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Competition Policy Review Panel
280 Albert Street, 10th Floor
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Dear Panel Members:

Re: Sharpening Canada's Competitive Edge

Osler, Hoskin & Harcourt LLP is pleased to provide the attached responses to the questions posed in chapters 2, 3 and 4 of the Panel's consultation paper entitled *Sharpening Canada's Competitive Edge*. We would be pleased to offer any additional assistance that the Panel might consider to be helpful.

Yours very truly,

Paul Crampton
PC:pc
attch.

OSLER

SHARPENING CANADA'S COMPETITIVE EDGE

SUBMISSION TO THE COMPETITION POLICY REVIEW PANEL

January 11, 2008

A. Introduction

Osler, Hoskin & Harcourt LLP is pleased to submit these responses to the questions posed by the Competition Policy Review Panel (the "Panel") in its consultation paper entitled *Sharpening Canada's Edge* (the "Consultation Paper"). We applaud the federal government for establishing the Panel and providing it with a mandate to review Canada's competition and investment policies with a view to making recommendations on how to enhance Canadian productivity and competitiveness, establish domestic conditions that will encourage Canadian firms to be active investors at home and abroad, and maximize Canada's attractiveness as a destination for new investment and talent. We hope that the Panel's recommendations will lead to decisive action to address Canada's declining productivity growth (relative to most other OECD countries), to make Canada more attractive to international investors and to cultivate an environment in which Canadian firms can grow to become competitive on the global stage.

Our responses to the specific questions posed by the Panel in chapters 2, 3 and 4 of the Consultation Paper are set forth below.[1]

B. Canada in a Global Context

1. **Should Canadians be concerned about foreign takeovers of Canadian firms? How important is domestic control and ownership of Canadian business activities to Canada's economic prospects and ability to create jobs and opportunity for Canadians?**

The data cited in the Consultation Paper strongly suggests that Canadians should not be overly concerned about foreign takeovers of Canadian firms and confirms that global trade and investment liberalization has, on balance, benefited Canada. For the reasons noted in the Consultation Paper, there can be significant positive benefits associated with domestic control and ownership. However, the loss of such benefits through foreign takeovers would appear to be offset by the positive benefits that accrue to (i) other Canadian controlled firms and the communities in which they are located, as those firms grow domestically, eventually expand on the global stage and generate a broader range of activities and world class opportunities at their Canadian head offices; and (ii) Canadian divisions or subsidiaries of foreign controlled companies, as their parent firms transfer technology and know-how to their acquired Canadian

[1] We have elected not to respond to the questions in chapters 5 and 6 of the Consultation Paper.

operations, and as those parent firms invest in growing those Canadian operations and in making them more competitive in Canada and abroad.

2. **How important are company headquarters to Canada's economic prospects and ability to create jobs and opportunity for Canadians? How important are global divisional head offices? What factors influence their location?**

Regarding the creation of jobs and opportunity for Canadians, the location of company headquarters in Canada can provide important benefits. However, as noted in our response above, the loss of such benefits in specific cases through acquisition by non-Canadian controlled entities appears to have been offset by (i) the growth generated by the investment that the latter entities have made in their acquired Canadian operations, and (ii) the growth and expansion, at home and abroad, of firms that have remained Canadian controlled.

The factors that influence the location of global divisional head offices are largely the same as those that influence foreign investment; namely, levels of corporate and individual taxes; the availability of skilled and competitively priced human resources; the availability of professional and technical support services; the cost of power and other important inputs; the extent to which relevant legal and regulatory frameworks are transparent, predictable and certain; the degree of confidence in government at all levels; the extent to which laws and regulations distort competition or impede investment; and any other factors that may impact upon the direct and indirect costs of doing business.

3. **How do Canada's policies impacting direct investment, both inward and outward, affect Canada's competitiveness as a destination for FDI and as a platform for global growth?**

The IMF has recently suggested that Canada's competitiveness and productivity would benefit from a reduction of the significant barriers to foreign investment that exist in Canada, particularly in relation to important network industries, such as transportation,

telecommunications, broadcasting and utilities.[2] The OECD has made similar suggestions,[3] as have experts on international competitiveness such as Michael Porter and Monitor Company.[4]

Other observers such as the C.D. Howe Institute,[5] The Fraser Institute[6] and the Rotman School of Management[7] have identified additional areas of government policy that adversely impact upon inward investment, Canadian productivity, and, by implication, the competitiveness of Canadian businesses.[8]

We agree that increased liberalization of existing restrictions on foreign investment, combined with a more narrowly focused and more transparent investment review regime, reduced corporate and personal taxes, reduced barriers to internal trade and reduced legislative and regulatory distortions of competition, would have a positive impact upon Canada's competitiveness as a destination for FDI and as a platform for global growth.

