



January 11, 2008

Competition Policy Review Panel
c/o Christiane Fox, Secretariat
280 Albert Street, 10th Floor
Ottawa, ON
K1A 0H5

Re: Submission to Competition Policy Review Panel Consultations

Dear Panel Members:

This submission and the attachments hereto set out the views of the Competition Law Group of Blake, Cassels & Graydon LLP ("Blakes") with respect to the Competition Policy Review Panel's (the "Panel's") consultation paper entitled: *Sharpening Canada's Competitive Edge* (the "Consultation Paper"). In the Consultation Paper, the Panel asks a number of questions that are fundamental to the success and prosperity of Canadian businesses and consumers in today's era of global competition and investment flows.

About Blakes

Blakes Competition Law Group is at the forefront of competition law in Canada. Blakes is consistently awarded the highest rankings in Canada by independent publications.¹ The Chair of Blakes' Competition Group is Cal Goldman, who was the first head of the Competition Bureau under the existing provisions of the *Competition Act*, a position now occupied by Commissioner Sheridan Scott. Blakes has represented clients in hundreds of merger and other competition cases and our Partner, Neil Finkelstein, has litigated 4 of the 5 merger cases commenced before the Competition Tribunal, all successfully. As to the *Investment Canada Act*, Blakes has also represented clients in hundreds of applications under that legislation. Moreover, Brian A. Facey and Julie Soloway of our Group are both past Chairs of the Foreign Investment Review Committee (the Canadian Bar Association's Committee which addresses issues affecting the Bar under the *Investment Canada Act*).

¹ Blakes is the only Canadian law firm to be ranked amongst the top 20 law firms worldwide in the area of competition law. It is also top ranked in *Chambers Global: The World's Leading Lawyers*, Law Business Research's *The GCR 100* and *PLC Which Lawyer? Yearbook*. Blakes has more lawyers ranked in these publications as well as the *Guide to the World's Leading Antitrust and Competition Lawyers* and Law Business Research's *The International Who's Who of Competition Lawyers*, than any other Canadian law firm.



In formulating these comments, we have canvassed the lawyers in Blakes Competition Law Group, as well as many of our clients. This submission does not represent the views of, and should not be attributed to any client of Blakes, or any work conducted by Blakes on behalf of any client.

Submission

Blakes strongly supports the Panel's goal of creating an environment in Canada that allows the private sector to capitalize on opportunities presented by global trade, investment and competition by enhancing Canadian productivity and competitiveness. In our view, this objective is embedded in the purpose clause (sec. 1.1) of the *Competition Act*. The Act's purpose clause lists a number of aims, including maintaining and encouraging competition in Canada to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada.²

The Panel has raised a number of important questions in the Consultation Paper regarding Canada's competition law and foreign investment policy, including: 1) Does Canada's approach to mergers strike the right balance between consumers' interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors? 2) What changes to Canada's competition regime would enhance the competitiveness of Canadian firms in the global economy? and 3) In the *Investment Canada Act* context, should the net benefit test reflect the new competitive environment and, if so, how?

Our comments on these topics are provided below in the following manner. We first provide a discussion of the treatment of efficiencies and the issue of Bureau resources in merger review, which informs the Panel's first question noted above. We then discuss one important example of the type of change sought by the Panel's second question noted above; namely, changes to the conspiracy provisions that would help Canadian firms enhance their competitiveness and innovativeness. We also address the issue of proposals to provide the Competition Bureau with investigatory powers to conduct market studies, a topic specifically raised by the Panel. Finally, we discuss issues concerning the net benefit test under the *Investment Canada Act*.

² The full text of sec. 1.1 reads: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."



Merger Review

1. *Treatment of Efficiencies*

The Panel has raised the issue of merger efficiencies. Clearly, mergers are one way in which businesses can integrate operations and reduce costs and save resources for the Canadian economy. Under existing law, if the anti-competitive effects of a merger are outweighed and offset by the efficiencies resulting from the merger, the Competition Tribunal is prohibited from making an order blocking the transaction. This provision, contained in sec. 96 of the *Competition Act*, is commonly known as the "efficiencies defence".

