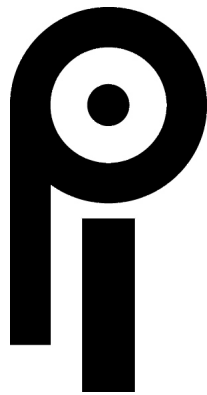


**Submission to the
Competition Policy Review Panel:
Sharpening Canada's Competitive Edge**



**The Professional Institute
of the Public Service of Canada**

January 2008

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Introduction

The Professional Institute of the Public Service of Canada represents 55,000 professionals across Canada's public sector, the majority of whom work for the federal public service. Not only do the Institute's members work as scientists, engineers and researchers in the science-based departments, agencies and laboratories, but the Institute represents most of the professionals working in the Competition Bureau and the Investment Review Branch of Industry Canada. Competition Law Officers who are predominantly economists and lawyers, as well as computer scientists form the professional backbone of the Competition Bureau. As the ones who are charged with making markets work well for consumers, they have a direct interest in having the Competition Policy Review Panel arrive at an intelligent set of recommendations. For about the price of a cup of coffee, the Competition Bureau strives to bring competitive markets to Canadians. In a good year, cartel fines and merger fees more than pay for the operation of the Bureau.

The Institute's second interest is that of the membership as a whole. Competitive markets which work well for our members increase our real incomes and economic welfare as well as provide economic opportunity for our members and their families.

This submission is designed to assist the Panel in focusing in on a core set of recommendations which would ensure that markets work well for Canadians. It will focus on six recommendations and in doing so address many of the questions posed in the Panel's Consultation Paper¹. Five of the six recommendations deal with Canada's competition policy and the sixth recommendation deals with Investment Canada reform. The competition policy recommendations concern:

1. Governance reform
2. Hard Core Cartel sanctions
3. Abuse sanctions
4. Mergers, and
5. Honesty of Marketplace Information

¹ Sharpening Canada's Competitive Edge, Competition Policy Review Panel
www.competitionreview.ca

1. Governance reform

The governance of Canadian competition law enforcement was last revised in 1952 when the enforcement functions of the Commissioner were separated from the adjudicative functions which evolved into the Competition Tribunal. However, all powers under the competition law were vested in one person, now called the Commissioner.² While this may have been appropriate when the professional staff numbered under ten, it is now very obsolete. Given the size of the Bureau and the complexity of enforcement process, it is time that enforcement decisions be devolved to a Commission.

The official media line is that the Competition Bureau is an independent law enforcement agency.³ In reality, however, it is technically independent only in enforcement decisions. For budget, reporting relationships, etc. it is part of the Industry department; it is not an agency with a dedicated enforcement budget. Most modern Competition Agencies around the globe are enforcement and advocacy bodies with a greater measure of operational independence from the government.⁴

Under any reformed governance structure, the Institute's members should retain their employee status within the public service in order to allow them to have adequate career opportunities and to allow the Competition Bureau to recruit talented employees from within the public service.

2. Hard Core Cartels

The heart of any competition law is its sanction of price fixing, market sharing and dividing agreements, and other collusive behaviour. Canada had the first and best anti-cartel law in 1889. In the following year, the US *Sherman Act* was passed and the conspiracy provisions have not been the leading model of a cartel law since then. It still ranks behind the US as an instrument for achieving competitive markets, and now it is clearly inferior to the laws of the 25 nations of the European Union and numerous other nations.

² This is not a criticism of the present or any former Commissioner. On the contrary, Canada has been blessed with Commissioners of the highest ethical standards and extraordinary ability.

³ See for example: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02548e.html>

⁴ See for example the UK Office of Fair Trading / Competition Commission, and the Australian Consumer and Competition Commission. In fact, only Kazakhstan and Jordan have adopted Canada's model of making Competition enforcement part of the Industry department. See <http://www.internationalcompetitionnetwork.org/index.php/en/members>

At a minimum, Hard Core Cartels as defined by the OECD⁵ need to be deemed to be *per se* undue. It is not a question of whether there is a consensus in favour of a *per se* approach to hard core cartels, but rather a question of modern decision-making theory, which requires focus, not on whether a practice has any pro-competitive benefit (or anti-competitive harm), but on the frequency and relative magnitude of those benefits and harms, and on the availability of less anti-competitive alternatives.

