



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 10, 2008

Mr. Lynton Ronald Wilson
Chair, Competition Policy Review Panel
280 Albert Street, 10th Floor
Ottawa, ON K1A 0H5

Dear Mr. Wilson:

RE: Competition Policy Review Panel Consultations

On behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section), I am pleased to provide you with our written submission and response to the Competition Policy Review Panel's October 2007 consultation paper, *Sharpening Canada's Competitive Edge*.

The CBA Section comprises some 1500 members of the CBA who practice in the area of competition and antitrust law. The CBA Section was founded in 1991 and is active in providing commentary on developments in competition law and policy. We meet regularly with Justice Canada, Public Prosecution Service and Competition Bureau officials to discuss matters of mutual and ongoing interest. In short, the CBA Section is the most active private sector organization focused on developments in competition law and policy in Canada. In recent years the CBA Section's mandate expanded to include matters related to foreign investment review under the *Investment Canada Act*. This was a natural development as the members of the CBA Section who were handling merger notification and review issues under the Competition Act were also providing advice and preparing the necessary filings under the *Investment Canada Act*.

This CBA Section appreciates the opportunity to provide its views to the Panel. We would be pleased to participate in your regional and thematic consultations and to respond to any comments or questions the Panel may have. To this end, I invite you to contact me at (780) 423-7344 or at barry.zalmanowitz@fmc-law.com.

We look forward to working with you on these issues.

Yours very truly,

(original signed by Tamra Thomson for Barry Zalmanowitz)

Barry Zalmanowitz
Chair
National Competition Law Section



THE CANADIAN BAR ASSOCIATION
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Competition Policy Review Panel

**NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION**

January 2008

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Competition Policy Review Panel

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to have the opportunity to provide this written submission and respond to the Competition Policy Review Panel's October 2007 consultation paper, *Sharpening Canada's Competitive Edge*. The Section comprises some 1500 members of the CBA who practice in the area of competition and antitrust law. The CBA Section was founded in 1991 and is active in providing commentary on developments in competition law and policy. We meet regularly with Justice Canada, Public Prosecution Service and Competition Bureau officials to discuss matters of mutual and ongoing interest. In short, the CBA Section is the most active private sector organization focused on developments in competition law and policy in Canada.

II. IMPORTANCE OF COMPETITIVE MARKETS

The CBA Section supports the work of the Competition Policy Review Panel, particularly the goal of seeking to maximize the competitiveness of Canadian markets. In our view, effectively functioning competitive markets are the mechanism most likely to generate wealth and increase the productivity of the Canadian economy. We believe that this principle applies not only to goods and services, but also to investment markets – the ability to attract capital and entrepreneurialism from abroad.

The competitiveness of markets can be constrained by private restraints created by market participants or by government regulation. While private restraints tend to be unstable and temporary, government regulatory restraints can have much more lasting and deeper anti-competitive effects. In our view, markets foreclosed or significantly constrained by regulatory restrictions almost inevitably prove to be less dynamic, less innovative, less efficient and less successful than more open markets. As well, competitive problems identified in regulated markets are often more difficult to remedy because established incumbents who have benefited from regulatory barriers to competition seek their preservation.

Consequently, in our submission, the policy bias should always favour open markets unless there are clear and pressing reasons for the contrary. Where choices are made to close markets in whole or in part from

some aspects of competition – to take an example, from foreign firms – the policy reasons for doing so should be transparent, and there should be an explicit acknowledgement that the trade-off will result in less competitive markets, and therefore a less vigorous Canadian economy. Further, the regulatory means to achieve a desired policy should restrict competition, and the number of available competitors, only to the minimum extent necessary to achieve the policy objective.

Later in this submission we address specific concerns surrounding the *Investment Canada Act*, (sometimes referred to as the ICA) where the principle of the minimal necessary restrictions on competition, competitors and investment is particularly relevant. This concern also relates to sectors of the economy, such as telecommunications and airlines, which face specific restrictions on foreign ownership. Wherever the range of possible investors is restricted there will be a loss by way of injury to the dynamism and efficiency of the economy. The tradeoff against other policy goals sought to be achieved by these restrictions may – or may not – be worth the price, but there will be a price that needs to be assessed.