As the Panel rightly points out, this issue was fully considered by the Tribunal and the Federal Court of Appeal from 1998 to 2002 in the litigation concerning the *Superior Propane/ICG Propane* merger³. (Blakes lawyers acted for Superior Propane). The efficiencies defence has generated a significant amount of public debate since *Superior Propane*. For example, the Commissioner has commissioned several reports discussing the merits of the efficiencies defence,⁴ and there have been legislative proposals – which ultimately were not adopted – aimed at amending the existing sec. 96.⁵

In short, Blakes believes Canada should retain the current efficiency defence for mergers. In our view, the current law reflects a workable, made-in-Canada solution which recognizes the geographically diverse and open nature of the Canadian economy. The current law also recognizes that competition is the best means to achieve efficiencies in the vast majority of cases, but that in some instances, merging parties ought to be able to invoke sec. 96 to permit mergers which might lessen competition but are ultimately of greater benefit to the economy based on the criteria set out in sec. 1.1 of the *Competition Act* and the principles laid down by Mr. Justice Marshall Rothstein of the Federal Court of Appeal (as he then was) in *Superior Propane*.

Significantly, in September 2006 the Commissioner recognized the role of the existing efficiencies defence in the merger review process. In a speech to the Canadian Competition Bar, Commissioner Scott stated:

[A] clear reading of the Act requires that we consider efficiencies in the course of our assessment as to whether to challenge a merger. As to section 96 specifically, we would not necessarily

³ Canada (Commissioner of Competition) v. Superior Propane Inc. [2003] F.C.J. No. 151; Canada (Commissioner of Competition) v. Superior Propane Inc. [2001] F.C.J. No. 455; and, Canada (Commissioner of Competition) v. Superior Propane Inc. [2000] C.C.T.D. No.15.

⁴ E.g., Competition Bureau *Report of the Advisory Panel on Efficiencies* (Aug. 2005), and *Innovation and Dynamic Efficiencies in Merger Review* (Apr. 2007).

⁵ E.g., Bill C-249, An Act to Amend the Competition Act (37th Parl., 2nd Sess.).



require recourse to the 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.⁶

Furthermore, the Commissioner added that the Bureau does "not consider that, in the short term, it is either desirable or advisable to seek amendments relating to efficiencies."⁷ We agree with the Commissioner that there is no need at this time to amend the efficiencies defence and that efficiencies should be considered by the Bureau during the merger review process.

2. *Bureau Resources*

As noted above, merger transactions are an important way in which businesses in Canada and the Canadian economy can become more efficient. In this regard, it is noteworthy that over the past two years the Bureau has reviewed 522 mergers. In the same time period, companies paid more than \$26 million in merger filing fees to the Canadian Government and the Bureau incurred \$22 million in direct and indirect costs. Merging parties also incur other costs (including management time and costs, legal fees, etc.) to prepare filings and secure approval for transactions either entirely or, in some cases, after restructuring at the request of the Bureau. Many of these transactions take weeks or months to be reviewed. In fairness, in many other cases, the Bureau very rapidly clears cases which clearly do not raise issues, even though a pre-merger notification is required.

Moreover, more than 60 countries around the world now have similar merger notification regimes. It is not uncommon for a multi-jurisdictional merger transaction to require filings in multiple countries, and for multiple reviews to take weeks and in some cases many months to be completed. In order to ensure that the market for corporate control operates efficiently, it is important that the regulatory burdens imposed on merger transactions not be over-intrusive in fulfilling the aims of the merger provisions of the *Competition Act*.

Changes to the Conspiracy Provisions

The Panel correctly points out that an improved framework for the conspiracy provisions under the *Competition Act* has been the subject of considerable debate for several years. A comprehensive discussion of the appropriate framework for the conspiracy provisions is beyond the scope of this submission.

⁶ Sheridan Scott, *Address before the Canadian Bar Association Annual Fall Conference on Competition Law* (Sept. 28, 2006) at 13.

⁷ *Id.*



However, keeping in mind the Panel's focus on providing recommendations to enhance the competitiveness through, among other things, innovation, one particular aspect of the existing conspiracy provisions is noteworthy. That is: the existing provisions that prohibit and penalize agreements that lessen or prevent competition unduly do not contain an exception for those agreements that have pro-competitive or efficiency-based justifications. In our view, an analysis of such agreements ought to involve a consideration of anti-competitive effects and pro-competitive or efficiency effects, where justified.