Many goods are both final consumer goods and business inputs. Cartels raise prices⁶ and reduce real incomes of our members directly. Cartels raise business input costs, raising costs of and suppressing Canadian value added economic activity. Additionally, of course, they bring about allocative inefficiency, umbrella effects, less innovation, managerial slack and non-price harms to quality and variety. Examples of some recent cartel investigations into products which are used by both consumers and businesses involve the paper cartel, the Sherbrooke-area gasoline cartel and the chocolate cartel.⁷

The finest hard core cartel law in the world without adequate sanctions is only as strong as a chain with a missing link. In order to achieve adequate specific and general deterrence, the maximum fine level needs to be increased by a factor of 25 to 50 from its current level.⁸

Canada needs to get serious about modernizing its laws addressing hard core cartels. It is time to make price fixing an offence. The evidence is clear that the unduly element in Canada's cartel law prevents Canada from seriously addressing foreign cartels

⁵ Recommendation of the Council Concerning Effective Action against Hard Core Cartels, OECD 1998 C(98)35/Final <http://www.oecd.org/dataoecd/39/4/2350130.pdf> See also Defining Hard Core Cartel Conduct: Effective Institutions: Effective Penalties, Report prepared by the ICN Working Group on Cartels, June 2005 www.internationalcompetitionnetwork.org/.../Effective_Anti-Cartel_Regimes_Building_Blocks.pdf See Globalization and Competition Policy: Attacking Cartels and Defending Market Liberalization. <http://www.oecd.org/dataoecd/39/63/2752129.pdf> See also Fighting Hard core Cartels: Harm, Effective Sanctions and Leniency Programs, OECD 2002, <http://www.oecd.org/dataoecd/41/44/1841891.pdf>

⁶ How High Do Cartels Raise Prices? Implications for Reform of Antitrust Sentencing Guidelines. By Connor, John M. And Rober H. Lande, Purdue University, 2005. www.agecon.purdue.edu/staff/connor/papers/HOW_HIGH_DO_CARTELS_4-20-05.pdf

⁷ See for the following news release on the paper case: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02018e.html> and for the chocolate investigation see: <http://www.thestar.com/Business/article/280883>. For the gasoline investigation see: http://www.stikeman.com/Comp_Highlights.htm. It should be noted that the later two matters are at the investigation stage only and the parties are presumed to be innocent.

⁸ How High Do Cartels Raise Prices? Implications for Reform of Antitrust Sentencing Guidelines, op. cit.

directed at Canadian businesses and consumers. This is costing Canadian businesses and consumers billions. The Competition Bureau and the Institute's members have shown great creativity in applying the law as it is, but it is time the Panel recommended that Canada have something better than the world's 37th best cartel law.⁹

3. Abuse sanctions

The Canadian abuse of dominance provisions have remedies but no sanctions¹⁰ and private sanctions are only available for violations of remedial orders. One only has to look at the 25 countries in the European Union with sanctions for abuse of dominance or the US with private treble damages for monopolization and contrast this with Canada's record of 2 or 3 abuse cases per decade to see that this instrument is not functioning well. What this usually means is that a monopolist can continue to prevent and exclude competitors for five years while it spins the legal processes with the Bureau. The lack of sanctions means there is no incentive not to engage in exclusionary and predatory behaviour and the business has a near free ride until ordered to stop.

The *Competition Act* is a general law of general application and sector specific abuse proposals merely demonstrate that the general law needs improvement.

4. Merger Control

Canada's approach to mergers is the only regime which treats efficiencies as a defence rather than as a factor in determining whether the merger would result in a substantial lessening or prevention of competition. Most of the time, this does not matter as it is rare to find a merger which results in a substantial lessening of competition and has large knowable efficiencies. However, the folly of Canadian approach was demonstrated in the 1998 Superior Propane/ICG merger. The merger to monopoly in some geographic markets and near monopoly in other geographic markets was expected to produce dead-weight loss¹¹ and other inefficiencies totaling about \$6 million but would also have saved the combined firms about \$30 million. Consumer and

⁹ The models suggested in the Discussion Paper: Options for Amending the Competition Act: Fostering a Competitive Marketplace, June 2003 certainly meets the test of a moderate proposal which adequately addresses the need to modernize Canada's competition law.

¹⁰ Sanctions for civil remedies are called Administrative Monetary Penalties or AMPs.

¹¹ The deadweight welfare loss is a measure of the dollar value of consumers' surplus lost (but not transferred to producers) as a consequence of a price increase. <http://stats.oecd.org/glossary/detail.asp?ID=3187> In this example, it is a measure of the dollars not spent on propane by poor rural consumers and business because of the price increases. These users either used an alternative form of energy such as wood, turned their thermostats down, increased the insulation in their dwellings, abandoned their dwellings for urban centres with natural gas, closed their businesses or went without heat.

business prices in the affected market for bottled propane gas which is sold mostly to lower income rural users and small businesses were projected to increase by about \$40 million or nearly 10%. If one places less weight on, or only considers the \$40 million from consumers and downstream businesses to be a transfer to the merging parties, then the \$30 million efficiency saving is larger than the \$6 million in dead weight loss.

