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Panel Recommends Significant Changes to Canada's Competition Laws

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I. REVIEW PANEL ISSUES REPORT

On June 26, 2008, the federally appointed Competition Policy Review Panel released its report on Canada's competition law and policies titled *Compete to Win*. The Panel was created in July 2007 by the federal government with the mandate of examining how to improve the domestic and international competitiveness of the Canadian economy.[1] The Panel has proposed what it describes as:

> a sweeping national Competitiveness Agenda based on the proposition that Canada's standard of living and economic performance will be raised through more competition in Canada and from abroad.

In a press release, the Chair of the Panel said that "Canada needs to be more open to competition, as competition spurs the productivity enhancements that underpin our economic performance and ultimately our quality of life." He added that "Canada needs to get its act together as a nation" and adopt a more globally competitive mindset.

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[1] For the Panel's report and related materials, *see* Compete to Win: Competition Policy Review Panel Releases Report, *at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home (last visited Aug. 26, 2008).

II. RECOMMENDATIONS

In pursuit of the above-stated goal, the Panel offers several far-reaching proposals to amend Canadian competition law and policies. The report's key recommendations are as follows:

- amend the merger notification process under the Competition Act to mirror the U.S. Hart-Scott-Rodino Antitrust Improvements Act process;
- reduce the current three-year period within which the Commissioner of Competition may challenge a completed merger to one year;
- replace the existing conspiracy provisions in the Competition Act with a per se criminal offense to address "hard core" cartels and a civil provision to deal with other types of anticompetitive agreements among competitors;
- grant the Competition Tribunal the power to order an administrative monetary penalty of up to USD 5 million for a "violation" of the abuse of dominant position provisions of the Competition Act; and
- repeal the Competition Act's criminal provisions relating to price discrimination, promotional allowances, and predatory pricing, and decriminalize the price maintenance offense.

A more detailed discussion of these recommendations is set out in the following sections.

A. Mergers

Under Canada's current merger review process, transactions that exceed certain financial thresholds and, in the case of share acquisitions, exceed an additional voting interest threshold cannot be completed before the expiration of a statutory waiting period (either 14 or 42 days following the filing of a notification containing certain prescribed information). The duration of the statutory waiting period depends on whether the acquirer elects to make a short-form filing (14-day waiting period) or a long-form filing

(42-day waiting period). The Bureau's substantive review of transactions, however, runs on a different non-statutory timetable, based on the complexity of the transaction. According to the Bureau's non-binding "service standard" periods, it will aim to complete a substantive review of "non-complex" transactions within two weeks, "complex" transactions within ten weeks, and "very complex" transactions within five months.

Canada's merger review process creates uncertainty for merging parties at various levels. For one, parties must themselves elect whether to file a short-form or long-form notification, assuming the risk that if they file a short form the Bureau may require them to resubmit a long form, thereby stopping the waiting period until the long-form filing is made. In addition, because the statutory waiting periods and the Bureau's "service standard" review periods are not correlated, merging parties can find themselves in a position where the waiting period has expired (legally entitling them to close) without the Bureau having completed its substantive review. Parties must then decide whether to wait until the Bureau is done or proceed to closing subject to the risk that the Bureau may seek an injunction to stop them.

The uncertainties in the Canadian merger system have led to suggestions that the process be amended by establishing a clearer series of deadlines, with an initial review period of set duration followed by a longer second phase of investigation for mergers that raise substantive issues.

The Panel appears to have agreed with this perspective in recommending that the merger review process in Canada be aligned with the U.S. Hart-Scott-Rodino Antitrust

Improvements Act ("HSR") procedure. The HSR process involves an initial 30-day waiting period in which a notified merger may not be completed while the government assesses the likely competitive effects of the proposed transaction. Before that 30-day period expires, the government may choose to issue a "second request" for information and documents, in which case the proposed transaction may not be completed until 30 days after the parties substantially comply with the request. There is also only a single-filing form (i.e., no short- and long-form dichotomy).

Although a step in the right direction, the Panel's preference for the wholesale adoption of the U.S. merger system—including the lengthy and onerous "second request" process—could actually create inefficiencies by significantly raising the costs and lengthening the potential delays for merger review in Canada. Given the Panel's stated goal of reducing the time, complexity, and cost of the Canadian merger review process, it would have been preferable for the Panel to have included in its recommendations a workable deadline within which a second stage review would have to be concluded (as is done in many other jurisdictions).

The Panel makes several other recommendations designed to reduce the scope and burden of merger review in Canada. For example, the Panel suggests notification thresholds be increased from the current levels of USD 400 million ("size of the parties" test) and USD 50 million ("size of the transaction" test). The Panel also recommends that the period of time within which the Bureau may challenge a completed merger be reduced from three years to one. While the Bureau has rarely challenged completed

mergers, the Panel's report notes that "[a] shorter period in which to challenge a transaction would provide more certainty for the Canadian business community and international investors."