4. **Do Canada's economic policies appropriately reflect our increased integration with the North American and global economy? How might these policies be changed to better reflect this new competitive environment?**

We submit that Canada's economic policies, on the whole, do not appropriately reflect our increased integration with the North American and global economy. For suggestions as to how these policies might be changed to better reflect our existing economic environment, please see our response to question 2 in section E below.

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2 International Monetary Fund, *Transcript of a Conference Call on Canada's 2007 Article IV Consultation*, available at http://www.imf.org/external/np/tr/2007/tr071219.htm.

3 See, for example, OECD, *Canada – Maintaining Leadership Through Innovation* (Paris: 2002), at 44-45. See also Paul Conway and Giuseppe Nicolleti, "Product Market Regulation and Productivity Convergence: OECD Evidence and Implications for Canada", 15 *International Productivity Monitor* (Fall 2007) 3, at 19-20.

4 Michael E. Porter and Monitor Company, *Canada At The Crossroads – The Reality of a New Competitive Environment* (October 1991.

5 See generally http://www.cdhowe.org/index.cfm.

6 See generally http://www.fraserinstitute.org/researchandpublications/researchtopics/trade.htm

7 See generally http://www.mgmt.utoronto.ca/research/competitive.htm.

8 These typically relate to the matters identified in our response to question 2 above.

C. Investment Policies

1. What impact has the ICA had on the Canadian economy and Canadian competitiveness, and specifically on our ability to attract FDI?

The ICA has not likely had any material impact (either positive or negative) upon the Canadian economy, Canadian competitiveness or our ability to attract FDI. In general, the ICA review process does not result in materially reducing the potential value associated with acquisitions of Canadian businesses by foreign entities. However, as discussed in our response to the question immediately below, we submit that the current review regime is anachronistic, overbroad, and could benefit from being more transparent, predictable and narrowly focused. It could also benefit from a shorter review period.

2. 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?

Based on our experience with a large number of reviews under the ICA over the years, we do not believe that the ICA as presently structured makes a positive contribution towards helping Canada address the challenges and complexities of the modern global economy. If anything, the existing review framework and its implementation adversely impact upon what the Panel has referred to as Canada's "investment identity". Accordingly, consideration should be given to assessing how the existing legislation could be (i) more narrowly focused and limited to (a) transactions that give rise to *prima facie* concerns about national security, and (b) acquisitions of control of a more narrowly defined category of Canadian controlled cultural businesses; and (ii) implemented in a more transparent and predictable fashion.

With respect to national security, it is important that there be a clear and narrowly circumscribed definition, whether in the ICA, its implementing regulations or guidelines, of the test that will be applied and the factors that will be considered in reviewing a proposed investment on national security grounds. This definition could permit the government to address any national security concerns that may arise in connection with acquisitions by sovereign wealth funds. In any event, we respectfully submit that it should be made clear that the review of transactions on national security grounds would be exceptional, and that investors should be able to (i) determine in advance whether they are likely to be reviewed on national security grounds; (ii) elect to submit an application for review/approval prior to closing; and (iii) obtain a final decision from the

Minister, prior to closing, within a relatively short period (such as 30 days, or some other period that is not longer than the timing applicable to takeover bids and plans of arrangements under securities and corporate law legislation).

With respect to cultural businesses, if it is considered appropriate to maintain the application of the ICA to acquisitions of control of such businesses, we submit that the ICA should be amended to, among other things, (i) substantially increase the review thresholds from the current levels of $5 million for direct acquisitions and $50 million for indirect acquisitions (at a minimum these thresholds should be increased to reflect the inflation that has occurred since those thresholds were established in 1985); (ii) exclude from the determination of whether those thresholds are met in any given case the value of foreign assets held by the Canadian business; (iii) insert a *de minimis* provision into the ICA to eliminate the review of acquisitions of Canadian businesses whose revenues from cultural activities is only a minor percentage of their total Canadian revenues (e.g., supermarkets that sell a few magazines at the checkout counter, or businesses that sell manuals or other written materials together with their principal, non-cultural, products); (iv) confine the application of the ICA to acquisitions of Canadian owned and controlled cultural businesses; (v) repeal the provision in section 15 which provides discretion to the Governor in Council to order a review of an otherwise non-reviewable investment; and (vi) clarify the control tests in sections 26 to 28 of the ICA. In addition, we respectfully submit that the existing policy barring acquisitions of Canadian-controlled businesses engaged in book publishing and distributing, film distribution and magazine publishing should be re-evaluated in light of current market conditions.

