



CASSELS BROCK
LAWYERS

**SUBMISSION TO
THE COMPETITION POLICY REVIEW PANEL**

**BY
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Introduction

Cassels Brock & Blackwell LLP (“CBB”) welcomes the opportunity to provide its comments on the issues raised by the Competition Policy Review Panel’s consultation paper *Sharpening Canada’s Competitive Edge*, issued on October 30, 2007 (the “Consultation Paper”).

CBB represents clients in all areas of competition law and investment review generally. As a result, we believe we can offer some insight as to how both domestic and foreign companies view Canada’s competition laws and investment control regimes. The Consultation Paper poses a number of questions, as well as highlights some important issues in competition law, and we regard it as a helpful step towards modernizing Canadian law in these areas.

We agree with the Panel’s view that Canadian competition policy has a direct effect on its competitiveness in a global environment. It creates incentives and disincentives that directly impact the ability of market participants to conduct business and to compete. Given the global economy, Canadian competition policy should strive to create a legal environment that avoids, to the extent possible, friction with legal regimes of our major trading partners, such as the United States and European Union. However, this does not mean that conversion should be the primary goal of any reforms. In our view, changes should only be made if they reflect specific conditions of the Canadian economy and legal framework.

With these general principles in mind, our comments on the specific questions and issues raised by the Consultation Paper are set out below. Given the limits on the length of submissions, we have focused on specific areas where we believe we can provide particular insight, rather than respond to all of the issues and questions raised in the Consultation Paper.

Q: How does Canada's competition policy affect Canadian competitiveness in an environment of globalization and free trade?

A:

Granting Formal Market Research Powers to the Competition Bureau

One of the proposals the Consultation Paper considers is granting the Bureau the formal power to conduct market studies. There has been considerable debate about granting this power to the Bureau or another government agency in the past, with similar proposals having been discussed in detail in 2003 and 2005 and views expressed both in support of and opposition to these proposals.

In our opinion, the power to conduct market inquiries should not be granted to the Bureau, as it is not clear that doing so will achieve results that cannot be achieved by existing and/or less intrusive means. Further, giving the Bureau formal market research powers may negatively affect Canadian competitiveness by subjecting businesses to potentially burdensome proceedings that can increase the cost of doing business in Canada.

Information productions are generally time-consuming and costly. In the context of a merger or an existing Bureau investigation or inquiry they are justified. The parties involved are trying to achieve a certain end, be it completing a merger or defending their conduct. However, the same cannot be said of a market study, where the companies being compelled to provide information derive no benefit from the process. Rather than concentrating its efforts on its business operations, a business required to participate in a market study will have to devote resources to responding to Bureau inquiries, which entails costs associated with both information gathering and diversion of management/employee time.

Market inquiries have proven to be very costly for the target industries in the past. For example, the Bureau has conducted several inquiries into the petroleum industry. These inquiries took years to complete and cost participants millions of dollars, without bringing any benefits to those involved. This is consistent with the experience of

businesses who have been subject to Bureau inquiries. For example, the Bureau's two-year inquiry into the Canadian motion picture industry cost participants several million dollars in legal costs. Any proposal to provide the Bureau with market inquiry powers must be carefully weighed in light of the corresponding costs, time and administrative burdens to participants.

In our view, the only area where market studies could possibly be of any use is in the context of mergers. More particularly, mergers in complex industries where the Bureau feels it may not be able to properly analyze the market in the time allowed under the *Competition Act* (the "Act"). In all other areas of competition law, such as abuse of dominance, pricing violations, conspiracy, etc., the Bureau can adequately address its concerns using the existing means. This is because in these areas the Bureau is not operating under the time constraints applicable to merger reviews. The Bureau can take as much time as it needs to investigate and obtain information by way of section 11 orders or search warrants under section 15. In addition to the formal investigatory powers currently available to it, the Bureau can, and often does, obtain information voluntarily. The recent studies undertaken by CRA International at the request of the Bureau are a good example of the Bureau's ability to obtain necessary insight into relevant markets and industries using existing means and voluntary submissions of information.¹

Another reason not to grant market research powers to the Bureau is the limited shelf life that these studies would inevitably have due to the dynamic nature of markets. Specifically, there is no guarantee that a study conducted today will be relevant even one year from the completion date. Consequently, these studies will need to be performed with some degree of frequency (possibly even annually), if they are to serve