III. GOALS OF COMPETITION LEGISLATION

It may not be within the mandate of the Panel to make detailed recommendations for amendments to the *Competition Act* (sometimes referred to as the Act). However, we believe it would be helpful for the Panel to make recommendations to the Government on the appropriate goals of competition legislation, and to recommend the types of amendments that would best achieve those goals.

This might seem, on its face, a relatively simple question. However, section 1.1 of the *Competition Act* states that the purpose of the *Act* is to maintain and encourage competition in Canada, and then goes on to articulate four objectives: promoting the efficiency and adaptability of the Canadian economy; expanding opportunities for Canadian participation in world markets; ensuring that small and medium size enterprises have an equitable opportunity to participate in the Canadian economy; and providing consumers with competitive prices and product choices. These purposes are not fully consistent. For example, because they lack efficient scale, some small and medium size enterprises may not be able to compete and offer Canadian consumers the best product choices and prices.

In our view, the principal or overriding purpose of a modern competition law is to promote the efficiency of the economy. However, the list of goals set out in section 1.1 of the *Act* has from time to time contributed to surprising results in the interpretation of the *Act*.¹

It would be helpful for the Panel to articulate what the paramount purpose of the *Competition Act* should be. The CBA Section believes that two of the goals articulated in Section 1.1 – promoting the efficiency and adaptability of the Canadian economy and providing consumers with competitive prices and product choices – should be paramount. On the rare occasions when those goals conflict with one another, we believe the success of the Canadian economy requires that efficiency be paramount. Ultimately efficiency will translate into greater wealth and greater benefits for Canadian consumers.

IV. SPECIFIC AMENDMENTS TO THE COMPETITION ACT

The *Competition Act* is generally a workable, modern competition law, but would benefit from certain amendments. Eliminating criminal treatment for price discrimination and “predatory” pricing is largely uncontroversial, and the Panel should recommend these changes. Other possible amendments to the *Act* are more controversial. These would include such things as changing the basic standard for illegal agreements among competitors, or decriminalizing the price maintenance provisions of the *Competition Act*. Views vary significantly as to whether these amendments would be beneficial.

Since we anticipate that some of these issues may be considered by the Panel, we are pleased to offer a brief summary of the CBA Section’s views for your consideration:

A. Possible Amendment to the Conspiracy Provision

Section 45 of the *Competition Act*, the criminal cartel provision, has been referred to as a cornerstone of the *Act* and has been in place in substantially the same form since 1889. It prohibits agreements which lessen competition “unduly”. Section 45 reform has been proposed and debated in recent years. While the language of section 45 is broad, years of jurisprudence and enforcement policies have made it well understood that section 45 is limited to cartel type agreements or arrangements among competitors to fix prices, limit supply, divide markets, or exclude competitors.

The main objectives of some recent proposals for reform are: (1) to remove the word “unduly” and make hardcore cartels illegal *per se* (i.e. without proof of economic impact); and (2) to clarify that, as a serious

¹ See “The Purpose of Canadian Competition Law”, Chapter 1 of *Fundamentals of Canadian Competition Law*, Canadian Bar Association, Thomson Carswell 2007, J. Musgrove (editor).

criminal offence, section 45 applies only to hardcore cartels, so as not to chill legitimate collaborations or joint initiatives among competitors that enhance the competitiveness of the economy and the economic welfare of Canadians.

While there is not much serious debate about the desirability of these objectives, finding language to achieve them that would not carry a significant risk of greater uncertainty has so far been elusive. As such, the CBA Section has been divided on the necessity and the wisdom of section 45 reform.² Certainty in the law is a quality that should not be undervalued. While section 45 is not perfect, it has had the benefit of almost 120 years of judicial consideration, scholarly commentary, and enforcement policy. The language is sufficiently flexible to allow modernization through judicial interpretation. The United States, which has a *per se* prohibition on hardcore cartels but a *rule of reason* approach to most types of agreements, has achieved this position through more than a century of jurisprudence. By contrast, a fixed statutory definition of hard core cartels may not permit such self-modernization.