For greater certainty, with respect to the other sectors that are designated as “sensitive” under the ICA, we submit that any concerns with respect to uranium production and producing properties could be addressed under the aforementioned “national security” framework, and that acquisitions of control by non-Canadians of Canadian businesses providing transportation services or financial services sectors should be left to be addressed by the Canada Transportation Agency or the Office of the Superintendent of Financial Institutions, to eliminate the duplication that exists today.

Regarding transparency and predictability, the current situation is far from optimal. In short, there is much ambiguity in the ICA, the Investment Review Division's interpretations have not been revised since 1985, unpublished interpretations change without notice, and little guidance is provided regarding the application of policies with respect to undertaking. We respectfully submit that there is room for improvement in each of these areas.

- **What, if any, changes to the investment review process would enhance Canada's competitiveness and improve Canadians' understanding of the benefits of FDI?**

To the extent that the existing review process does not likely impact upon Canada's competitiveness, at a macro level, to any material degree, it is unlikely that any changes to that process would result in materially enhancing that competitiveness. However, the changes suggested immediately above likely would lead to (i) marginal improvements in our competitiveness (and potentially greater benefits in certain sectors, if they were opened up to greater FDI); (ii) material reductions in foreigners' cost of doing business in Canada; (iii) potentially enhancing shareholder welfare by eliminating a significant regulatory burden faced by non-Canadian bidders in a range of situations, such as auction processes; (iv) the elimination of a significant source of time delay in a broad range of transactions that are otherwise able to proceed after the completion of more expeditious reviews under the *Competition Act*;[9] (v) potentially important improvements in the external perception of Canada as a place to invest; and (vi) the economic benefits associated with earlier realization of the efficiencies that are often delayed as a result of undertakings sought under the ICA.

- **Should the net benefit test be adapted to reflect the new competitive environment? If so, how?**

As discussed above, we submit that the existing legislation should be more narrowly focused on transactions that give rise to *prima facie* concerns about national security and, possibly, to acquisitions of control of Canadian controlled *bona fide* cultural businesses. With respect to national security, there should be a narrowly circumscribed test that is clearly defined in the

[9] According to the Competition Bureau, approximately 80% of merger reviews are completed within 14 days. See http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02366e.html. In the U.S., over 97% of merger reviews under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* are completed within 30 days. See United States Federal Trade Commission and Department of Justice, *Hart-Scott-Rodino Annual Report – Fiscal Year 2006*, at 5 (available at http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf).

legislation and based on considerations that are focused on national security. If it is considered desirable to continue applying the ICA to acquisitions of control of Canadian controlled cultural businesses, or any other businesses, consideration should be given to reversing the existing net benefit test and requiring an affirmative finding, supported by written reasons, of why a proposed investment is not likely to be of net benefit to Canada, before any undertakings can be sought in respect of the proposed investment. In addition, detailed guidelines should be issued on how the "net benefit to Canada" determination is made, including the relative weighting that is placed upon the relevant factors that are considered by the Minister.

D. Sectoral Investment Regimes

3. **What changes, if any, are required to Canada's sectoral investment regimes to minimize or eliminate negative impacts on Canada's competitiveness?**

Please see our response to question 2 in section E below.

4. **What have been the impacts of these investment regimes on productivity and competitiveness in the specific sectors?**

Please see our response to question 3 in section B above, and questions 1 and 2 in section E below.

5. **Are there alternative mechanisms that would achieve the non-economic policy objectives of the sector while also ensuring maximum competitiveness of firms operating in the sector?**

Please see our response to question 2 in section E below.