¹ *Ex Post Merger Review: An Evaluation of Three Competition Bureau Merger Assessments*, prepared by Mark Neumann and Margaret Sanderson, CRA International (August 1, 2007); *Innovation and Dynamic Efficiencies in Merger Review*, prepared by Andrew Tepperman and Margaret Sanderson, CRA International (April 9, 2007). For its post-merger study, for example, CRA consulted with a number of industry participants and reviewed other relevant sources of information as part of the study. As we understand, CRA received sufficient information voluntarily.

as a meaningful resource. If this is the case, the resulting costs to industry participants will be considerable.

Finally, in addition to the tenuous benefits of a market research power and significant potential downside, it is questionable whether conducting market inquiries is an effective use of the Bureau's scarce resources. In this regard, our view is that the Bureau's limited resources would be better used in other areas, such as the enforcement of the criminal and civil reviewable provisions of the Act.

Q: What changes to Canada's competition regime would enhance the competitiveness of Canadian firms in the global economy?

A:

Abuse of Dominance Provisions

Enforcement Approach

As stated above, Canadian competition policy should strive to create a legal environment that avoids, where reasonable, friction with our major trading partners. In this regard, the position in the US and, increasingly the EU, has been that competition laws should focus on consumer welfare. In other words, they should protect competition as opposed to competitors.²

Until recently, both the Bureau's enforcement approach and the Canadian case law regarding abuse of dominance were consistent with the purposes of the Act, as outlined in section 1.1, as well as the US approach, in that they focused on consumer welfare. However, the Commissioner's position, as affirmed in the recent decision of

² *The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency*, a note submitted by the United States under Session I (Part I) of the Global Forum on Competition, (February 10-11, 2003); A. Pera and V. Auricchio, "Consumer Welfare, Standard of Proof and the Objectives of Competition Policy", *European Competition Journal*, March 2005, vol. 1, issue 1, 153.

the Federal Court of Appeal in *Canada Pipe*,³ represents a considerable departure from the established approach.

In addition to creating uncertainty as to the key elements of the abuse of dominance provisions, the approach taken in that case seems to be a regression to the old approach of protecting competitors as opposed to protecting competition. In *Canada Pipe*, the Court of Appeal concluded that to be “anti-competitive”, the conduct need not decrease competition or harm consumers. Instead, the inquiry should focus exclusively on the intended effects of the conduct in question on a competitor. The Court of Appeal’s focus on individual competitors not only raises the question of how to distinguish between “anti-competitive acts” and legitimate competition (since virtually every competitive initiative could potentially have negative effect on competitors and is often intended to do so – e.g., taking customers away from rival firms), but also represents a considerable departure from the consumer welfare approach adopted previously in Canada and by our major trading partners.

In *Canada Pipe*, the Court of Appeal also agreed with the Competition Tribunal’s conclusions on market power, which were based, in part, on evidence of Canada Pipe’s high profit margins. This approach was advanced by the Commissioner and differs significantly from the one long adopted in the United States, based on the analysis undertaken by Franklin M. Fisher and John J. McGowan.⁴

We will have to wait and see how the Bureau’s enforcement approach in this (and potentially other areas) develops in light of *Canada Pipe* and what practical implications, if any, it has on Canadian businesses. For now, it appears that Canadian businesses must carefully consider the possible risk of allegations of abuse of dominant

³ *Canada (Commissioner of Competition) v. Canada Pipe Corporation Ltd.*, 2006 FCA 233, leave to appeal to the Supreme Court of Canada denied, [2006] S.C.C.A. No. 366 (“**Canada Pipe**”).

⁴ In their article “On the Misuse of Accounting Rates of Return to Infer Monopoly Profits”, 73 Am. Econ. Rev. 82 (1983), Fisher and McGowan concluded that reliance on accounting profits to determine market power often leads to incorrect inferences about market power. This is so because it is often impossible to properly measure all economic costs which do not appear in accounting profit and loss statements. In the United States, Fisher’s and McGowan’s analysis is generally considered to be dispositive of this point.

position before introducing new competitive initiatives such as customer rebate programs. If anything, *Canada Pipe* highlights the need for the Bureau to carefully consider the larger policy implications of modifying its enforcement approach and whether the approach taken is appropriate in the broader context, including the consistency with the approach taken in other jurisdictions.

