette, P.C., Deputy Chair

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Barbara Reynolds

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Tuesday, October 30, 2012:

The Honourable Senator Carignan moved, seconded by the Honourable Senator Poirier:

That, in accordance with rule 10-11(1), the Standing Senate Committee on National Finance be authorized to examine the subject-matter of all of Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, introduced in the House of Commons on October 18, 2012, in advance of the said bill coming before the Senate;

That the Standing Senate Committee on National Finance be authorized to sit for the purposes of its study of the subject-matter of Bill C-45 even though the Senate may then be sitting, with the application of rule 12-18(1) being suspended in relation thereto; and

That, in addition, and notwithstanding any normal practice:

1. The following committees be separately authorized to examine the subject-matter of the following elements contained in Bill C-45 in advance of it coming before the Senate:

(a) the Standing Senate Committee on Banking, Trade and Commerce: those elements contained in Divisions 1, 3, 6 and 14 of Part 4;

(b) the Standing Senate Committee on Energy, the Environment and Natural Resources: those elements contained in Divisions 4, 18 and 21 of Part 4;

(c) the Standing Senate Committee on Transport and Communications: those elements contained in Divisions 5, 12 and 20 of Part 4;

(d) the Standing Senate Committee on Aboriginal Peoples: those elements contained in Division 8 of Part 4; and

(e) the Standing Senate Committee on Agriculture and Forestry: those elements contained in Division 19 of Part 4;

2. The various committees listed in point one that are authorized to examine the subject-matter of particular elements of Bill C-45 submit their final reports to the Senate no later than November 30, 2012; and

3. As the reports from the various committees authorized to examine the subject-matter of particular elements of Bill C-45 are tabled in the Senate, they be deemed referred to the Standing Senate Committee on National Finance so that it may take those reports into consideration during its study of the subject-matter of all of Bill C- 45.

The question being put on the motion, it was adopted, on division.

Gary W. O’Brien

Clerk of the Senate

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PART 4, DIVISION 1: AMENDMENTS TO THE *TRUST AND LOAN COMPANIES ACT, THE BANK ACT AND THE INSURANCE COMPANIES ACT*

Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, permitted public-sector investment pools to be equity investors in federally regulated financial institutions upon approval by the Minister of Finance. Division 1 would amend the *Trust and Loan Companies Act*, the *Bank Act*, the *Insurance Companies Act* and the *Jobs and Economic Growth Act* to clarify the provisions governing the purchase of a small amount of a financial institution's shares by a public-sector investment pool and the approval process undertaken by the Minister of Finance.

In his appearance before the Standing Senate Committee on Banking, Trade and Commerce, the Minister of State (Finance) explained that Division 1 contains technical and coordinating amendments to support the provisions in Bill C-38; the objective of Division 1 and the provisions in Bill C-38 is to ensure that Canadian financial institutions are competitive with foreign financial institutions when attracting investors. He told the Committee that public-sector investment pools are allowed to invest in other sectors of the Canadian economy and that other jurisdictions – such as Australia, the United States, Switzerland and the United Kingdom – allow public-sector investment pools to invest in financial institutions.

The Office of the Superintendent of Financial Institutions (OSFI) indicated that, for ministerial approvals, investments in Canadian financial institutions must be in the best interests of the financial system and are subject to national security considerations. In general, OSFI's role in ministerial approvals is to collect and analyze information regarding any prudential considerations, including the integrity of the applicant and the circumstances of any previous investments, and to provide its analysis to the Minister of Finance. Division 1 states that the Minister would not require OSFI's advice in order to approve an investment by a public-sector investment pool; however, OSFI indicated that it would inform the Minister of Finance if it had prudential concerns. Given that an issuance of shares can be a lengthy process, OSFI stated that the issuance and an application for approval occur concurrently. With the Basel III Accord imposing stricter capital requirements on financial institutions, OSFI suggested that financial institutions are likely seeking capital investments; however, Canadian banks are currently very well capitalized and the provisions in Division 1 would provide an opportunity to access additional capital. OSFI mentioned that a bank may reject an offer of investment if it is considering a repurchase of its shares.