E. Competition Law and Policy

1. **How does Canada's competition policy affect Canadian competitiveness in an environment of globalization and free trade?**

We applaud the Panel for recognizing that Canada's competition policy "should not … insulate Canada from global competition" (p.4) and that "the opening of borders and increasingly vigorous competition spur innovation and an accompanying increase in productivity" (p.5). As the Consultation Paper notes, "[t]his results in greater economic efficiency and generally higher-quality products available at lower prices" (p.5). Conversely, protected markets tend to result in higher costs for consumers and businesses. As Michael Porter has demonstrated, the adverse

consequences that this has for overall domestic productivity and growth are exacerbated by the fact that protected firms have greater difficulty competing abroad.[10]

We also applaud the Government of Canada for recognizing the importance of competition policy in the nation's overall economic policy and for committing to review Canada's competition policies "to ensure that they provide competitive marketplaces".[11]

A nation's competition policy is generally considered to extend beyond any legislation that addresses restrictive trade practices and merger review to include the manner in which competition considerations are incorporated into the nation's general economic policy.

We generally concur with the views of Canadian competition policy that were described in the OECD's 2002 report entitled *The Role of Competition Policy in Regulatory Reform.* After observing that "[c]ompetition policy has been integrated inconsistently into the general policy framework in Canada", that report noted that economic policy in Canada has "sometimes tolerated local market power, entry controls, industry co-operation, and protection of national firms at the expense of national consumers".[12] More specifically, the report concluded that:

> [t]he extent of regulatory intervention, through ownership restraints, provincial licensing and other trade-regulating authorities, and special sectoral arrangements is substantial. It has never been surveyed comprehensively, and the total effect is hard to quantify, but it is likely to be impairing opportunities for smaller firms, entrenching the position of some dominant ones, and encouraging others to look outside of Canada for growth.[13]

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[10] Michael E. Porter, *The Competitive Advantage of Nations* (The Free Press, Macmillan, Inc., 1990), at 665. In a 1991 study of Canada, Porter and Monitor Company observed that "[w]eak domestic rivalry in many industries in Canada … will tend to diminish the odds of achieving sustained international success". See *supra* note 4, at 29.

[11] Department of Finance, *Advantage Canada – Building a Strong Economy for Canadians* (2006), at 81.

[12] OECD, *The Role of Competition Policy in Regulatory Reform*, (Paris: 2002), prepared for *The OECD Review of Regulatory Reform in Canada*, at 6 (available at http://www.oecd.org/dataoecd/47/48/1960522.pdf).

[13] *Ibid*.

After reviewing a broad range of federal regulatory distortions of competition (e.g., in sectors such as financial services, airlines, agriculture, fisheries, telecommunications, broadcasting, publishing, sports and the performing arts), that report turned its attention to provincial restrictions of competition and concluded that:

> The impact of anti-competitive provincial legislation is a matter of concern. Examples are intra-provincial trucking regulation in some provinces, rules that prevent competition by professionals, and restraints on trade and services among provinces. A comprehensive study should be undertaken to assess the competitive effects of provincial laws and regulations and to identify sectors where reform is most needed. A model for such a study in a federal context is the review of state-level constraints on competition undertaken in Australia. Prime targets for action would be provincial laws and decisions that constrain trade among the provinces, that permit business and professional associations to restrict price and other forms of competition among their members, and that protect providers and dealers against new competition or prohibit aggressive pricing and other marketing methods.[14]

We note that this emphasis on reducing interprovincial barriers to competition was reflected in the OECD's subsequent 2004 report on Canadian competition law and policy[15] and is consistent with advice offered a decade earlier by Michael Porter and Monitor Company, when they urged "the federal and provincial governments [to] make an extraordinary effort to eliminate interprovincial barriers as expeditiously as possible".[16] It is also consistent with a report published last month by two leading OECD economists, who identified "persisting barriers to interprovincial trade" as one of the potential explanations for Canada's "subdued productivity

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[14] *Ibid*., at 43.

[15] OECD, *Canada – Report on Competition Law and Institutions* (2004), at 23.

