

MCMILLAN BINCH MENDELSON

Brookfield Place, Suite 4400, Bay Wellington Tower, 181 Bay Street, Toronto, Ontario, Canada M5J 2T3
TEL : 416.865.7000 | www.mcmbm.com | FAX : 416.865.7048

Reply Attention of **J. William Rowley, QC l**
Direct Line **416.865.7008**
Internet Address **wrowley@mcmbm.com**
Or
Direct Line **A. Neil Campbell**
Internet Address **416.865.7025**
Our File No. **neil.campbell@mcmbm.com**
Date **0032031**
 January 18 , 2008

Competition Policy Review Panel
280 Albert Street, 10th Floor
Ottawa, Ontario
K1A 0H5

Attention: Mr. L.R. Wilson, O.C.

Dear Sir:

**Re: *Sharpening Canada's Competitive Edge – Submissions of the
Competition Policy Group***

Introductory Comments

This submission has been prepared on behalf of the “Competition Policy Group,” a group of Canadian corporations representing a cross-section of industries that have a strong interest in the development of sound competition policies.¹ Established in 1970 to provide input regarding proposed amendments to the *Combines Investigation Act*, the Group has participated actively in prior reform proposals² and welcomes the opportunity to provide input in respect of the issues raised in the Competition Policy Review Panel’s Discussion Paper, *Sharpening Canada’s*

¹ The current members of the Group are: BP Canada Energy Company; Ford Motor Company of Canada, Limited; General Electric Canada Inc.; General Motors of Canada Limited; IBM Canada Limited; Imperial Oil Limited; and Petro Canada.

² The Group provided input regarding the various proposals leading to the enactment of the “Stage I” amendments in 1976, the “Stage II” amendments in 1986, Bill C-20 in 1999, Bill C-23 in 2002, to the Public Policy Forum on its Discussion Paper “Options for Amending the *Competition Act*: Fostering a Competitive Marketplace” in 2003 and to the House of Commons Industry Standing Committee on Bill C-19 in 2005.

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Competitive Edge.³ This submission focuses on those issues that the Group considers to be most significant to competition in Canada. Accordingly, it addresses issues raised in Chapter 4 of the *Discussion Paper*, “Competition Law” as well as certain prior amendment proposals relating to the conspiracy offence, market studies and reviewable practices which, if pursued, the Group believes would reduce Canadian competitiveness and economic welfare. In addition, the Group’s submission discusses potential improvements to the *Competition Act* (the “*Act*”) in respect of its treatment of efficiencies and its antiquated criminal pricing offences.

Are Changes Necessary or Desirable?

The *Discussion Paper* notes that effective competition law and policies are key elements assuring the competitiveness and efficiency of the Canadian economy. The Panel’s mandate, *inter alia*, is to ensure that Canadian competition policies are relevant in the context of global commerce and economic activity that extends beyond domestic markets. To assure the competitiveness and efficiency of the Canadian economy, Canada’s competition regime must promote efficiency while avoiding unnecessary chilling effects and burdens for Canadian businesses. The Group believes that the Canadian competition law regime is an international model, although there are opportunities for improvement through greater consideration of efficiencies and decriminalization of the present laws on predatory pricing, price discrimination and price maintenance.

While such amendments to the *Act* could enhance the competitiveness and efficiency of Canadian industry, many amendments that have been proposed in the past would threaten to undermine this objective. Of particular concern are proposals to convert Section 45 into a “*per se*” conspiracy offence, to abandon “reviewable practices” in favour of fines and/or tort-style damages, and to create a formal power to conduct market studies. In each area, there is no clear evidence that reforms are necessary or desirable; on the other hand, there are significant risks that such changes could stifle pro-competitive conduct and impose additional costs and risks on Canadian companies.

³ Government of Canada, *Sharpening Canada’s Competitive Edge* (30 October 2007) [hereinafter the “*Discussion Paper*”].

Conspiracy Offence

In 1992, in its decision in *R. v. Nova Scotia Pharmaceutical Society* (“PANS”) the Supreme Court of Canada recognized the *Act*’s conspiracy provision as one of its “pillars”, and the “core of the criminal part of the *Act*.”⁴ Any proposed change to such a central part of the competition regime demands rigorous consideration. The Group believes that the conspiracy provision should not be reformed unless it can be demonstrated that it is either ineffective in the prosecution and deterrence of cartels or that it is over-inclusive and interferes with strategic alliances or other pro-competitive collaboration between firms.