There are serious dangers with entrenching a potentially over-broad or inflexible definition of cartels, and thereby chilling pro-competitive conduct. Section 45 reform should therefore be undertaken only with great care to ensure that an imperfect but workable and reasonably well understood provision is not discarded for something less clear. This is especially a concern in that civil damage actions, including class actions, are available for conduct contrary to section 45. Amendments that risk greater uncertainty in the scope of section 45 may discourage Canadian firms from pursuing collaborative activities and joint ventures that foreign competitors may confidently pursue with impunity. That would be harmful to the competitiveness of the Canadian economy and make Canada unattractive as a place for joint ventures or other efficiency enhancing collaboration and innovation activities.

If proposals for reform are to be considered, it is vital to involve the widest possible, fully public consultation, addressing both the wisdom and desirability of the reform in concept, and the language proposed.

B. Decriminalization of Pricing Provisions

The CBA Section's position is that the criminal pricing provisions (price discrimination and predatory pricing) in section 50 of the *Act* should be repealed and addressed under the non-criminal abuse of

² See National Competition Law Section, Canadian Bar Association, Comments on the Competition Bureau's Discussion Paper: Options for Amending the *Competition Act*, October 2003 at 29-61, and Submission on Reform of Section 45 of the *Competition Act* (Conspiracy), February 2003.

dominant position provisions in sections 78 and 79.³ Differential and low pricing are generally pro-competitive and only rarely anti-competitive. Moreover, it is often difficult to assess in advance whether it will have anti-competitive effects in a particular situation. It is harmful to the competitiveness of the Canadian economy to continue to have criminal provisions prohibiting such conduct.

C. Compulsory Powers to Conduct Market Studies

The Consultation Paper refers (at page 25) to proposals to give the Competition Bureau investigatory powers to conduct market studies outside the context of its enforcement activities. We are not aware of any concrete evidence that such powers would actually improve Canada's economy. Market references are likely to impose a significant and unnecessary burden on Canadian businesses and Canadian taxpayers. These inquiries would also raise due process issues, for example in relation to the use of information gathered by a market study in subsequent enforcement proceedings under the *Competition Act*. The Commissioner already enjoys extensive powers to conduct inquiries where there is a reason to believe that conduct is contravening the *Act*. Also, the Governor in Council already may ask the Canadian International Trade Tribunal to conduct broader economic inquiries.⁴

D. Penalties or Fines for the Reviewable Practices

The addition of Administrative Monetary Penalties, to the remedies currently available for abuse of dominant market position, or other reviewable practices in the *Act*, is inconsistent with the structure and purpose of the *Competition Act*. Reviewable practices such as abuse of dominance are presumptively lawful and prohibited only where it is established that they are likely to have a significant anti-competitive effect. That presumption is intended to foster pro-competitive conduct.

The determination of whether reviewable conduct is pro-competitive depends on a number of factors, such as the structure of the market, and requires sophisticated economic analysis. For these reasons, reviewable conduct, such as abuse of dominance, was deliberately not made subject to the threat of sanctions, but is addressed instead through various injunctive remedies and remedial orders.

³ See National Competition Law Section, Canadian Bar Association, Comments on the Competition Bureau's Discussion Paper: Options for Amending the *Competition Act*, October 2003, at 61-69. See also J.A. Van Duzer and G. Paquet "Anticompetitive Pricing Practices and the *Competition Act*: Theory, Law and Practice". See also Interim Report on the *Competition Act*: Report of the Standing Committee on Industry, June 2000.

⁴ See [Submission](#) of the National Competition Law Section of the Canadian Bar Association in response to the Government of Canada's June 23, 2002 discussion paper "Options for Amending the *Competition Act*: Fostering a Competitive Marketplace", October 23, 2002, at 68-77.