Deterrence & Sanctions

Over the last several years, various proposals have been made in response to claims that additional deterrence was required to enforce the abuse of dominance provisions. The key proposals include: (i) giving the Competition Tribunal the authority to impose administrative monetary penalties (“AMPs”); (ii) allowing private parties to bring applications to the Tribunal; and (iii) expanding the Tribunal’s jurisdiction to enable it to award damages.⁵ In our view, these measures are both unnecessary and undesirable.

In addition to the question of whether AMPs, which are arguably quasi-criminal in nature, are constitutionally valid, there is a real issue of whether it is appropriate to impose the same types of sanctions for abuses of dominance that are generally reserved for criminal conduct such as conspiracies or bid-rigging. The same concern applies to allowing private parties to seek damages in these types of cases, as the Act currently reserves this right for damages sustained as a result of violations of the criminal provisions of the Act or breaches of Tribunal orders.

In our view, the possibility of being fined or subject to private claims for damages only makes sense when the conduct at issue is unambiguously harmful. Unlike conspiracies, bid-rigging or other clearly socially-undesirable behaviour, the types of

⁵ Canada, Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada’s Competition Regime*, (Ottawa, April 2002) (“**Industry Report**”), Recommendations 3 and 8. See also Organisation for Economic Cooperation and Development (“OECD”), *Reviews of Regulatory Reform, Canada: The Role of Competition Policy in Regulatory Reform* (2002) (“**2002 Report**”), online at: <http://www.oecd.org/dataoecd/47/48/1960522.pdf>; and Canada: Report on Competition Law and Institutions (2004) DAF/COMP (2005)4 (18 January 2005) (“**2004 Report**”), online at: <http://www.oecd.org/dataoecd/51/17/34425393.pdf>.

activities potentially caught by section 79 are prohibited only when engaged in by a dominant firm (or group of firms acting in concert) for an anti-competitive purpose and result in a substantial lessening or prevention of competition. Practically, this means that in many (if not most) cases, conduct that could constitute an abuse of dominant position does not raise any concerns under section 79.

Further, it is often not clear whether the conduct being examined is an “anti-competitive act” or has a legitimate business justification. In this regard, it is worth noting that the Federal Court of Appeal’s consideration of this issue in *Canada Pipe* took some 15 pages – highlighting the complexity involved in making this determination.

In the same vein, given that a finding of abuse of dominance largely depends on the definition of the relevant market, there is a good chance that businesses may unwittingly engage in prohibited behaviour. *Canada Pipe* is a good example, as in that case, had the market been defined more broadly, Canada Pipe’s share would drop from 80%-90% to only about 11%.⁶ The complexity of determining the relevant market in abuse of dominance cases is illustrated by the fact that in *Canada Pipe*, the Competition Tribunal took some 110 paragraphs to determine the relevant market.

From this and other cases, it is clear that businesses, the Commissioner of Competition, the Competition Tribunal and the Federal Court of Appeal can and often do disagree with one another with regard to the determinations of “dominance” or the characterization of conduct as either anti-competitive or justifiable. Consequently, we submit that it is not appropriate to impose sanctions such as AMPs or allow private damages claims where it is often unclear whether conduct is potentially problematic at the time it is engaged in.

In addition to the concerns regarding the type of sanctions discussed above, it is worth noting that many of the practices potentially caught by the abuse of dominance provisions are often pro-competitive or competitively-neutral. In our view, increasing negative consequences for engaging in potentially pro-competitive business conduct

⁶ *Commissioner of Competition v. Canada Pipe*, 2005 Comp. Trib. 3 at paras. 60-61.

(for example loyalty rebates such as those at issue in *Canada Pipe*) may create a chilling effect on businesses. In this sense, over-deterrence is as problematic as under-deterrence.

Extending the private right of action to the abuse of dominance provisions and awarding damages is equally undesirable. According to the Industry Report, the purpose of expanding the right of private action to abuse of dominance is to create additional jurisprudence and to help the Bureau's enforcement efforts by alleviating some of its budgetary and resource burdens.⁷ However, given the paucity of private applications (and resulting case law) in the last five years, there is no reason to expect that expanding the private right of action to include abuse of dominance would necessarily yield different results, i.e., more jurisprudence in the area. With regard to this goal, we note that more jurisprudence does not necessarily equal good jurisprudence.