As noted in the *Discussion Paper*, changes to the conspiracy regime have been the subject of extensive debate over the past decade. Public consultation on proposed changes to the *Act* in both 2003 and 2005 revealed that a large portion of the business and legal communities opposed the suggested changes.⁵ The Competition Bureau has continued to explore possible alternatives with an Internal Working Group and an External Working Group over the past two years, but has not produced a new proposal that addresses the over-inclusiveness of the numerous previous attempts to replace the “undue lessening of competition” test with “*per se*” definitions of cartel conduct.

Given the Commissioner’s extensive record of success in obtaining convictions and fines in conspiracy cases over the past 15 years, and the absence of concrete evidence that the current conspiracy provision has a material chilling effect on strategic alliances or other pro-competitive agreements and arrangements, the Group advocates the retention of the current conspiracy provision.

⁴ [1992] 2 S.C.R. 606 at 648, 43 C.P.R. (3d) 1 [“PANS”].

⁵ In its final report in 2004, the Public Policy Forum noted that there were interventions both in support and in opposition to proposed changes to the conspiracy offence but that even those interveners who supported reform generally recognized that any changes should be approached with caution. See: Public Policy Forum, *National Consultation on the Competition Act: Final Report* (8 April 2004) at pp. 16, available online at: <http://www.ppforum.ca/common/assets/publications/en/final_report.pdf>.

Prosecution and Deterrence

Some proponents of change have inaccurately suggested that the current conspiracy provision makes it exceedingly difficult to obtain convictions and is therefore an insufficient deterrent to cartel activity.⁶ However, enforcement statistics demonstrate that the Competition Bureau and the Department of Justice have been extraordinarily successful in obtaining convictions and fines in conspiracy cases. The Group noted in its 2003 Submission that the Bureau had obtained convictions in 25 of 28 conspiracy cases since the law was clarified in 1992. Since that time, the Bureau has obtained convictions in a further 16 cases and has resolved two additional cases through prohibition orders.⁷

A careful study published in 2001 found that in each of the three acquittals that had occurred since 1992, the Crown's case had been fundamentally flawed.⁸ In one subsequent case where the Crown was unsuccessful, *St. Johns Taxi*, the court found the evidence of the Bureau's economic expert to be unpersuasive, even given the lower standard of proof at a preliminary inquiry.⁹

Since 1992, the Bureau/Department of Justice has been successful in obtaining convictions in over 91% of its cases, and convicted companies have faced significant financial penalties. In 2006, for instance, three companies involved in the carbonless paper conspiracy were fined a total of \$37.5 million.¹⁰ The remarkable success rate of the Bureau/Department of Justice in obtaining convictions and fines under the existing conspiracy provision suggests that the

⁶ OECD, "Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation" (2005) at p 29, available online at: <<http://www.oecd.org/dataoecd/58/1/35863307.pdf>>.

⁷ See: Competition Bureau, "Penalties Imposed by the Courts" available online at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01863e.html>>. The Bureau obtained prohibition orders without guilty pleas against Sotheby's in 2006 and Fort McMurray Auto Body Shops in 2007.

⁸ McMillan Binch LLP on behalf of the Competition Policy Group, "Submission to the Public Policy Forum Regarding Proposals to Amend the *Competition Act* Contained in Government of Canada Discussion Paper Entitled 'Options for Amending the *Competition Act*: Fostering a Competitive Marketplace" (30 September 2003) ["2003 Submission"]; and B.A. Facey & D.H. Asaf, "Innovation, Growth and Prosperity: A Framework for Amending Canada's Conspiracy Laws" 20 Can. Compet. Rec. 4 (Winter 2001-2002) 61 at 63.

⁹ *R. v. Bugden's Taxi (1970) Ltd.*, [2007] N.J. No. 322, 2007 NLTD 167 (T.D.), at para 81.

¹⁰ "Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy", Competition Bureau News Release (9 January 2006), available online at: <www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02018e.html>.

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provision as currently drafted is not under-inclusive and is, in fact, an appropriate and effective tool for the prosecution and deterrence of cartels.¹¹

Proponents of change often refer to OECD materials related to hard core cartels. However, as demonstrated in the Group's 2003 Submission, Section 45 covers fully the OECD's recommended scope for an effective cartel law: price fixing, market allocation and output restriction agreements all contravene Section 45 when they are engaged in by firms with "market power".¹² Based on the Supreme Court of Canada's ruling in its 1992 *PANS* decision, to establish a conspiracy offence, the Crown must show that (i) there was an agreement, (ii) the accused was a party to the agreement, (iii) the agreement, if implemented, would prevent or lessen competition unduly, and (iv) a reasonable business person would have expected the agreement to have such effects. An undue lessening of competition was defined as an effect that was of seriousness or significance. Whether there are serious or significant anti-competitive effects involves considering the market structure and the actions of the accused. While market power plays a role in this inquiry, the Court emphasized that "[a] particularly injurious behaviour may also trigger liability even if the market power is not so considerable."¹³