In addition, there is no evidence that abuse of dominance is so prevalent in Canada as to warrant altering the balance of incentives for Canadian businesses to compete aggressively. Imposing after-the-fact sanctions on pro-competitive conduct risks deterring the aggressive competition which the *Act* seeks to foster. This has been the view of the CBA Section for some time.⁵

E. Eliminating Industry Specific Rules in the *Competition Act*

The CBA Section is concerned about separate competition-related rules for different industries or sectors, where there does not appear to be a clear basis for creating different rules. It is preferable to apply the same general principles contemplated in the *Competition Act* in the appropriate context.

We have seen special provisions added to the *Competition Act* dealing with airlines under the abuse of dominance provisions, and special review of transportation mergers pursuant to the *Canada Transportation Act* (CTA), as well as proposals to amend the *Competition Act* specific to the retail gasoline industry. The result may be a needlessly complex set of rules and regulations applicable to a range of industries that gain public profile from time to time. The *Competition Act* will cease to be a general framework law for the economy, and become a repository of industry specific rules.⁶

Absent truly exceptional circumstances, the *Competition Act* is the appropriate means to address concerns about the effects on competition of mergers and abuses of market power. The creation of multiple sets of competition rules for different industries is both unnecessary and inefficient. It may also undermine support for general competition rules, applicable to all economic actors.

Further, the proliferation of non-judicial reviews of mergers or other business conduct on competition grounds will create an unstable playing field. For example, the public review process contemplated by the merger provisions in the CTA establishes a process (including a review of effects on competition by the Commissioner) that is uncertain and potentially subject to the influence of lobbyists and special interest groups. We would support repeal of the airline specific provisions in the *Competition Act* and at least modifications to the current CTA merger process to restore the usual standards and role of the Commissioner for mergers involving a transportation undertaking.⁷

⁵ See our April 26, 2007 [letter](#) to the Honourable Maxime Bernier, and submission of December 2004 with respect to [Bill C-19](#).

⁶ See, for example, [Bill C-381](#), an Act to amend the *Competition Act* (vertically integrated gasoline suppliers), given First Reading on February 13, 2003.

⁷ With regard to the CTA merger provisions, see: [Submission on Bill C-11 Canada Transportation Act Amendments](#), National Competition Law Section and National Air and Space Law Section, Canadian Bar Association, September 2006.

V. ENHANCED ROLE FOR COMMISSIONER AS COMPETITION ADVOCATE

In Chapter 6 of the Consultation Paper, the Panel asks “What further could be done in Canada to promote an ongoing review of Canadian competition, investment and productivity performance aimed at Canada’s sustained competitiveness?”

In 1776 Adam Smith wrote that “the proposal of any new law or regulation of commerce” which has the effect of reducing the amount of available competition, whatever its other alleged beneficial goals, should be “examined not only with the most scrupulous, but with the most suspicious attention”. These words are as true now as they were in 1776. A systematic application of suspicious attention to any proposed laws or regulations which may have the effect of limiting competition would be of significant benefit to the Canadian economy, and ultimately Canadian consumers.

The CBA Section accepts that there are circumstances where other important policy objectives can justify restraints on competition. Requiring medical doctors to have a certain level of training, for instance, no doubt restricts the market for medical services, but for *bona fide* public policy reasons. Nevertheless, we believe that there are many instances where government regulation significantly restrains the freedom of Canadian businesses (both large and small) from achieving the most efficient outcome and offering the lowest prices to Canadian consumers, but the intended benefits of the restrictive regulations are uncertain, or the Government's objectives could be achieved by less restrictive means.