[16] Porter and Monitor Company, *supra* note 4, at 98.

growth".[17] The C. D. Howe Institute has estimated the direct costs of interprovincial barriers to competition to be in the range of approximately 1% of Canada's Gross National Product ("GNP"). When indirect costs (such as the "discouragement" factor, where investment is lost because of the perception of barriers and excessive red tape) are considered, the cost of those barriers is estimated increase to at least 2% of GNP.[18] Fortuitously, the IMF has just echoed the calls for action on barriers to interprovincial trade and foreign investment.[19]

Based on experience with regulatory reform in other jurisdictions (see our response to the next question), we believe that the significant distortions of competition that result from a broad range of federal, provincial and municipal legislation, regulation and other measures (collectively "Regulation") are likely having a material adverse impact on Canada's international competitiveness and on Canadians' average standard of living in the current environment of increased global competition.[20] We hope that the situation may improve somewhat as a result of the recent *Cabinet Directive on Streamlining Regulation*,[21] which requires government departments and agencies to "ensure that [any] regulatory restriction is fair, limited, and proportionate to what is necessary to achieve intended policy objectives", and to "prevent or mitigate any adverse impacts and enhance the positive impacts of regulation on … competitiveness, trade and investment". However, we submit that Canadian competitiveness would be further strengthened through the adoption of the approaches described immediately below.

2. What changes to Canada's competition regime would enhance the competitiveness of Canadian firms in the global economy? What international best practices, if any, would

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17 Conway and Nicoletti, *supra* note 3, at 4.

18 The Canadian Chamber of Commerce, Smart Regulation (2005) (citing the C.D. Howe Institute's findings) (available at http://www.chamber.ca/cmslib/general/G051.pdf).

19 International Monetary Fund, *Transcript of a Conference Call on Canada's 2007 Article IV Consultation*, available at http://www.imf.org/external/np/tr/2007/tr071219.htm ("At the same time, we would emphasize the importance, as we've seen in other countries, of boosting productivity by reducing restrictions on foreign direct investment and by lowering barriers to interprovincial trade and labour mobility.")

20 This is consistent with the findings of Porter, *supra*, note 10, at 664, where the author reported that "[t]he nation in which competition itself was least regulated was often the international leader in the industries we studied".

21 Government of Canada, *Cabinet Directive on Streamlining Regulation* (April 1, 2007) (available at http://www.regulation.gc.ca/directive/directive00-eng.asp).

strengthen Canadian competitiveness [and make Canada more attractive] as a destination for foreign investment if we were to adopt them?

We assume that the term "regime" in this question contemplates the same competition policy mentioned in the immediately preceding question.

Competition Policy

As reflected in our response to the immediately preceding question, we submit that there is room for Canada to strengthen its competition policy and the international competitiveness of Canadian firms by providing a greater role for competition considerations in the development of new, and in the review of existing, Regulation at all levels of government.

The OECD and APEC have developed helpful frameworks for international best practices in this area. Specifically, the OECD's 1997 *Policy Recommendations on Regulatory Reform* recommend that countries "[r]eform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests".[22] In this regard, those recommendations urge OECD members to "[r]eview as a high priority those aspects of economic regulations that restrict entry, exit, pricing, output, normal commercial practices, and forms of business organisation".[23]

Likewise, the comprehensiveness principle in the *APEC Competition Principles* advocates "[b]road application of competition and regulatory principles to economic activity including goods and services, and private and public business activities", as well as the "recognition of the competition dimension of policy development and reform which affects the efficient functioning of markets".[24] To implement this comprehensiveness principle, the *APEC Competition Principles* encourage APEC Member Economies (including Canada), to, among other things:

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[22] OECD, *The OECD Report on Regulatory Reform – Summary* (Paris: June 1997). See also the main *Report on Regulatory Reform* (Paris: 1997, at 253), which recommended that regulatory "reform should be built on a foundation of competition policy".

[23] *Ibid*. (Summary).

[24] *APEC Principles to Enhance Competition and Regulatory Reform* (1999), available at http://www.dfait-maeci.gc.ca/canada-apec/principles-en.asp.

(i) identify and/or review regulations and measures that impede the ability and opportunity of businesses (including SMEs) to compete on the basis of efficiency and innovation; and
(ii) ensure that measures to achieve desired objectives are adopted and/or maintained with the minimum distortion to competition.

These OECD and APEC principles also have found their way into the 2005 *APEC-OECD Integrated Checklist on Regulatory Reform*, which begins by drawing attention to the importance of including competition among the key pillars of regulatory reform.[25] That *Checklist* then invites APEC and OECD member countries "to ensure that competition and efficiency dimensions are brought to the assessment of regulations that may have an impact upon market". In this regard, the *Checklist* commentary states that:

> [t]his exercise ought to be guided by the general principle that competition should be stimulated and maximised except in cases of market failure or where other legitimate public interest objectives give rise to a need for continued or even new regulation. In such cases, the competition distorting impact of the regulation ought to be minimised and the regulatory regime as a whole ought to be oriented towards promoting efficiency.