It is clear that all the types of "hard core cartel conduct" which are generally included in proposed changes to Section 45 (price-fixing, market or customer allocations and agreements to restrict output) are generally regarded as "particularly injurious behaviour". Moreover, during the past two decades the Competition Bureau has developed substantial expertise in assessing and proving the existence of market power across the three pillars of the *Act* – the conspiracy, merger and abuse of dominance provisions. Thus the market power requirement inherent in the undue lessening of competition test is not an inordinately demanding element for the Crown to

¹¹ The fact that the majority of conspiracy cases are settled through guilty pleas indicates that corporations acting in the Canadian market place believe that there is a substantial possibility of conviction under the conspiracy provision. If companies believed that they were unlikely to be convicted at trial, they would not plead guilty to an offence.

¹² Organization for Economic Co-operation and Development, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (25 March 1998) at recommendation A.2, available online at: <<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/7328AA9E04799859C1256DAA00643D29?OpenDocument>>.

¹³ *Supra* note 4 at 657.

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establish before a company or individual is convicted of a serious criminal offence (whose inherent “evil” is a negative economic effect on markets).

Per Se Definitions are Overreaching

In both Bill C-472, introduced in 2000, and the Government of Canada’s discussion paper “Options for Amending the *Competition Act*: Fostering a Competitive Marketplace”, published in 2003, specific proposals were made for revising section 45 to create a *per se* offence for hard core cartel conduct. In both cases, despite more than a decade of attempts to develop a workable definition of conduct that should be covered by a *per se* offence, the proposed construction was over-broad and would have captured a variety of types of pro-competitive arrangements.¹⁴

Competitors in many industries collaborate in ways that enhance efficiency. Collaborative arrangements or strategic alliances that are pro-competitive often include pricing clauses, market, territorial or customer restrictions, non-compete provisions or output restrictions that are necessary to the success of these arrangements but that are likely to be captured by a *per se* offence. Despite the passage of a further five years since the 2003 Discussion Paper, no one has yet come forward with a proposal for a *per se* offence that avoids over reach into non-hard core cartel conduct.

Existing Regime Does Not Have Significant Chilling Effects

The second rationale frequently put forward for amending the conspiracy provision is the possibility that the current provision may be over-inclusive and, therefore, have a chilling effect on strategic alliances and other pro-competitive types or collaboration. However, as the Group outlined in its 2003 Submission, the constituency best positioned to identify whether Section 45 of the *Act* produces problematic chilling effects in real world situations is made up of Canadian businesses which are participants in numerous strategic alliances and other types of collaborative

¹⁴ For further discussion see the 2003 Submission, *supra* note 8.

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activity in Canada and internationally. And, as can be seen from past submissions, Canadian businesses clearly are not seeking these reforms.¹⁵

In practice, the conspiracy provision has rarely, if ever, been applied to strategic alliances. Where the Bureau has identified concerns relating to a non-hard-core agreement, it has relied on the reviewable practices of abuse of dominance or merger.¹⁶ In addition, if parties to a strategic alliance are concerned about possible exposure under the conspiracy provision, it is possible to apply to the Commissioner for a written opinion on the lawfulness of the arrangement.¹⁷ This procedure has been used to obtain assurances that a strategic alliance will not be subject to scrutiny under the conspiracy provision (as well as under other provisions such as refusal to deal, exclusive dealing and abuse of dominance.)¹⁸

Conclusion

The existing conspiracy offence is much less likely than any of the proposed amendments to cause chilling effects on pro-competitive or benign conduct. No need has been established and no credible net benefit has been put forward to justify departing from this well-functioning provision of the *Act*.

Market Studies

The *Discussion Paper* identifies the granting of formal powers to the Competition Bureau or another independent government agency to conduct market studies as an option which will

¹⁵ *Ibid* at p 17.

¹⁶ *Competition Act*, ss. 91-92 and ss. 78-79. Examples include the “Interac” and “White Pages” joint abuse of dominance cases, *Canada (Director of Investigation and Research) v. Bank of Montreal et al.* (1996) 68 C.P.R. (3d) 527 (Comp. Trib.) and *Canada (Director of Investigation and Research) v. AGT Director Ltd. et al.*, [1994] C.C.T.D. No. 24 Trib. Dec No. CT 9402/19, respectively, as well as numerous transactions reviewed under the merger provisions. For a more detailed analysis, see Neil Campbell, “Competition Reform – Again *The Discussion Paper and Bill C-249: The Application of the Merger and Abuse of Dominance Provisions to Competitor Agreements*” (17 November 2003) Prepared for the Institute for Professional Development Inc. Available online at: <<http://www.mcmbm.com/Upload/Publication/Neil%20Campbell.pdf>>.

