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**Competition Policy Review Panel**  
**Research Paper Summary**

**Author: Competition Bureau**

**Title: A Synthesis and Review of Recent Reform Proposals Regarding Canada's Competition Act**

**Subjects Addressed:**

- Competition Policy
  - Cartels and Conspiracies
  - Merger Efficiencies
  - Merger Reviews
  - Market Study Power
  - Abuse of Dominance Penalties
  - Decriminalizing Pricing Offences
  - Industry exemptions under the Act
- International Standards and Best Practices

While the purpose and general scope of the *Competition Act* is consistent with the laws governing competition in other leading jurisdictions, there are a number of areas in which improvement has been advocated. Between 2002 and 2004 there was an extensive review and public consultation process, led by Industry Canada, of the *Competition Act* which culminated in proposed legislation (Bill C-19). This Bill died on the Order Paper in the autumn of 2005.

*Criminal Provisions:*

Of major concern is the status of the criminal conspiracy (anti-cartel) provisions of the Act. The current provision, which has not fundamentally changed in 120 years, has proven to be difficult to enforce in contested proceedings because of the necessity to prove complex economic concepts related to harm to a criminal standard of "beyond a reasonable doubt". The Crown has succeeded in 3 of 21 contested conspiracy cases since 1980. The Bureau notes that this is particularly troubling given that each of these cases involved hard core-cartel behaviour, such as agreements to fix prices. This inability to secure convictions is not a theoretical concern. Every business that purchases products at prices that have been inflated by cartel agreements suffers from increased costs that make it less competitive in its own markets.

Because of the broad scope of the conspiracy provision, the uncertainties regarding its application and the risk of criminal sanctions, Canadian firms can be "chilled" or discouraged from entering into potentially beneficial strategic alliances. These problems are compounded by the fact that the conspiracy provision subjects all of these forms of agreements to criminal prosecution punishable by imprisonment for up to 5 years and fines of up to \$10 million.

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The paper points out that the Canadian conspiracy provision is out-of-step with the approach taken in other jurisdictions, most notably, the United States. The paper notes that in the United States, hard-core cartel agreements are subject to criminal penalties under a “per se” prohibition – meaning that the harm caused by cartels is presumed and need not be proved by the Crown. Other types of agreements, such as strategic alliances, are subject to a full analysis of competitive effects in a civil proceeding. The Bureau recommended that the Act be amended to make it consistent with this approach: a criminal prohibition against the most egregious forms of cartel agreements – price-fixing, market allocation and output restriction agreements – and a non-criminal section to address all other forms of agreements.

On the question of the pricing provisions of the Act (e.g., price discrimination, predatory pricing), the paper notes that there is widespread consensus that many of the pricing provisions of the Act could be repealed. In their place, the Competition Bureau would address these types of practices under the existing abuse of dominance provisions of the Act.

*Non-criminal Provisions:*

The paper supports the introduction of one form of financial penalty for the non-criminal abuse of dominance provision of the Act. Currently the abuse of dominance provision allows the Competition Tribunal to order that the conduct stop but does not allow for the award of any form of financial consequences to deter such behaviour. Nonetheless, there are parties opposed to this proposal, citing the potential size of the penalties and the fact that the Tribunal already has the power to order the prohibition of any practice deemed to be anticompetitive. There is wide spread support for the proposal to repeal the various airline specific provisions of the *Competition Act*.

*Merger Review Process and Treatment of Efficiencies:*

The Competition Bureau argues that its merger review process is not an impediment to the efficient restructuring of Canadian industries. In support, it cited the fact that, of over 7,900 mergers that occurred in Canada from 2002-2007, the Competition Bureau reviewed only about 1,400. Of these, the Bureau obtained some form of remedy in 15 of these files (1% of those reviewed, or 0.2% of total reported mergers). Even in the small number of cases found to lessen competition substantially, the parties have an ability to present evidence that the transaction should be cleared in light of the efficiencies it will bring to the Canadian economy. With respect to the time required by the Bureau to review mergers, over 90% of mergers that are filed with the Competition Bureau are cleared within 10 days.

The paper also covers the treatment of efficiencies under the merger provisions of the Competition Act. It notes that some argue that the current efficiencies exception in the Act goes too far as it has been interpreted by the Tribunal and courts as allowing for mergers to monopoly where efficiencies

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override the substantial lessening or prevention of competition, and because there is no requirement that efficiency benefits be passed on to consumers. Others argue that the Bureau does not adequately account for efficiencies in its merger reviews. As well, the application of the statutory trade-off between gains in efficiency and the anti-competitive effects has been the subject of considerable debate. In this regard, there has been very limited enforcement experience in respect of the relatively recently proscribed “balancing weights” standard used to weigh efficiency claims in merger cases. Likewise, the debate thus far has not produced any consensus on an alternative approach. The Bureau intends to continue to study and develop its approach to efficiencies in competition law analysis.

#### *Market Study Powers:*

The Bureau noted that it currently has a limited ability to and does conduct market studies as part of its role as advocate for market forces. The Bureau relies upon voluntary cooperation to obtain the relevant and necessary information. The paper points out that there are a number of benefits from market studies. They allow the government to assess specific issues relating to the operation of certain markets in an informed way in order to make policy decisions. The challenge is that the Bureau’s authority to conduct market studies is much narrower in scope compared to that of the authorities in the United Kingdom or the United States. The Bureau believes that its ability to perform market studies would be enhanced if it had greater access to information. At the same time, the Bureau is mindful of the costs such inquiries impose on businesses and the need for appropriate safeguards to address concerns that have been raised about the use of formal powers to compel the information needed to undertake such studies. The UK operates a system whereby markets with features that are conducive to anti-competitive behaviour (i.e. high barriers to entry, diffuse consumers or suppliers) are widely reviewed apart from any specific investigatory work. .

#### *Conclusions:*

There have recently been several studies regarding the need for reform of the *Competition Act* (both domestically and internationally) and despite some disagreements between stakeholders, they have come to similar conclusions regarding those provisions of the Act that warrant reform. Specifically, these reports have suggested that Canada should strengthen its conspiracy provisions by addressing the burden imposed on the Crown of meeting the undue lessening of competition standard. The Bureau’s research supports a move from criminal enforcement of most pricing provisions to a civil enforcement system. The report concludes that in light of the very limited enforcement experience regarding the consideration of efficiencies in merger reviews, these should continue to be treated as they currently are as the Bureau studies and develops the area.