In comparison with the OECD and APEC approaches, as mentioned in our response to the immediately preceding question, the OECD's 2002 review of Canadian competition policy has found that competition policy has been integrated inconsistently into the general policy framework in Canada.

We understand that the Competition Bureau is endeavouring to address this shortcoming by encouraging other federal government departments to perform an assessment of the potential impact of proposed Regulations on competition, at an early stage of the development of such Regulations. Among the materials circulated by the Bureau as part of this project is a short policy assessment guide developed by the OECD's Competition Committee, which builds upon

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25 *APEC-OECD Integrated Checklist on Regulatory Reform*, at recommendations A1 and C1 (available at http://www.oecd.org/dataoecd/41/9/34989455.pdf).

the APEC-OECD *Checklist*.[26] We applaud this initiative as an excellent first step. However, much more could be done with the competition and regulatory reform principles that have been developed within APEC and the OECD.

The Australian experience provides a good example of how a competition-driven approach to new and existing Regulation can be effectively implemented and demonstrates the magnitude of the benefits that can be achieved. In short, in 1995 governments at the federal, state and territorial level in Australia signed a series of agreements that established a National Competition Policy ("NCP").[27] Among other things, the Competition Principles Agreement ("CPA") obliges governments to review and, where appropriate, reform all existing legislation (from June 1996) that restricts competition. It further requires governments to remove restrictions on competition unless it can be demonstrated that (i) the benefits of the restriction to the community as a whole outweigh the costs and (ii) the objectives of the legislation can only be achieved by restricting competition. The signatories to the agreement are also obliged to review, at least once every ten years, any restrictive legislation against these guiding principles.

To provide an incentive for state and territorial governments to implement the NCP and the related reform program, the federal government agreed to make financial payments to those governments to share the benefits of the initiative that otherwise would have accrued solely to the federal government through the taxation system. These payments are based on recommendations by the Council of Australian Governments, which assesses governments' progress against their NCP obligations.

The NCP led to the review of approximately 1800 pieces of legislation from 1996 to 2003, encompassing, for example, agricultural marketing, forestry, energy, fishing, transport services, occupations, compulsory insurance arrangements, retail trading hours, liquor licensing, education, gambling, communications, construction and development services. The prioritization process then led to a focus on approximately 800 pieces of legislation.

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[26] OECD, *Competition Assessment: Brief for Policy Officials*, DAF/COMP(2007)5 (available at www.olis.oecd.org).

[27] The key aspects of these agreements are described at http://www.ncc.gov.au/pdf/AST5Ov-002.pdf and http://www.ncc.gov.au/pdf/AST5Ov-005.pdf.

A study by Australia's Productivity Commission that was released in early 2005 estimated that the pro-competitive legislative reforms which resulted from the NCP were a major contributor to the increase of approximately A$7,000 in average household annual income that was realized in the late 1990s following the implementation of the NCP.[28] In this regard, the role that increased competition had in pressuring Australian businesses to be more productive was specifically highlighted. With respect to making Australia more attractive as a destination for foreign investment, the study found that following the reform program inward FDI increased from 17% of GDP in the early 1980s to 30% in 2003 (while outward FDI rose from 4% of GDP to over 20% over the same period).[29]

The Australian experience demonstrates that pro-competitive regulatory reform can and does lead to significant increases in productivity, aggregate economic wealth, international competitiveness and FDI. This experience is consistent with the U.S. experience with pro-competitive reform.[30]

Competition Law

Stronger Advocacy Powers

Some jurisdictions have reinforced their commitment to pro-competitive regulatory reform by providing the head of the domestic competition agency with strong advocacy powers. The

[28] Australian Productivity Commission, *Review of National Competition Policy Reforms*, Productivity Commission Inquiry Report No. 23, February 2005, at XVII and 40 (available at http://www.pc.gov.au/__data/assets/pdf_file/0016/46033/ncp.pdf).

[29] *Ibid*., at 44.