¹⁷ *Competition Act*, s. 124.1.

receive consideration. The Group opposes the granting of such powers to the Bureau or any other agency because there are serious concerns about the utility, efficiency and procedural fairness of such powers. Seven of the nine other stakeholders which took a position on this issue before the Standing Industry Committee in 2005 were also opposed to the market study proposal.¹⁹ The creation of a formal market studies regime is unnecessary given the current powers of the Bureau. Furthermore, such powers would impose unnecessary costs on businesses and would risk violating rights under the Canadian *Charter of Rights and Freedoms*.

Existing Powers of the Competition Bureau

The Bureau already has substantial scope to examine activities in Canadian markets. It routinely undertakes detailed, if informal, examinations of markets based on complaints from market participants or in response to media items. These examinations can evolve into full inquiries where warranted, including the use of search/seizure and subpoena powers.²⁰ Even where there is no indication that an offence or a reviewable practice under the *Act* has been or is about to be committed, the Commissioner may nevertheless undertake studies using information that is voluntarily provided by businesses or that is publicly available. The Commissioner may also employ outside experts to assist with such studies.

Proposals to establish additional formal investigatory powers for market studies would provide the Commissioner with extraordinary powers in situations where the Commissioner has not established reasonable grounds to believe that an offence under the *Act* either has been or is about to be committed. Where such reasonable grounds do not exist, there is no need for the

¹⁸ Competition Bureau, "Strategic Alliances: Conspiracy, Refusal to Deal, Exclusive Dealing/Tied Selling/Market Restriction, Abuse of Dominant Position" (Compliance and Advocacy). Available online: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00854e.html>>.

¹⁹ Suzanne Legault and Erin Melrose, "Market Studies: A Contextual Overview" (25 April 2006), 2006 Langdon Hall Competition Law and Policy Forum. Opponents included the Canadian Association of Petroleum Producers, Canadian Chamber of Commerce, Canadian Real Estate Association, Canadian Council of Chief Executives, Association of Canadian Advertisers, Canadian Bar Association, Retail Council of Canada and the Competition Policy Group.

²⁰ Where there is a reasonable basis to believe that an offence or reviewable practice under the *Act* either has been or is about to be committed, the Commissioner has the power to undertake a formal inquiry on her own initiative. She must also undertake a formal inquiry if she is directed to do so by the Minister of Industry or petitioned to do so by any six Canadian residents. *Competition Act*, s. 10(1).

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Commissioner, who is a law enforcement official, to have such intrusive and burdensome powers.

Recent examples of detailed market studies that have been conducted by the Bureau without the use of a formal market studies regime accompanied by formal investigatory powers include:

- Cattle and beef pricing (2004) – The Bureau commenced an inquiry in response to concerns expressed by parliamentarians and others about the significant decline in prices paid to Canadian cattle producers for cattle relative to the smaller declines in retail prices for beef after the discovery of BSE in Canada in 2003. The Bureau gathered information from a wide variety of industry participants including producers, customers, industry associations and other government departments. The Bureau also retained independent industry and economic experts to prepare reports on the industry. Based on its investigation, the Bureau concluded that there was no evidence of anti-competitive acts undertaken by beef packers, wholesalers or retailers.²¹
- Gasoline prices (2005/2006) - The Bureau commenced an examination of high gasoline prices following Hurricane Katrina and allegations by independent retailers of predation and margin squeezing in the Canadian gasoline industry. The Bureau gathered information from publicly available sources and through direct contact with market participants who provided proprietary data. The Bureau also retained an independent expert to report on the key determinants of profitability for retail gasoline stations. Based on this information, the Bureau conducted what it referred to as a “thorough examination” and concluded that there was no evidence of a national conspiracy to fix gasoline prices.²²
- Generic drug prices (2006/2007) – Studies that found prescription generic drugs to be relatively more expensive in Canada than in other countries prompted the Bureau to examine the generic drug market. In its study, the Bureau relied on publicly available information, data purchased from data providers and information voluntarily provided by sector participants. The Bureau concluded that a regulatory and market framework where incentives to supply drug plans more closely reflect the underlying market dynamics could provide significant benefits to drug plans and to insurers, employers and Canadian consumers.²³

²¹ Competition Bureau Backgrounder, “The Competition Bureau’s Examination into Cattle and Beef Pricing” (29 April 2005), available online at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01311e.html>>.