Additionally, there are valid reasons to be concerned that extending the private right of action to abuse of dominance could result in strategic litigation. The fact that strategic litigation has not proven as problematic as predicted in the context of sections 75 and 77 applications⁸, does not mean that the risk does not exist in respect of section 79, having regard to the significant differences between the nature of the provisions. In particular, the current right of private action generally applies to situations where a customer seeks to challenge a refusal to supply or supply terms. This would not likely be the case in the context of private applications under the abuse of dominance provisions, where the most likely applicant would be a competitor. The ability to require a business to justify to the Tribunal the rationale for its business practices and its strategic approach to its competitors is a potentially powerful tool to put into the hands of a competitor. Consequently, there is a significant risk that any benefits achieved by

⁷ Industry Report, *supra* note 5, Ch. 2.

⁸ In this regard, it is worth noting that to date, no applicant has been successful at the merits phase of a private application and several private applications have been brought for strategic reasons (for example to thwart a supplier's contractual ability to terminate a distribution arrangement).

expanding a private right of action to section 79 may be more than offset by the corresponding chilling effect on potentially pro-competitive initiatives.

Finally, there is no evidence that section 79 as it currently exists is ineffective or that the Commissioner is not able to properly enforce it. We are not aware of any meritorious cases that the Commissioner was prevented from bringing due to the substantive elements of the abuse of dominance provisions. Further, we are not aware of any evidence of abuses of dominance being commonplace or of recidivism on the part of companies against whom abuse of dominance cases have been brought. This suggests that the abuse of dominance provisions, as they currently exist, are effective from both a specific and general deterrence perspective. For all of the reasons discussed above, we are of the view that increasing the sanctions (and potential exposure) under the abuse of dominance provisions of the Act is both unnecessary and undesirable.

Reforming The Conspiracy Provisions

The debate regarding reforming the conspiracy provisions has been ongoing for some time now.⁹ The two main arguments advanced by the proponents of reform have been that section 45 is both under and over-inclusive. Those in favour of reform claim the law is under inclusive because the undue lessening of competition element is difficult to prove in the criminal context, leading to lack of enforceability of section 45. At the same time, section 45 is claimed to be over-inclusive because it applies to all agreements that potentially lessen competition and may, therefore, create a chilling

⁹ The interest in reforming the current section 45 can be traced back at least to 2000, when the Minister of Industry initiated public consultation in response to the introduction of four private members' bills in the House of Commons which proposed broad amendments to the Act, including amendments to the conspiracy provisions (Bill C-472, *An Act to amend the Competition Act (conspiracy agreements and right to make private applications)*, the *Competition Tribunal Act (costs and summary dispositions)* and the *Criminal Code as a consequence*, 2d. Sess., 36th Parl., 1999-2000 (1st reading 6 April, 2000). See also OECD, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (1998), online at: [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)35](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35); 2002 Report and 2004 Report, *supra* note 5.

effect on pro-competitive or competitively-neutral agreements.¹⁰ A detailed discussion of the merits of these arguments can easily form the subject matter for a separate paper. In summary, while we agree that hard-core criminal cartels are the most egregious violation of competition law and deterring them should be one of the Bureau's top enforcement priorities, we are of the view that section 45 does not need to be reformed.

With respect to the over-inclusiveness argument, although some commentators have suggested that section 45 creates a chilling effect on pro-competitive agreements or arrangements and that promising collaborations have been abandoned due to concerns regarding possible prosecution¹¹, in our view, there is not enough empirical evidence to confirm that section 45 has this effect to a degree that negatively affects Canadian economy. With respect to the under-inclusiveness argument, there is similarly no evidence that section 45 is not effective or that it is negatively affecting Canadian competitiveness either domestically or globally. The number of convictions/guilty pleas and fines obtained under section 45 over the last several years demonstrate that the conspiracy provisions, as they currently exist, are an effective deterrent against cartel behaviour.

Reforming The Pricing Provisions

We are of the view that it is not appropriate to treat the pricing conduct currently addressed in sections 50, 51 and 61 of the Act (i.e., predatory pricing, price discrimination, discriminatory promotional allowances and price maintenance) as criminal behaviour.