Regarding national security considerations, OSFI said that the security status of any foreign investor is confirmed by it. It checks lists that identify individuals, companies and jurisdictions linked to terrorism, and consults with the Canadian Security Intelligence Service and the Royal Canadian Mounted Police. OSFI stated that public-sector investment pools that wish to invest must have a public mandate and must have commercial – not political – objectives. If the public-sector investment pool changes its mandate or objectives, OSFI indicated that the Minister of Finance can withdraw his/her approval. Lastly, OSFI confirmed that Division 1 would not alter the ownership limits set out in the legislation governing banks, trust and loan companies, and insurance companies.

The Canadian Life and Health Insurance Association (CLHIA) noted that the insurance industry supports the provisions in Division 1, which would allow Canadian financial institutions to be as competitive as international financial institutions when pursuing capital. The CLHIA confirmed that Division 1 pertains to the primary issuance of shares and that the rules for investment proposed in Division 1 are quite strict. Furthermore, it indicated that – like banks – insurance companies have a statutory ownership limit, which is 20%. As the financial institution and the potential investor would submit a joint application to the Minister of Finance for approval, the CLHIA suggested that the process would allow an insurance company to reject an attempted takeover by not supporting the application.

In its written submission to the Committee, the Canadian Bar Association (CBA) remarked that the banking sector is subject to strict size-based ownership rules, noting that banks with equity exceeding $12 billion must be widely held; thus, any single shareholder or group of shareholders cannot own more than 20% of the voting shares, or 30% of the non-voting shares, of the bank and that the Minister of Finance must approve any investment in a Canadian bank of more than 10% of its shares. The CBA indicated that these ownership rules and the rules set out in Division 1 would allow the Minister of Finance to ensure that any investment is in the best interest of the financial sector.

PART 4, DIVISION 3: AMENDMENTS TO THE *CANADA DEPOSIT INSURANCE CORPORATION ACT AND THE PAYMENT CLEARING AND SETTLEMENT ACT*

In response to a Group of 20 (G20) commitment to preserve the stability of the global financial sector in relation to over-the-counter (OTC) derivative transactions, Division 3 would amend the provisions in the *Canada Deposit Insurance Corporation Act* that apply to bridge institutions – temporary financial institutions created to preserve critical functions of a Canada Deposit Insurance Corporation (CDIC) member institution facing insolvency – in order to ensure that administration, by a bridge institution, of a member institution that is facing insolvency does not trigger a condition imposed by an eligible financial contract (EFC) – such as a derivative agreement – entered into by that member institution. The *Payment Clearing and Settlement Act* would also be amended to support the central clearing and settlement of derivatives transactions. Moreover, Division 3 would provide for a limited automatic stay on the ability of certain counterparties of a failed CDIC member institution to terminate EFCs. In particular, the stay would have a duration of one business day following the incorporation of a bridge institution.

In his appearance before the Committee, the Minister of State (Finance) indicated that the objective of Division 3 is to reinforce Canada's financial stability framework and to fulfill a G20 commitment to support a financial sector reform agenda by improving the regulation of OTC derivative transactions. The Minister explained that the proposed changes would create a process for OTC derivative transactions that would be similar to the clearing that occurs at the end of the day in the stock market, when each transaction is settled. The Department of Finance said that no central counterparties (CCPs) that deal in OTC derivative transactions currently exist in Canada; however, some may be established in the future. It also noted that existing CCPs are not government entities, although they are supervised and regulated by governments. According to the Department, the main purpose of CCPs is to ensure that both parties to a transaction will be protected even if the other party fails; this protection is usually accomplished by requiring the parties to post collateral. Furthermore, it explained that – with Division 3 – OTC derivative

transactions would be required to be reported to a "trade repository," which would collect information about trades and provide summary information about those trades; while much of the information would be available only to regulators, some information would be made public. According to the Department, Division 3 would also make a change in relation to the Bank of Canada and supervision of CCPs.