²² Competition Bureau News Release, “Competition Bureau Concludes Gasoline Pricing Examinations” (30 March 2006), available at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02046e.html>>.

²³ Competition Bureau Report, “Generic Drug Sector Study” (29 October 2007), available online at <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html>>.

- Self-regulated professions (2006/2007) – The Bureau initiated this study to determine whether and to what extent professions have restrictions that limit competition in their own or related markets. The Bureau relied on an analysis of legislation, regulation, codes of practice and responses to a voluntary questionnaire the Bureau sent to professional associations, colleges and boards. The Bureau concluded that there were competition concerns arising from regulations in various professions that limited competition and entry more than necessary to achieve legitimate public policy goals.²⁴

Risk of Violating Charter Rights

The use of formal investigatory powers to conduct market studies would risk blurring the distinction between the Bureau's market study activities and its enforcement activities. Market studies are distinct from criminal or civil investigations. The use of formal investigatory powers in conducting those studies would create a danger that market studies could be used as fishing expeditions. Moreover, evidence gathered in the context of a market study could lead to the initiation of a criminal investigation, which could raise concerns about a violation of the right against self-incrimination in the *Canadian Charter of Rights and Freedoms*.²⁵ A violation of this right is of concern both because it represents a breach of a fundamental protection in Canadian society and because a determination that evidence had been obtained through the violation of a *Charter* right could undermine any criminal proceedings. The Commissioner, in fact, identified the violation of Charter rights as a possible concern in her testimony before the Industry Committee in October 2004.²⁶

Imposition of Unnecessary Costs on Businesses

Formal investigations are typically lengthy and expensive for both businesses and the government. As noted by the Canadian Chamber of Commerce in its submission to the Standing Committee in 2005, the Competition Bureau investigation into the petroleum industry in the

²⁴ Competition Bureau Report, "Self-Regulated Professions – Balancing Competition and Regulation" (2007), available online at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>>.

²⁵ *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁶ 38th Parliament, 1st Session, Standing Committee on Industry, Natural Resources, Science and Technology, Evidence, 18 November 2004 (Sheridan Scott, Commissioner of Competition) at 1600.

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1980s lasted for the better part of five years and cost many millions of dollars for the industry in both legal fees and the diversion of management time. While the investment of government resources and the diversion of business resources from effective participation in the marketplace can be appropriate where there are grounds to believe contraventions of the *Act* are occurring, such a diversion of resources is not warranted where no such grounds exist.

These costs would be of particular concern to industries that are prone to becoming political targets (*eg*, the airline, petroleum, pharmaceutical, banking and grocery sectors). For instance, since the 1980s inquiry into the petroleum industry noted above, the gasoline industry has been the subject of no less than five further investigations by the Competition Bureau - yet the Bureau has found no evidence of a national or regional conspiracy during any of these investigations.²⁷

Concluding Observations

Formal investigations that are not based on reasonable grounds lack transparency and predictability, may discourage investment and growth, and impose significant costs on businesses. The Competition Bureau's recent studies on topics such as self-regulating professions and generic drug prices demonstrate that the Bureau can conduct effective studies without a formal market study regime and related formal investigative powers. The Bureau almost always receives significant cooperation on a voluntary basis from industry participants where the study has been launched and information requests are made on a reasonable basis. Intrusive and burdensome formal powers of inquiry should continue to be reserved for situations where the Commissioner has reasonable grounds to believe that a possible offence has been or is likely to be committed or an anti-competitive market practice needs to be investigated.

²⁷ See *eg* Competition Bureau, "Speaking Notes for Konrad von Finckenstein, Commissioner of Competition: Recent Increases in the Price of Gasoline." (5 May 2003) Standing Committee on Industry, Science and Technology. Available online at: < <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01069e.html>>. See also Competition Bureau, News Releases, "Competition Bureau Concludes Gasoline Pricing Examinations" (30 March 2006), available online at: < <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02046e.html>>.

Fines and Damages for Unilateral Conduct

There have been multiple proposals to introduce large fines (under the euphemism “administrative monetary penalties”) and/or damages for companies found to have engaged in reviewable practices including refusals to deal, selling exclusive dealing, customer or territorial market restriction and abuse of dominant position (collectively “unilateral conduct”). Such proposals would fundamentally alter the treatment of reviewable practices in Canada by turning them into offences and/or torts. This would risk discouraging a wide range of conduct that is, in almost all cases, pro-competitive and efficiency enhancing.