[30] For example, in a review of a number of studies relating to the deregulation of the natural gas, long distance telecommunications, airlines, trucking and rail industries in the U.S., Crandall and Ellig reported that real prices dropped at least 25% and sometimes close to 50% within ten years of deregulation in those industries. The annual value of consumer benefits from such deregulation was estimated to be approximately US$5 billion in the long distance telecom industry, US$19.4 billion in the airline industry, US$19.6 billion in the trucking industry, and US$9.10 billion in the railroad industry. At the same time, consumers were able to benefit from improvements in the quality of service. Moreover, "[c]rucial social goals like airline safety, reliability of gas service, and reliability of the telecommunications network were maintained or improved by deregulation and customer choice". See Crandall, R. and Ellig, J., *Economic Deregulation and Customer Choice: Lessons for the Electricity Industry*, George Mason University, Center for Market Processes (1997), at 2-3. See also the passage quoted from Porter, at *supra* note 20.

Competition Act includes some provisions in this regard, but falls short of international best practice. In summary, section 125 empowers the Commissioner to make representations to and call evidence before any federal board, commission or other tribunal on her own initiative, at the request of such body, or on direction from the Minister, whenever such representations are, or evidence is, relevant to a matter before the body. Section 126 contains a similar power with respect to provincial boards, commissions or other Tribunals, but only at the request or consent of such body.

By contrast, in May 2006 Article 24 of Mexico's *Federal Law of Economic Competition* was amended to provide the Federal Competition Commission with the power to issue *legally binding opinions* (i) to other government agencies and bodies in charge of public policies or programs, and (ii) regarding draft laws, regulations and administrative acts. These opinions, as well as any veto or objection that may be made by the President of Mexico, must be published.

Somewhat between the Mexican and Canadian approaches is the approach set forth in Article 63(1) of Korea's *Monopoly Regulation and Fair Trade Act*, which requires the chief-officer of administrative authorities to:

> seek, in advance, consultation with the Fair Trade Commission, where he wishes to propose legislation or amend enactments containing anti-competitive regulations such as restrictions on the fixing of prices or the terms of transaction, entry to markets, business practices, improper concerted acts, prohibited practices of an enterpriser or an enterprisers organization, etc. and where he wishes to approve or make other measures involving anti-competitive factors against an enterpriser or an enterprisers organization.[31]

In addition, Article 63(2) of that legislation requires the chief-officer of competent administrative authorities to "give, in advance, notice to the Fair Trade Commission when he intends to enact or amend any rules or regulations involving anti-competitive factors".

[31] Available at http://www.ftc.go.kr/eng/index.html.

Although not binding, we understand that advice provided by the KFTC to other government agencies and bodies is highly persuasive.

Modernization of the *Competition Act*

For the most part, the *Competition Act* is consistent with international best practices. The two noteworthy exceptions are the basic conspiracy provisions in section 45 of the legislation, which have remained largely unchanged from 1889, and the criminal pricing practices, which date back to the middle of the last century. There has been substantial support for (i) the modernization of section 45, through the adoption of a two-track approach that would retain a more effective criminal approach in respect of truly hard-core cartel conduct while decriminalizing the approach to all other agreements; and (ii) repealing the criminal pricing practices.[32] We would support both of these types of amendments to the *Competition Act* and encourage the Panel to make recommendations to the government in this regard.[33] In addition, please see our suggestions immediately below regarding the approach to efficiencies in the merger provisions of the *Competition Act*.

[32] See, for example, House of Commons Canada, *A Plan to Modernize Canada's Competition Regime* (April 2002) (available at http://www.parl.gc.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06-e.htm); *Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology "A Plan to Modernize Canada's Competition Regime"*, October 1, 2002 (available at http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/SpecialReports); the OECD's 2002 and 2004 reviews of Canada's competition law, *supra* notes 3 and 15; Public Policy Forum, *National Consultation on the Competition Act: Final Report* (April 2004) (available at http://www.ppforum.ca); Public Policy Forum, *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations (Final Report)*, December 20, 2000, (available at http://www.ppforum.ca/ow/ow_e_08_2000/ow_e_08_2000C.PDF); three expert reports on the reform of s. 45 that were commissioned by the Commissioner and are available at http://www.strategis.ic.gc.ca/SSG/ct02125e.html; an expert report by A. Van Duzer, and G. Pacquet on the pricing practices that was commissioned by the Commissioner, entitled *Anti-competitive Pricing Practices and the Competition Act: Theory, Law and Practice* (October 22, 1999); and various articles/papers offering proposals for reform of section 45 and the pricing practices, including: J. Quinn, M. Nicholson, C. Hersh and P. Watson, *Section 45 Reform*, Paper Presented to the University of Toronto Competition Law Roundtable, December 13, 2002; Y. Bériault and M. Renaud, *Horizontal Agreements: State of the Reform Process*, Paper Presented to the University of Toronto Competition Law Roundtable, February 27, 2004; T. Kennish and T. Ross, "Towards a New Approach to Agreements between Competitors", [1997] 28 *Can. Bus. L.J*. 22; and P. Crampton, "Beyond Bill C-23: A Competition Law for the New Millennium", [2002] 36 *Can. Bus. L. J.* 161.