The Alberta Securities Commission (ASC) quoted the G20 statement from the 2009 Pittsburgh Summit: "all standardized OTC derivatives should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by the end of 2012 at the latest. OTC derivatives contracts should be reported to trade repositories." It also stated that Canadian regulators agreed that Canadian market participants should be required to clear OTC derivative transactions through CCPs. According to the ASC, Canada's regime for OTC derivative clearing will likely be in place by the end of 2013, rather than by the end of 2012; that said, several other G20 countries will also miss the 2012 deadline. The ASC told the Committee that, after giving consideration to requiring the establishment of domestic CCPs, Canadian regulators concluded that there are not many market participants that would be able to undertake the role of a CCP in the most significant areas of OTC trading; consequently, global CCPs would be acceptable for authorized trading in Canada. Furthermore, the ASC clarified that increased transaction speed was not an objective of Division 3; in fact, most OTC derivative transactions would be slower due to the involvement of an additional party and the reporting requirements. It also shared its view that, eventually, all OTC derivative transactions that formerly took place between two parties and without reporting requirements will take place through a CCP and with a reporting system. In terms of oversight of CCPs, the ASC highlighted that the Bank of Canada would oversee OTC derivative transactions that are considered to be systemically important, while securities regulators would oversee other transactions, although they would not be required to approve individual transactions.

The Canada Deposit Insurance Corporation (CDIC) indicated that the proposed amendments to the *Canada Deposit Insurance Corporation Act* would enhance its ability to take on and preserve the critical functions of a failed CDIC member institution by providing time for it to determine which eligible financial contracts (EFCs) it wishes to transfer from the failed institution to a bridge institution. It also suggested that the proposed amendments would provide for a limited automatic stay on the ability of certain counterparties of a failed CDIC member institution to terminate EFCs; the stay would be one business day following the incorporation of the bridge institution.

The Bank of Canada addressed proposed changes to the *Payment Clearing and Settlement Act*, which it says would remove doubt regarding whether clearing houses have protections that – in the case of failure by a financial institution that has made an OTC derivative trade – are sufficient to allow them to claim transfers of collateral and other assets that support the derivative clearing systems. According to it, Division 3 would ensure that CCPs could successfully exercise their legal remedies, without risk of having those rights stayed or frozen; this proposed change would alleviate the concerns of global CCPs that Canadian law does not protect a CCP's ability to exercise its right against Canadian participants.

In a joint presentation to the Committee, the Canadian Derivatives Clearing Corporation (CDCC) and the Montréal Exchange stated that amendments to the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act* and the *Winding-Up and Restructuring Act* maybe be

needed in the future to enhance legal certainty for all participants in the OTC derivative clearing process. In their view, the proposed removal of the requirement to settle Canadian dollar payments through the Bank of Canada implies that settlements would be made through Canadian chartered banks, or perhaps foreign banks, which could expose participants in the OTC derivatives market to greater credit and liquidity risk, and could increase systemic risk in Canada. Furthermore, the CDCC and the Montréal Exchange noted that, in the event that OTC derivative transactions be settled through the central bank be removed, Canadian legislation would be inconsistent with Principle 9 of the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions; Principle 9 states: "A [financial markets infrastructure] should conduct its money settlements in central bank money, where practical and available, to avoid credit and liquidity risks."The CDCC and the Montréal Exchange expressed their support for the proposed changes to the *Canada Deposit Insurance Corporation Act*.

PART 4, DIVISION 6: *BRETTON WOODS AND RELATED AGREEMENTS ACT*

Following the implementation of quota reforms in Canadian legislation under Bill C-38, Division 6 would amend the *Bretton Woods and Related Agreements Act* to implement the governance reforms agreed to by International Monetary Fund (IMF) members in 2010. In particular, it would modify the manner in which members of the Executive Board are elected by eliminating the requirement that 5 of the 20 members be elected by the members with the largest quotas.

In his appearance before the Committee, the Minister of State (Finance) said that the change proposed in Division 6 is a consequential amendment to ensure that domestic legislation would reflect and ratify the updated IMF agreements on quota and governance reform. He also clarified that Division 6 would create no new obligations for Canada and is unrelated to IMF resources.