Rationale for “Reviewable Practices”

Reviewable practices are activities that are not inherently anti-competitive and that are normally beneficial to both businesses and consumers as well as to the Canadian economy. For instance, tied selling occurs whenever a restaurant offers a combo meal or a supplier offers a discount to distributors that carry more than one of its products. Such discounts result in lower prices for customers that purchase a bundle of products. Exclusive dealing arrangements and “market restrictions” (eg exclusive territories) are frequently used to establish efficient distribution systems that are mutually beneficial to suppliers and customers.

To take advantage of the fact that reviewable practices generally enhance the efficiency and competitiveness of the Canadian marketplace, but in rare situations may become anticompetitive, the 1976 and 1986 amendments to the *Act* treated such activities as lawful unless and until the Competition Tribunal determines, based on evidence presented during a hearing, that a specific instance of such conduct should be prohibited.²⁸ The enforcement history of the reviewable practice provisions since that time confirms that this approach was sound – there is only a case or

²⁸ *Competition Act*, s. 79.

two each year in the entire Canadian economy where the Bureau determines that such distribution practices may be having an anti-competitive effect.²⁹

Chilling Effects

As stated in the Group's 2003 Submission and re-iterated in its 2005 Submission, the line between pro-competitive conduct and conduct that amounts to an abuse of dominance or other anti-competitive unilateral conduct (eg over-aggressive low pricing or discounts) may not immediately be apparent without careful analysis.³⁰ The uncertainty as to whether a firm is dominant in any given market, and whether its conduct could be deemed anticompetitive, will not normally chill pro-competitive conduct when the legal framework for review is structured as a reviewable practice with a remedial focus. The conversion of the existing unilateral conduct provisions into "offences" with fines, and/or torts, which carry damages, will create opportunities for private parties (usually competitors or former customers) to use unmeritorious legal proceedings as a competitive tactic. This is far more likely to deter businesses from engaging in aggressive conduct that may in fact be efficient and competitive, than it is to provide a remedy that is presently unavailable.

Appropriateness of Remedies

Unlike hard core cartel behaviour, aggressive unilateral conduct is not clearly welfare-reducing or blameworthy. Significant fines are inappropriate because they would transform an administrative compliance regime into a quasi-criminal punitive regime. The *Act* currently provides for the imposition of "administrative monetary penalties" of up to \$15 million for abuse of dominance by airlines.³¹ Such a fine, particularly when compared to the \$10 million maximum fine for a conspiracy offence, is clearly a punitive response to non-criminal conduct.

²⁹ J. William Rowley QC and A. Neil Campbell, "Private Litigation Over Reviewable Practices: A Cost-Benefit Analysis" in *Should Reviewable Practices be Turned into Competition Torts? A Report prepared for The Competition Policy Group* (October 2007) at pp.56-57.

³⁰ 2003 Submission, *supra* note 8 at p 9; and Competition Policy Group *Submission to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology Regarding Bill C-19, An Act to Amend the Competition Act* (March 2005).

³¹ *Competition Act*, s. 79(3.1).

Where anticompetitive conduct is occurring (or is likely to occur), the Tribunal already has substantial powers to remedy the effects: section 79 which deals with abusive behaviour by one (or more) major player(s) in a market not only allows the Tribunal to make an order prohibiting the participants from engaging in that conduct, it also allows the Tribunal, where it determines that a prohibition order is not sufficient to restore competition to the market, to make an order directing the parties to take actions, including divestitures, that are necessary to overcome the anti-competitive effects.³² In addition, limited private rights of action which allow private parties (typically competitors or terminated customers) to seek leave from the Tribunal to pursue such remedial orders directly were added in the 2002 amendments.³³ Such amendments were controversial, and the “leave” mechanism was added as a safeguard to reduce unmeritorious private cases (along with other safeguards such as the absence of damages and a loser-pays costs rule³⁴).

The history of cases since 2002 confirms that these concerns were warranted. There have been many more private applications under sections 75 and 77 than Bureau applications (15 private actions since 2002 and one Bureau application).³⁵ Of the 15 private cases brought to the Tribunal, one was withdrawn before being granted or denied leave and nine were denied leave by the Tribunal because the applicants could not meet the extremely lenient criteria for obtaining leave. Of those private cases that have proceeded, *none* have been found to be meritorious claims by the Tribunal. In light of this clear history, there is no reason to extend this type of private right of action to abuse of dominance, let alone to introduce damage remedies which would incentivize even more unmeritorious litigation.