There is little evidence that having these provisions in the Act has a positive impact on competition. Also, unlike conspiracy to fix prices or bid-rigging, the pricing

¹⁰ See for example Al Gourley, *A Report on Canada's Conspiracy Law: 1889-2001 and Beyond* (August 2001), online at: <http://strategis.ic.gc.ca/pics/ct/gourleyrep.pdf>; and McCarthy Tétrault, *Proposed Amendments to Section 45 of the Competition Act* (August 2001) (the "**McCarthy Tétrault Report**"), online at: <http://strategis.ic.gc.ca/pics/ct/tetrault.pdf>.

¹¹ For example, the McCarthy Tétrault Report, *ibid.*, states at page 10: "[o]n the basis of our experience, we are convinced that a large number of pro-competitive arrangements, which otherwise present some antitrust risk, do not proceed because counsel cannot give an unqualified opinion that there is no risk of criminal prosecution."

practices addressed in these sections are not morally objectionable and, in many instances, the conduct prohibited may even be pro-competitive. With respect to price discrimination, for example, it is hard to understand why, in principle, one form of vertical restraint (i.e., vertical price control) should be subject to a criminal prohibition, while other forms, such as market restriction and exclusive dealing, which often have the same effects as vertical price controls, are treated as civil reviewable practices. Consequently, these practices should not be subject to criminal sanctions or private damages claims – consequences we believe should be reserved for the most egregious forms of anti-competitive conduct.

Furthermore, Canadian case law on price maintenance is not in line with the federal US case law following the recent US Supreme Court decision in *Leegin*¹², where the Court concluded that price maintenance should not be treated as a *per se* violation of US antitrust laws. Rather, the Court held that this type of conduct should be subject to a rule of reason analysis, which considers the economic rationality and actual competitive impact of the specific conduct at issue.

As a result of the *Leegin* decision, the Canadian approach to price maintenance is now completely at odds with that in the United States. Consequently, US businesses cannot implement consistent pricing programs throughout US and Canada. Accordingly, firms must incur additional costs associated with developing Canada-specific pricing programs. This reduces efficiency of business operations and increases the costs of doing business in Canada. While it is unlikely that the differences in the pricing provisions are a determinative factor in deciding whether to conduct business in Canada, they certainly create additional compliance costs/burdens and may, in combination with other factors, deter firms from expanding into Canada.

Reforming The Efficiencies Defence

The role of efficiencies under the Act has been debated in Canada for over a decade, primarily with respect to the role efficiencies play in merger analysis. Unlike

¹² *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007) ("*Leegin*").

other jurisdictions, the Act includes a unique efficiencies defence in section 96(1) that allows an otherwise anti-competitive merger to proceed if the resulting efficiencies are greater than, and will offset, the anti-competitive effects that will or are likely to result from the merger and if these efficiencies cannot be obtained otherwise.

Although introduced in 1986, the efficiencies defence was untested until the 2000 Superior Propane merger.¹³ Ultimately, the Competition Tribunal allowed the merger to proceed on the basis of the efficiencies defence. Ever since then (and largely in response to the outcome in that case), there have been calls for the reform or abolishment of the efficiencies defence.

Our view is that reform of the efficiencies defence is premature and, in the absence of compelling evidence that change is required, it is appropriate to maintain the *status quo*. There is no empirical evidence that section 96(1) in its present form is problematic. In particular, there is no evidence to suggest that it has allowed a significant number of anti-competitive mergers to proceed. In the overwhelming majority of cases, parties to a merger rely on factors other than efficiencies (such as, for example, the definition of the relevant market, the remaining competition and absence of barriers to entry) to advocate the merger. The fact that *Superior Propane* is the only contested case brought to date supports this view.¹⁴

At this time, there is simply not enough case law to justify reforming section 96(1). Basing fundamental policy changes on a single case is not prudent and the law in this area should be given more time to develop before any reforms are contemplated.

¹³ *Canada (The Commissioner of Competition) v. Superior Propane Inc.*, [2003] 3 F.C. 529 (C.A.), aff'g (2002), 18 C.P.R. (4th) 417 (Comp. Trib.) (re-determination decision following [2001] 3 F.C. 185 (C.A.), rev'g (2000), 7 C.P.R. (4th) 385 (Comp. Trib.)) ("**Superior Propane**").