The Department of Finance stated that Division 6 would not change Canada's representation on the IMF's Executive Board. It indicated that Canada's commitment to the IMF has increased by $11 billion over the last five years.

The IMF described its Executive Board, indicating that there are 24 directors managing the IMF's day-to-day operations, 19 of whom represent a cluster of countries and 5 of whom represent their country alone. The IMF observed that there are eight European directors and that the managing director is also European; by any measure, having 9 of 24 – or 37.5% - of the directors from a region is too large, giving rise to a need for greater representation for emerging countries. According to the IMF, in order to improve fairness and increase the IMF's credibility, the distribution of representation must be improved, which requires three steps. The first step pertains to IMF quotas, which Canada has already ratified, while the second step concerns the IMF's Articles of Agreement, which would be legislated through Division 6. The proposed amendment would eliminate the five positions filled by those who represent their country alone, thereby allowing all IMF members to have the ability to participate in a cluster. The second step would enter into force when three fifths of the IMF member countries, representing 85% of the total voting power, have accepted the proposed amendment. Currently, 69% have ratified and the IMF expects that the United States, which represents 16.75% of the vote, will soon ratify the proposed amendment. The IMF stated that the third step involves a re-examination of the way in

which quotas are calculated, an issue that will probably be discussed by the Executive Board during the winter.

Although the Centre for International Governance Innovation welcomed the proposed governance changes to the IMF, it saw the proposed changes as insufficient to make the IMF representative of the global economy. It stated that although two European countries have agreed to give up their director positions on the Executive Board in order to increase the representation of developing countries, the countries that will take over the positions are expected to be European, thereby changing the composition only in terms of the balance between developed and developing countries; Europe's position is expected to be maintained. For example, Poland is expected to take Belgium's chair. The Centre noted that there are broader governance issues to be debated, such as the role of the G20 in respect of the IMF, the manner in which countries not involved in the G20 can have a role in decision making, whether the Executive Board should have a supervisory or operational role, and the diversity of senior appointments and staff.

The IMF and the Centre for International Governance Innovation told the Committee that Division 6 reflects the IMF's updated Articles of Agreement.

PART 4, DIVISION 14: *AGREEMENT ON INTERNAL TRADE IMPLEMENTATION ACT*

Signed by the Canadian premiers in 1994, the objective of the Agreement on Internal Trade (AIT) is to lower barriers to the free movement of persons, goods and services among Canada's provinces and territories. Division 14 would amend the *Agreement on Internal Trade Implementation Act* to provide for the introduction of person-to-government dispute resolution processes and for the enforceability of orders resulting from the dispute-settlement process contained in the AIT, particularly disputes involving the various levels of government. The Division would also amend the Act's terminology in order to harmonize it with that used in the AIT and to clarify the effect of orders made under the Act. Lastly, the bill would repeal a subsection of the *Crown Liability and Proceedings Act* respecting proceedings initiated under the AIT.

In his appearance before the Committee, the Minister of Industry stated that internal trade has more than doubled since the AIT was signed. In order, the most active provinces in internal trade are Ontario, Quebec, Alberta and British Columbia; generally, the value of these provinces' international trade is twice that of their internal trade. The value of international trade of smaller provinces normally is equal to the value of their internal trade. The Minister explained that Division 14 has three purposes: to introduce monetary penalties that could be imposed against governments that do not respect their obligations under the AIT; to establish stricter criteria for individuals nominated to be on dispute-resolution panels; and to update and correct any inconsistences in the language between the AIT and the *Agreement on Internal Trade Implementation Act*. According to the Minister, amendments proposed in Division 14 reflect changes to the AIT that were agreed upon in 2008 and 2012, and indicate a federal desire to respect the AIT's obligations and to reduce barriers to internal trade when the AIT meeting is chaired by the federal government in 2013. The Minister said that when an individual has a favourable decision against a government and is awarded a monetary penalty, which can range from $250,000 to $5 million, the individual would be indemnified only for the costs that he/she

incurred associated with the dispute-resolution process; the balance would be deposited into the Internal Trade Advancement Fund, which would be used to promote internal trade.