³² *Competition Act*, s. 79. See also s-ss. 77(2) and (3) which provide a similar extended remedy where a prohibition order would not restore competition that has been substantially lessened or prevented by tied selling, exclusive dealing and market restriction.

³³ *Competition Act*, s-ss. 75(1), 77(2) and 77(3).

³⁴ *Ibid*, s-ss. 75(1) and 77(3.1).

³⁵ The *Canada Pipe* case was primarily an abuse of deviance proceeding that also included overlapping allegations regarding exclusive dealing. In 2006, the Commissioner successfully appealed the Tribunal’s dismissal of its application and this case was subsequently settled by agreement in 2007. See: *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233; and Competition Bureau News Release, “Competition Bureau reaches agreement with Canada Pipe Company Ltd.” (20 December 2007) available online at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nst/en/2548c.html>>

Treatment of Efficiencies

The *Discussion Paper* identifies the treatment of efficiencies in the context of mergers as an issue that has been the subject of debate and legislative proposals. This issue has only been considered fully by the Competition Tribunal and the courts in one case: the *Superior Propane/ICG Propane* merger.

In *Superior Propane*, the Federal Court of Appeal and the Competition Tribunal moved from a “total surplus” standard to a “balancing weights” standard for assessing the efficiencies associated with a merger.³⁶ The *Discussion Paper* raises the issue of how to balance the efficiency gains realized by producers with welfare losses experienced by consumers following an anti-competitive merger. The total surplus standard is a clear, economics based, approach to assessing the effect of mergers: the overall welfare outcome is assessed without granting any preference to consumers versus producers. In contrast, the balancing weights approach assigns some preferential weight to efficiency effects on consumers, but the degree of the favouritism is arbitrary.

Any approach to an efficiency analysis that gives preferential weight to efficiency effects on consumers implies that consumers are more deserving of wealth than producers.³⁷ However, this is an extremely crude technique for redistribution of wealth: to redistribute wealth effectively through an efficiency analysis, it would be necessary to consider the relative wealth of both the consumers and the shareholders of each specific merging firm.³⁸ Such an analysis could result in a situation where a merger would be approved based on efficiency gains where the majority shareholder was a group such as an employee pension plan, but the same merger would be rejected where that majority shareholder was a wealthy private family.³⁹

³⁶ *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53 at para 161.

³⁷ Margaret Sanderson, “Competition Tribunal’s Redetermination Decision in *Superior Propane*: continued Lessons on the Value of the Total Surplus Standard,” (Spring/Summer 2002), 21(1) *Canadian Competition Record* 1 at 1.

³⁸ Michael Trebilcock, Ralph A. Winter, Paul Collins and Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy*. (Toronto: University of Toronto Press Incorporated, 2002) at p. 149.

³⁹ *Ibid* at p. 149-50.

As noted by the OECD, to introduce *relative* welfare considerations into efficiency analyses is to introduce “wholly subjective determinations by members of a judicial tribunal.”⁴⁰ The introduction of any additional attempts to redistribute wealth through competition policy would reduce the transparency of Canada’s competition regime and shift the focus away from maximizing the efficiency and competitiveness of the Canadian market. The Group therefore urges the Panel not to introduce any further attempts to redistribute consumer and producer surpluses into the efficiencies analysis.

One notable omission in the *Act* is a general efficiencies defence for abuse of dominance or the other reviewable practices that govern unilateral conduct in Canada. Efficiency considerations can be examined under various elements of these reviewable practices – for example, some conduct may generate efficiencies that would prevent a “substantial lessening of competition” from occurring. However, as with mergers,⁴¹ it would also be appropriate for Canada’s overall economic welfare to allow conduct which results in a “substantial lessening of competition” to continue when there are efficiencies being generated that are greater than the anti-competitive effects. Thus, if amendments to the *Act* are being put forward, it would be appropriate to add a formal efficiency defence to the abuse of dominance, tied selling, exclusive dealing, market restrictions, refusal to supply and other reviewable practices in Part VIII of the *Act*.

Competition Law – Questions

The Group’s responses to the three specific competition law questions in the *Discussion Paper* are set out below:

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

As indicated under “Fines and damages for Unilateral Conduct” above, the reviewable practices in the *Act* are an international model for dealing effectively with abuses of

⁴⁰ OECD, “Canada – Report on Competition Law and Institutions” (2004), OECD DAF/COMP(2005)4 at para 70.

⁴¹ See *Competition Act*, s. 96

dominant position or other anti-competitive pricing/distribution practices without imposing unnecessary chilling effects or burdens on firms operating in the Canadian market. This legal framework helps to support the competitiveness of Canadian firms.