¹⁴ Although the efficiencies defence has been invoked in one Tribunal case (*Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.)) and mentioned in several others, *Superior Propane* is the only case where it has been applied. Some commentators have suggested that if the case were to be reheard today with the benefit of hindsight, the outcome may well have been different.

Q: What changes to the ICA and Canada's investment review regime would help Canada address the challenges and complexities of the modern global economy, within the constraints of Canada's international obligations?

Although the foreign investment review process generally applies only to larger investments and is said to be "perfunctory", there are a number of changes to the review process which, in our view, will both make Canada a more attractive destination for foreign investment and improve the competitiveness of the Canadian economy.

Foreign Ownership Restrictions

At first glance, foreign ownership restrictions do not appear to present a considerable problem for the Canadian economy since they are confined to a few industries. However, a closer inspection reveals that these restrictions have resulted in sub-optimal competition in the subject industries. In our view, foreign ownership restrictions have not served their stated public policy goals and have, quite possibly, frustrated the achievement of a number of others. Consequently, laws that control or limit foreign ownership interests in banking, airlines, telecommunications and media should be eliminated, although we believe that special considerations should remain for acquisitions by state-owned enterprises. This position is consistent with previous recommendations by the Organisation for Economic Co-operation and Development ("OECD")¹⁵, as well as with the views expressed by various industry participants and the Competition Bureau.

We agree with the Bureau's position that access to capital is essential for dynamic and efficient markets and that markets need diversity of options, including a diversity of sources of capital, to function optimally. Foreign capital is not just about the influx of cash into a country, but also involves bringing new financial ideas and influences, sources of technology and managerial efficiency. Consequently, restricting the participation of foreign investors is not consistent with effective capital markets.¹⁶

¹⁵ See 2002 Report and 2004 Report, *supra* note 5.

¹⁶ Submissions made by the Competition Bureau in response to the 2002 Report.

Restricting foreign ownership is an inefficient method of accomplishing policy objectives. It not only discourages investment activity, but may also deprive consumers of competitive choices. The current restrictions have allowed anti-competitive mergers to proceed because interested foreign investors were prevented from participating in the market. A prime example is the 1999 Canadian Airlines/Air Canada merger, which was largely the product of the restrictions on foreign ownership in the Canadian airline industry. The merger resulted in a near monopoly, the anti-competitive consequences of which the Bureau had to deal with through the enactment of industry provisions to the Act and bringing of costly proceedings in response to complaints brought by industry participants. Similarly, restrictions on foreign ownership applicable to retail book-selling facilitated the 2001 Chapters/Indigo merger that combined the only two national book-selling chains in Canada. The prevention of foreign firms from participating in this sector also likely contributed to the failure to effect a meaningful remedy to the competitive concerns resulting from the merger.

Foreign ownership restrictions constitute significant barriers to entry¹⁷ and harm the competitiveness of Canadian economy by reducing the threat of competitive entry. They have resulted in economic costs to the Canadian economy, including limiting access to foreign capital/investment, limiting the number of potential market participants, increased costs to consumers, reduced innovation, etc. While the record number of foreign takeovers of Canadian companies in 2006 and 2007 has resulted in renewed cries about “hollowing-out” of corporate Canada, investment policies should not be shaped by rhetoric, especially in the face of the evidence suggesting the significant benefits of foreign investment in Canada.¹⁸

¹⁷ See for example the Competition Bureau’s technical backgrounder on the Rogers/Microcell merger, online at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00257e.html>.

¹⁸ According to numerous reports, foreign multi-nationals make the best Canadian corporate citizens. See for example a study conducted by Statistics Canada *Global Links: Multinationals in Canada: An Overview of Research at Statistics Canada* (released November 13, 2007), part of *The Canadian Economy in Transition*, no. 14; see also “The Benefits of Foreign Business Activity in Canada”, The Fraser Institute (November 2007), online at: http://www.fraserinstitute.org/commerce.web/product_files/benefitsforeignbus.pdf.