Regarding the nomination of individuals to dispute-resolution panels, the Department of Industry explained that the provinces and territories that are signatories to the AIT are able to appoint individuals to the roster lists for panels; these individuals need to have expertise in administrative law and/or dispute resolution, although expertise in any specific sector of the economy is not required. It indicated that the AIT's dispute-resolution process is similar to the process contained in the *North American Free Trade Agreement*, in that the parties have a number of opportunities to work together to achieve a resolution before a dispute-resolution panel is convened. According to the Department, there have been 52 disputes since the AIT came into effect in 1995, or about three disputes per year; 42 of the 52 disputes were government-to-government disputes, and about 33 have been resolved; penalties would not have been required to resolve these disputes. That said, the Canadian Federation of Independent Business, the Certified General Accountants Association of Canada (CGA-Canada), and other business organizations highlighted the lack of penalties as a weakness of the AIT.

The Chair of the Committee on Internal Trade, which is established under the AIT, supported Division 14. He said that legislative amendments are needed to implement the changes agreed upon in the 10th and 14th Protocols of Amendment to the AIT, and explained that the 10th Protocol of Amendment permits orders issued under the AIT against a government to be enforceable in the same manner as orders issued against the Crown in superior courts, while the 14th Protocol – which was approved in principle in June 2012 – incorporates the same dispute-resolution process for person-to-government disputes as for government-to-governments disputes. Moreover, the Chair indicated that provinces and territories that are signatories to the AIT have taken steps to enact or amend legislation in order to establish mechanisms to enforce the changes introduced in the 10th and 14th Protocols of Amendment. In his view, the Committee on Internal Trade should meet with stakeholders more often; however, given that the parties to the AIT meet once per year, meetings with stakeholders may be difficult to arrange. Regarding the Internal Trade Advancement Fund, the Chair indicated that the fund would be established for the purpose of reimbursing the costs associated with disputes under the AIT; however, details about how the funds would be disbursed have not been finalized by the Committee on Internal Trade.

CGA-Canada mentioned that it has participated in three disputes under the AIT. It supported the changes proposed in Division 14, feeling that there is little incentive for governments to comply with dispute-resolution panel rulings. It indicated that people, businesses and private-sector organizations encounter barriers to trade and labour mobility, and should have more opportunities to interact with the Committee on Internal Trade regarding AIT reforms. In commenting on the Internal Trade Advancement Fund, which is not contained in Division 14 and has not been discussed publicly by the parties to the AIT, CGA-Canada said that it may take up to 18 months before the 14th Protocol of Amendment is ratified and details of the Internal Trade Advancement Fund are released to the public. While CGA-Canada recognized that the objective of the Internal Trade Advancement Fund is to discourage non-meritorious complaints by individuals, it explained that complaints that reach the level of a dispute-resolution panel must have been seen to have merit, as there is a screening process under the AIT to ensure that complaints are warranted. CGA-Canada suggested that discussions on technical barriers to trade

and reduced regulatory red tape would be helpful to businesses: in particular, it mentioned that a harmonized federal-provincial/territorial approach to the number of regulations as well as to the duplication and overlap of regulations is required.

The Canadian Council of Chief Executives (CCCE) told the Committee that a number of bodies – such as the Organisation for Economic Co-operation and Development, the IMF and the Canadian Competition Policy Review Panel – have repeatedly stated that internal trade barriers are a major factor in Canada's poor productivity performance. According to it, these barriers cost Canadian businesses up to $14 billion a year; furthermore, the perception that Canada has internal barriers to trade affects the way in which international investors view the country. The CCCE supported the changes proposed in Division 14, believing – in particular – that the introduction of person-to-government dispute-resolution processes would be a major step toward enabling a free market within Canada. The CCCE noted that, for businesses, the goal of the dispute-resolution process is the elimination of the discriminatory practice or policy, not the payment of a penalty by the government and the continuation of the practice or policy; the 2008 changes to the AIT have resulted in every dispute being resolved through a change to the offending practice or policy, which was not the case prior to 2008. It suggested that the parties to the AIT should now discuss other issues, such as corporate registration, business licensing discrepancies, technical barriers to trade and labour mobility. It stated that labour mobility is particularly important in light of skill shortages in certain provinces and territories as well as the aging of Canada's population. The CCCE expressed its hope that, in the future, more of the funds collected through monetary penalties would be made available to the parties bringing forth the dispute.