The specific types of agreements that likely suffer the greatest "chill effect" from this deficiency are strategic alliances, joint ventures, and other efficiency-enhancing inter-competitor arrangements. These are the very types of agreements that are most likely to bring about innovation and other real benefits for the Canadian economy. For example, a strategic alliance or joint venture might permit the creation of a new product, reduce transaction costs, or create a new market.

Moreover, the Canadian economy continues to become increasingly globalized, technology-dependent and rapidly-evolving. In these circumstances, strategic alliances play an even more important role in enabling Canadian businesses to emerge at the forefront of the latest trends and developments. As with the area of mergers, it is important that pro-competitive justifications and efficiencies be recognized if the provisions dealing with agreements between competitors are to be re-engineered. Such a recognition is all the more important given the unique nature of the Canadian economy and the trends it faces.

Power to Conduct Market Studies

In our view, the granting of additional formal investigatory powers to the Bureau or another independent agency to conduct market studies is not necessary, and raises several complicating issues. We note that such a proposal was included in the consultations conducted by the Public Policy Forum in 2003 regarding possible changes to the *Competition Act*. Among the concerns expressed by Canadians at that time regarding a proposal to grant the Bureau or another agency the power to conduct market studies were:

- The Commissioner already has the tools necessary to properly investigate issues regarding anti-competitive conduct in an industry with a view to determining the facts.
- A broad ranging reference into the state of competition in an industry could be time consuming and costly both for industry participants and government.
- Such powers should not be granted to the Bureau, which also carries an enforcement function. If at all, such market studies should be conducted by an impartial third party.⁸

⁸ Public Policy Forum, *National Consultation on the Competition Act, Final Report* (Apr. 8, 2004).



In addition, if such powers are contemplated, procedural safeguards would need to be implemented to address adequately: the scope of probing powers of the investigative body; the rights of parties required to provide evidence/information; whether such information could be used in subsequent proceedings; privacy considerations; the possibility of rebutting the findings of any market studies, and other due process issues.

Investment Canada Act

Blakes supports an open environment for foreign direct investment ("FDI") with low regulatory barriers (recognizing that there are sector-specific exceptions). However, there are some issues with the *Investment Canada Act* and its administration that, if addressed, would in our view enhance Canada's ability to attract FDI and its international competitiveness.

In particular, Blakes is of the view that the implementation of the net benefit test outlined in sec. 20 of the *Investment Canada Act* requires modification to reflect the new competitive environment outlined in the Panel's Consultation Paper. Over the past several years, *Investment Canada Act* review of foreign investment has developed into a negotiation process whereby the government requires undertakings from foreign investors in virtually all cases of significance as a condition of approval of a foreign investment. The provision of undertakings can be particularly onerous on foreign investors in terms of: the substance and duration of the undertakings; delays to closing during the statutory review period; and the costs involved in negotiating the undertakings themselves.

Blakes is of the view that a more articulated and case-by-case approach to the determination of net benefit is warranted. It should not be assumed that undertakings are required in every large-scale transaction. Moreover, undertakings need to account for the inherent flexibility required of foreign investors to operate their newly-acquired business in a competitive, innovative fashion.

Further guidance on how the net benefit test is applied in practice and the relative weights of the various sec. 20 factors would also be helpful. In this regard, factors that are often difficult to quantify such as: plans to improve or enhance technology transfers; better access to global markets; and greater strategic focus, are often accorded relatively little weight in the more formalized undertakings process. Yet, it is often these factors that underlie the strategic rationale behind the investment and explain why the investment is of net benefit to Canada.

Finally, additional steps could be taken to improve the transparency and predictability of the investment review process, such as the publication of past legal interpretations (subject to any confidentiality concerns).

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Blakes Competition Law Group applauds the work of the Panel in reviewing Canada's competition and foreign investment law and policy, and appreciates the opportunity to provide input. We trust this submission will be helpful to the Panel's deliberations and look forward to participating further in the important work of the Panel through future submissions and discussions.

If you have any questions concerning any aspect of this submission, please do not hesitate to contact Cal Goldman (cal.goldman@blakes.com or 416-863-2280), Brian A. Facey (brian.facey@blakes.com or 416-863-4262), Navin Joneja (navin.joneja@blakes.com or 416-863-2352) or Julie Soloway (julie.soloway@blakes.com or 416-863-3327).

Yours sincerely,

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