Cultural Sector Investment Review

Currently, any foreign acquisition of a Canadian “cultural business” may be subject to review by the Minister of Canadian Heritage, regardless of the value of assets. Furthermore, even if the acquired business is only marginally involved in “cultural” activities, acquisitions by “non-Canadians” are still potentially subject to review. In our view, there is no need to subject investors to lengthy and, potentially costly, review when the “cultural” business constitutes only a small portion of the overall business being acquired. Consequently, we believe that a *de minimis* exception for a “cultural” component of a business should be introduced into the *Investment Canada Act* (the “ICA”).

Additionally, the definition of a “cultural business” is currently over-broad and should be revised to only encompass businesses involved in creating content. Under the ICA, a “cultural business” includes any business involved in production, distribution or sale of books, periodicals, compact discs, videos, movies and similar products. This definition is format-based and does not explicitly incorporate a content test. As a result, it is much wider than it at first appears and applies to many businesses that people would not generally perceive as “cultural”.

The main objectives of having cultural review is to ensure that Canadian cultural heritage and national identity are preserved and protected. However, the current definition catches businesses that have little or nothing to do with Canadian culture and identity. For example, a convenience store that sells newspapers or paperback books may be considered a “cultural business” under the current definition. In our view, subjecting acquisitions of these types of businesses by foreign investors to cultural review is entirely unconnected to the purposes for which these provisions were enacted. In addition, the restrictions on foreign investment in the cultural sector have facilitated the creation and maintenance of virtual monopolies/oligopolies, with a corresponding negative effect on competition.

It also seems that, to promote effective competition, foreign investors should, to the extent possible, be put on a common footing with domestic investors. For example,

there is no reason why foreign investors should have less control over their product mix than domestic investors. Yet, foreign investors are often required to provide undertakings regarding stocking Canadian content as a condition of being allowed to purchase retail businesses that sell cultural products. It seems unfair that Canadian retailers are not required to carry products produced by Canadian authors while foreign investors may be required to do so.

Overlapping Reviews/Jurisdiction

Transactions in certain economic sectors are subject to review by multiple governmental agencies. Some examples include transportation, where transactions may be reviewable by Industry Canada, the Bureau and the Ministry of Transportation and telecommunications, where transactions may be reviewable by the Canadian Radio-television and Telecommunications Commission, the Bureau and Industry Canada.

Canada is already perceived as a heavily-regulated jurisdiction. According to the 2006 OECD study, there are more restrictions on foreign investment in Canada than in most OECD countries.¹⁹ Requiring firms to go through multiple reviews with respect to the same transaction increases costs to both domestic and foreign investors. In our view, overlapping reviews should be eliminated or, at the very least, they should be coordinated by the responsible agencies. In particular, to the extent possible, attempts should be made to harmonize the informational requirements, procedures and timing, to make overlapping reviews as painless as possible.

In addition, given that, presumably, the effect of the investment on competition in the relevant market will be addressed under the Act, the requirement to show this effect should be removed from the “net benefit” test under the ICA.

¹⁹ OECD, *OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies*, OECD Working Papers on International Investment (December 2006), online at: <http://www.oecd.org/dataoecd/4/36/37818075.pdf>. See also the Fraser Institute news release, “Increased foreign investment provides Canadian consumers with lower prices and higher wages” (November 8, 2007) online at: <http://www.fraserinstitute.org/commerce.web/newsrelease.aspx?nID=5042> and OECD, *Economic Survey of Canada: 2006* (June 26, 2006) online at: http://www.oecd.org/document/58/0,3343,en_33873108_33873277_36951632_1_1_1_1,00.html.

Summary

We believe that, while the current Canadian competition law and foreign investment review regimes are reasonably effective, there are aspects that can and should be improved. We believe that decriminalizing the pricing provisions of the Act, eliminating overlapping review and revising the definition of a “cultural business” are all changes that will make Canada both more competitive in the global economy and a more attractive destination for foreign investments.

At the same time, we do not believe changes should be made for changes' sake. In this regard, our view is that, in the absence of any compelling evidence that the current conspiracy provisions or the efficiencies defence are having a negative impact on the competitiveness of the Canadian economy, the proposals for change are premature.

We are happy to provide any additional information or comments that the Panel may find helpful. We thank the Panel for the opportunity to participate in the consultation process and would also appreciate the opportunity to participate in any round-table discussions or consultations that the Panel may conduct in the future.