CONCLUSION

The Committee wishes to note that a number of the changes proposed in Bill C-45 would amend legislation that was relatively recently examined by the Committee in the context of other bills. From that perspective, during the four hearings in relation to Divisions 1, 3, 6 and 14 of Part 4 of Bill C-45, the Committee heard from witnesses from whom it routinely consults, including relevant federal departments and agencies as well as stakeholders. During the hearings, Committee members were provided with an opportunity to pose questions to the witnesses; these questions were completely and satisfactorily answered by them.

Finally, Division 14 addresses a variety of issues in relation to internal trade. The Committee urges the federal and provincial/territorial governments to work together with a view to reducing barriers to internal trade.

APPENDIX A: Witness List

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE NO.
Department of Finance Canada	The Honourable Ted Menzies, P.C., M.P., Minister of State (Finance)	2012-11-06	26
Industry Canada	The Honourable Christian Paradis, P.C., M.P., Minister of Industry	2012-11-06	26
Industry Canada	Krista Campbell, Director General, Strategic Policy Branch	2012-11-06	26
Department of Finance Canada	Wayne Foster, Director, Financial Markets Division	2012-11-06	26
Department of Finance Canada	Jane Pearse, Director, Financial Institutions	2012-11-06	26
Department of Finance Canada	Jeremy Rudin, Assistant Deputy Minister, Financial Sector Policy Branch	2012-11-06	26
Department of Finance Canada	Rob Stewart, Assistant Deputy Minister, International Trade and Finance	2012-11-06	26
Canada Deposit Insurance Corporation	Greg Cowper, Director, Policy	2012-11-07	26
Canadian Securities Administrators	William S. Rice, Chair, and Chair, Alberta Securities Commission	2012-11-07	26
Canada Deposit Insurance Corporation	Chantal Richer, Director, Legal Services	2012-11-07	26
Office of the Superintendent of Financial Institutions Canada	Philipe-A. Sarrazin, Managing Director, Legislation and Policy Initiatives	2012-11-07	26
Bank of Canada	Robert Turnbull, Special Counsel, Financial System	2012-11-07	26
Canadian Life and Health Insurance Association	Frank Zinatelli, Vice President and General Counsel	2012-11-07	26

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE NO.
Centre for International Governance Innovation	Thomas A. Bernes, Distinguished Fellow and Former Executive Director	2012-11-08	26
Canadian Council of Chief Executives	Joe Blomeley, Policy Analyst	2012-11-08	26
Canadian Council of Chief Executives	John Dillon, Vice President, Policy, and Corporate Counsel	2012-11-08	26
International Monetary Fund	The Honourable Thomas A. Hockin, P.C., Executive Director	2012-11-08	26
Certified General Accountants Association of Canada	Carole Presseault, Vice President, Government and Regulatory Affairs	2012-11-08	26
Committee on Internal Trade	The Honourable David Ramsay, MLA, Chair, Minister of Industry, Tourism and Investment, NWT	2012-11-08	26
Government of the Northwest Territories	Peter Vician, Deputy Minister, Department of Industry, Tourism and Investment	2012-11-08	26
Montreal Exchange	Pauline Ascoli, Vice President, Legal Affairs (Derivatives)	2012-11-21	27
Canadian Derivatives Clearing Corporation	Glenn Goucher, President and Chief Clearing Officer	2012-11-21	27

APPENDIX B: Briefs submitted but did not appear before the Committee

ORGANIZATION	NAME
Canadian Bankers Association	Marion G. Wrobel