Essentially, the more inelastic the demand for a product, the smaller is the dead weight loss. With efficiencies as a defence, higher prices are a mere transfer from one group of citizens to another group of shareholders. For example, if the last two insulin suppliers were to merge, and gained the efficiency of having one less receptionist, as long as consumers could continue to buy insulin from a combination of their own funds, their insurance companies' plans, their government or through charitable campaigns and did not become, quite literally, deadweight loss, by having to give up purchasing insulin, it matters not how much the price goes up. This is, of course, a limiting example but the reality is that price does matter.

Dominant market position may last far into the future whereas the efficiencies may be a one time saving. The other reality is that whole businesses and economic activity in rural Canada can be undermined by monopoly suppliers of critical inputs. On balance, Canada should align its merger policy with best models in the world and make efficiencies a section 93 factor in the analysis rather than a defence. If consumers and businesses have the right to the benefits of a competitive market, then this is the only policy option which makes long term sense.

Sanctions for failing to notify of a merger are too small. They are less than the notification fees plus GST. This is akin to a situation where the parking fine is less than the cost of feeding the parking meter. This is not an example of first world public policy design.

The merger provisions permit the parties to close a transaction as early as 42 days after filing a long form. No one can do a merger investigation and prepare a merger case in 42 days. Without the ability to block the closing of the transaction until one can conclude the merger investigation, irreparable harm to competition is a certainty. The alternative of challenging closed transactions is neither an effective nor a desirable way to maintain competitive market structures.

5. Honesty of Marketplace Information

When a business advertises 20% off the regular price for a product¹², the law assumes that the businessman has done a survey of the relevant geographic market, knows what the regular price is in the market and is offering 20% off that market price. To determine whether the 20% off was a fictitious sale price, the law requires the Bureau to go to the expense of doing a survey of the relevant geographical market for each product, determine the regular price and see whether that sale is a genuine 20% off the regular price in the market. It is not an offence not to be able to substantiate the truth of the claim. The status quo ensures that there is insufficient enforcement of this law because it is too expensive to do market surveys to determine the regular prices.¹³

The current statutory levels of sanctions in the form of administrative monetary penalties are clearly insufficient to provide either specific deterrence or general deterrence. It has only been through the creative use of multiple counts and multiple products, that the few cases which have been done have achieved a measure of success.

6. *Investment Canada Act*

The emergence of large pools of capital in economies that are outside the World Trade Organization, controlled by foreign states which do not operate open, rules-based, competitive economies, raise the risk that Canadian resources become part of another state's empire and unavailable to Canadian users as consumers and business persons. Thus far, such acquisitions have not involved a substantial percentage of any market. Nevertheless the concern exists as to whether this National Security issue can be addressed adequately under the "Net benefit" test of the *Industry Canada Act*. If the answer is that National Security issues can already be addressed under the analysis of the factors, then the instrument appears to be adequate to address the issue.

¹² If the business states that the sale is 20% off its own regular price, a time and volume test is applied to determine the veracity of the claim.

¹³ See http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/h_00154e.html

Conclusions:

In an environment of globalization and free trade, applying Canada's competition policy with vigour is essential to make markets work well for Canadians. Not only do the members of the Institute form the professional backbone for delivering competitive markets to Canadians for about the per capita cost of a cup of coffee per year, the 55,000 members of the Institute and their families directly benefit from the suppression of cartels, the remedying of marketplace abuses, the maintenance of competitive market place structures through merger regulation and the suppression of false advertising and mass market fraudulent activities.

By way of example, one only has to look at the markets for vehicles and tires to see markets where free trade has allowed the manufacturers to trade without barriers only to replace governmental barriers with restrictive business practices. These practices can elevate prices in Canada by 30 to 50% and harm Canadian consumers and businesses. Canada will not be as desirable a market for foreign investment if Canadian markets do not work well. At the same time, many Canadian producers must meet world prices for the products which they market whether they are exporting or selling in the domestic market to firms who then export. The fact that they are paying too much for some of their inputs by buying in Canadian markets which do not work well, does not bring tears to the eyes of their customers.

Canada needs to focus on making markets work for Canadians. Maintaining the domestic interest in healthy competition will go a long way to ensuring that Canadians can face global competitive challenges.