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 strengthen Canadian competitiveness as a destination for foreign investment if we were to adopt them?*

The *Act* is generally sound. There are three criminal pricing offences which are widely recognized to be inappropriate, based on modern economic thinking:

- **Predatory Pricing⁴²** – Low prices are generally beneficial to consumers unless competitors are disciplined or eliminated in a market protected by barriers to entry and the predator can then recoup its lost profits through higher future prices. The abuse of dominance provisions (which were introduced decades after this offence was established) cover such activity. It is no longer necessary to have a separate criminal offence which may chill conduct that is almost always beneficial.
- **Price Discrimination (and the related Geographic Price Discrimination and Discriminatory Promotional Allowances offences)⁴³** – These provisions have no “competitive effects” component. They impede flexibility and competition for both buyers and sellers, while protecting inefficient purchasers. In addition, price discrimination often enhances output and economic welfare. The abuse of dominance provisions (which were introduced decades after these offences were established) are broad enough to deal with the rare situations where discriminatory pricing may result in anti-competitive effects. It is no longer necessary to have separate criminal offences which impede and chill conduct that is usually beneficial or at least economically benign.⁴⁴
- **Price Maintenance** – This provision creates a “*per se*” criminal prohibition against most vertical pricing restrictions (as well as horizontal pricing restrictions, which are already covered by the conspiracy offence). Economists recognize that

⁴² *Competition Act*, s. 50 (1)(c).

⁴³ *Ibid.*, ss. 50 (1)(a) and (b) and 51.

⁴⁴ The US Antitrust Modernization Commission recently recommended the appeal of the analogous *Robinson-Patman Act* in the US: see Antitrust Modernization Commissioner, *Report and Recommendations*. (April 2007) available online at http://www.amc.gov/report_recommendation/toc.htm at pp. 38 and 330.

vertical non-price restrictions are usually efficiency-enhancing and only occasionally anti-competitive, which is reflected in the design of the *Act*; reviewable practices for vertical non-price restrictions. Similarly, vertical price restrictions may often be pro-competitive/efficiency-enhancing rather than anti-competitive. The US Supreme Court recently acknowledged this by overruling its prior “*per se*” jurisprudence⁴⁵ and making price maintenance subject to “rule of reason” review.⁴⁶ It would be appropriate to convert price maintenance into a reviewable practice in Canada since the existing *per se* criminal offence is unnecessarily rigid and impedes as well as chills conduct that is not anti-competitive.

As a practical matter, the Competition Bureau’s published guidelines and enforcement practices have reduced some of the uncertainty and chilling effects related to these criminal pricing offences.⁴⁷ However, if amendments to the *Act* were to be put forward, the conversion of these provisions into reviewable practices would help to enhance the competitiveness of Canadian firms and bring the *Act* into line with best economic and international practices in these areas.

As indicated under the “Conspiracy Offence”, “Market Studies” and “Fines and Damages for Unilateral Conduct” discussions above, changes that have been proposed in these areas are unnecessary and undesirable. The Group believes that such changes would be a move away from international best practices, would decrease the competitiveness of firms operating in Canada, and would rightly be regarded as a negative factor by foreign investors considering the economic regulatory environment that would be applicable to investments in Canada.

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?*

⁴⁵ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁴⁶ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. ___ (2007).

⁴⁷ See particularly: Competition Bureau, “Predatory Pricing Enforcement Guidelines” available online at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01746e.html>> and Competition Bureau, “Price Discrimination Enforcement Guidelines” available online at: <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01810e.html>>.

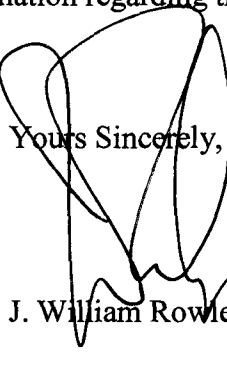
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In general, Canada's merger review regime appears to be based on sound economic underpinnings. However, as noted under "Treatment of Efficiencies" above, the "balancing of weights" interpretation of the merger efficiency defence results in an arbitrary redistribution of wealth from firms to consumers. This will be unhelpful in those situations where merging competitors are seeking to enhance their international competitiveness by realizing economies of scale or other efficiencies.

Representatives of the Group would welcome an opportunity to meet with members of the Panel during their Toronto consultations with stakeholders. We also would welcome an opportunity to participate in the thematic roundtable on competition issues and believe that we could make an in-depth contribution to that session.

If you have any questions or would like more information regarding the items covered in this letter, please let us know.

Yours Sincerely,


J. William Rowley Q.C.


A. Neil Campbell