[33] Subject to the comments that we provided to representatives of the Competition Bureau and the Department of Justice during and subsequent to a technical roundtable meeting last month, we are broadly supportive of the draft legislation that would create such a two-track approach, and that was the subject of discussion at that meeting.

3. 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?

Yes, for the most part. To the extent that a competitive industry generally provides the optimal environment within which Canadian firms can grow to become global competitors, the substantive test for merger review that is set forth in section 92(1) of the *Competition Act* is aligned with consumers' interest in vigorous competition.

In exceptional circumstances, a conflict may arise between protecting competition and achieving one of the paramount goals of competition, namely, the attainment of greater economic efficiency. In such cases, it is entirely appropriate to resolve the conflict in favour of the paramount goal, rather than in favour of the *means* used to achieve that goal, provided that the likely efficiency gains in Canada will be greater than, and offset, the adverse welfare effects of any prevention or lessening of competition that will result or is likely to result from the merger. In general, a merger that meets this test should assist the parties thereto to grow and to become more successful global competitors.

The efficiencies defence set forth in section 96 of the *Competition Act* arguably incorporates this test and therefore strikes the appropriate balance between competition and efficiency. Unfortunately, as the Commissioner's 2005 Advisory Panel on Efficiencies concluded, "the efficiency defence has had very little public policy relevance".[34] Apart from one litigated case, *Commissioner of Competition v. Superior Propane* ("*Superior Propane/ICG*"),[35] in which the elements of the defence were found to have been met, section 96 has not played any meaningful role in merger review. Indeed, a number of economists have pointed out that had the anti-competitive effects of the merger been properly calculated by the Commissioner, the efficiencies defence probably would not have been met even in that single case.[36] As a result of the

[34] *The Report of the Advisory Panel on Efficiencies* (August 2005), at 25 (Available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1954&lg=e.).

[35] (2000), 7 C.P.R. (4th) 385 (Comp. Trib.); *rev'd in part* (2001) 11 C.P.R. (4th) 289 (FCA); *redetermination*, (2002), 18 C.P.R. (4th) 417 at § 137 (Comp. Trib.); *confirmed*, (2003) 23 C.P.R. (4th) 316 (FCA).

[36] Tom Ross and Ralph Winter, "Canadian Merger Policy Following Superior Propane", (2003) 21:3 *Can. Comp. Rec.* 7 at 20; and Margaret Sanderson, *Public Consultation on Treatment of Efficiencies in the Competition Act*, (available at http://www.primestrategies.ca/bureau/index.html), at 7. See also Don McFetridge "Efficiencies

jurisprudence created by *Superior Propane/ICG*, section 96 arguably will have even less of a potential role than it had prior to that case, under the framework set forth in the Competition Bureau's 1991 *Merger Enforcement Guidelines*.[37]

Section 96 of the *Competition Act* would provide a more meaningful role for the consideration of efficiencies in merger review, and thereby better enable Canadian firms to become global competitors, by (i) giving greater weight to dynamic efficiencies, and (ii) reducing the evidentiary burden on merging parties claiming dynamic and other efficiencies. In addition, efficiencies could be given a more meaningful, and appropriate, role in merger review by making it clear that they should also be considered in the initial determination, under section 92, of whether a merger is likely to prevent or lessen competition.

Standards: Take Your Pick" (2002) 21:1 *Can. Comp. Rec.* at 55; and Frank Mathewson and Ralph Winter, "The Analysis of Efficiencies in Superior Propane: Correct Criterion Incorrectly Applied" (2000) 20:2 *Can. Comp. Rec.* 88 at 92.

37 See generally P. Crampton, "Efficiencies in Merger Review: What is the Best Approach for Canada?" (May 2006) (available at http://www.osler.com/resources.aspx?id=11217).