B. Conspiracy

The Panel's proposal to repeal the existing conspiracy provisions and replace them with (i) a per se criminal offense and (ii) a civil provision to deal with other types of anticompetitive agreements is consistent with the position that the Competition Bureau has been advocating for several years. However, this position has been unable to achieve wide support within the competition bar and other stakeholders. Among other concerns, the Bureau has not yet been able to propose a specific amendment that would more effectively capture hard core cartel behavior without also making illegal, or at least significantly deterring, efficiency enhancing or benign agreements between competitors or other parties. While the Panel suggested that its proposal would have the beneficial effect of harmonizing Canadian conspiracy laws with those in the United States, it does not seem to appreciate that the U.S. per se cartel offense is not contained in an explicit statutory code, but has evolved through over 100 years of case law and judicial consideration of particular circumstances. Drastic amendments to the Canadian conspiracy offense that abandon Canada's own 119 years of judicial precedents risk creating the type of uncertainty that is antithetical to the encouragement of innovation, collaboration, and investment in Canada.

C. Abuse of Dominance

The Panel's proposal to establish administrative monetary penalties ("AMPs") of up to USD 5 million for conduct constituting an abuse of dominant position advances another favorite position of the Competition Bureau. As with the conspiracy amendments, however, the Bureau's position on AMPs for abuse of dominance has also failed to generate widespread support. Opponents question the wisdom of introducing significant fines for what is—under Canadian law—non-criminal conduct. The concern is that potential exposure to substantial fines will hamper the creativity and aggressive competitiveness of leading Canadian businesses.

D. Pricing Provisions

The Panel recommends the repeal of the Competition Act's criminal offenses of price discrimination, discriminatory promotional allowances, and predatory pricing—which are virtually never enforced—in favor of dealing with these matters under the civil abuse of dominance provision. This proposal has been suggested before and (unlike other proposals) has the advantage of widespread support. Significantly, the Panel also recommends the same treatment for the criminal price maintenance provision. In light of recent developments in U.S. law, this would have the added benefit of encouraging greater cross-border convergence in enforcement.

E. Advocacy

The Panel also recommended that responsibility for competition advocacy be moved from the Competition Bureau to a new Canadian Competitiveness Council,

leaving the Bureau to focus on its core mandate of enforcing and promoting compliance with the Competition Act. The Panel recommended that the Council be led by a board of directors comprised of both government and non-government representatives, with a majority from outside government.

The Panel also recommended that a senior federal economic minister be mandated to implement a new regulatory screen by June 2009 that would subject all new regulations to a rigorous assessment of their impact on competition. While the proposed scope of such a review is not entirely clear, and it is also not clear what the consequences would be of proposed regulations failing such a regulatory screen, this recommendation has the potential for having a significant impact on limiting unnecessary restraints on competition flowing from regulatory provisions.

III. OTHER PROPOSALS

In addition to a discussion of competition law, the Panel's report covers other topics relevant to the competitiveness of the Canadian economy, including recommendations with respect to taxation, education, immigration, urban issues, growth of small- and medium-sized enterprises, securities law considerations in mergers and acquisitions (such as poison pills and defensive tactics), environmental assessments, and both interprovincial and Canada-U.S. trade barriers.

Most significantly, the report contains several important recommendations with respect to Canada's foreign investment laws. These include to:

- substantially increase the Investment Canada Act review threshold for acquisitions of Canadian businesses by non-Canadians to a USD 1 billion

enterprise value (except in the case of cultural businesses) and reverse the onus in the review standard to require that the Minister finds the proposed acquisition would be contrary to Canada's national interest;

- remove the de facto prohibition on bank, insurance, and cross-pillar mergers of large financial institutions;
- increase the limit on foreign ownership of air carriers to 49 percent of voting equity on a reciprocal basis through bilateral negotiation;
- initially allow foreign companies to establish new telecommunications businesses in Canada or acquire existing businesses with market shares of up to 10 percent and subsequently further liberalize foreign ownership restrictions in this sector; and
- liberalize the non-resident ownership policy on uranium mining.

IV. CONCLUSION

The Panel's proposals to repeal or decriminalize certain pricing offenses in the Competition Act are welcome initiatives that would clearly enhance Canadian competitiveness and Canada's attraction to foreign investors. It is less clear that the proposed amendments to the Competition Act's conspiracy provisions, adoption of a U.S.-style merger notification system, or significant penalties for abuse of dominant position will enhance the efficiency and competitiveness of Canadian businesses. It also remains to be seen whether these proposals will attract sufficient political support to be enacted in the context of the current minority government.