Part of this problem results from the fact that the beneficiaries of government policies, regulations or legislation that may lessen the competitive vigor of a particular industry may be concentrated and identifiable, and may be effective advocates for the imposition or maintenance of restraints on competition, whereas the beneficiaries of free competition will often be diffuse, unidentified, unorganized and therefore less articulate and less effective in advancing their views. This is an age-old problem, but one, we believe, that the Competition Bureau is in a good position to address. The Competition Bureau has extensive expertise in identifying the likely competitive impact of various types of conduct in the marketplace.⁸

⁸ For example, the Bureau's commentary on provincial regulations limiting dental hygienists from offering their services independent of dentists may have supported regulatory change to permit greater competition in this market in some provinces. See, for example, "Competition Bureau Applauds Nova Scotia Move to Permit Greater Competition in Dental Hygiene", press release, November 28, 2007, and "Competition Bureau Supports Alberta Decision to Allow Greater Competition in Dental Hygiene Services", press release, November 1, 2006.

We believe that if the Bureau were given the statutory mandate to, in Adam Smith's words, examine with suspicious attention, policies, regulations and legislative proposals for their likely negative effect on competition, and authorized to express its views on such policies to governments and the public, the risk of unintended or unnecessary anti-competitive consequences would be significantly reduced.

We believe that charging the Competition Bureau with this responsibility would require, at minimum:

- A statutory requirement that all legislation which directly affects competition be reviewed by the Competition Bureau and receive Competition Bureau input, except perhaps where Parliament specifically instructs otherwise. That is, Competition Bureau review should be the default position. In such circumstances, the views of the Competition Bureau should be available to the public.
- Mechanisms for early input by the Competition Bureau into government policies which directly affect competition so that the Bureau's views may usefully be taken into account in time to structure proposals to minimally affect competition.
- Mechanisms to permit the Bureau to comment on provincial policies which directly affect competition (perhaps after negotiation with the relevant provincial governments) would be desirable.
- Appropriate funding for the Competition Bureau to take on these significant added duties.
- A new funding and reporting relationship for the Competition Bureau which ensures its independence from a particular government department whose proposals might be subject to examination.

Although not an attempt to offer detailed international comparisons,⁹ it is our understanding that the Australian office of Best Practice Regulation (part of the Productivity Commission but separate from the Australian equivalent of the Competition Bureau) reviews proposed laws and regulations for their likely competitive impacts.¹⁰ We recommend that a similar system be adopted in Canada, whether the independent review is conducted by the Competition Bureau or a new and separate organization, as in the Australian model. We believe that over time such a mechanism has the potential to significantly enhance the efficiency, competitiveness and productivity of the Canadian economy.

⁹ Some references include OECD Policy Paper, January 12, 2007 "Institutional Options for Competition Assessment"; Speech by Neelie Kroes, June 6, 2005 "The Competition Principle as a Guideline for Legislation and State Action – the Responsibility of Politicians and the Role of Competitive Authorities"; Competition Analysis in Rule Making: A Comprehensive Case Study" Jacobs & Associates, April 4, 2005; "Six Practices for Limiting Government – Facilitated Restrictions on Competition", Michael Gal and Inbal Faibish.

¹⁰ See above, and also "Rethinking Regulation: Report of the Task Force on Redrawing Regulatory Barriers on Business", January 2006 – Government of Australia.

VI. CANADIAN MERGER POLICY

The CBA Section believes that the approach to mergers taken in the *Competition Act* is generally consistent with those of Canada's major trading partners and international best practices, is based on sound principles of competition policy, and generally works well in practice. The *Competition Act* protects consumer interests in competition and, by fostering a competitive Canadian marketplace, helps create an environment in which Canadian firms can grow to become global competitors. The CBA Section believes that legislative change to readjust that balance is not necessary or desirable.¹¹ In particular, we would be concerned if the *Competition Act* were to be viewed as the appropriate vehicle to achieve non-competition objectives such as the creation of "national champions."

Legislative flexibility coupled with pragmatic enforcement by the Commissioner has resulted in a system that allows for relatively quick clearance of the vast majority of transactions. Merging parties may seek an advance ruling that a merger is not problematic and the Commissioner has been very efficient in handling such requests. This is significant, because the vast majority of merger transactions are not problematic, and are cleared within two weeks.

The basic test to evaluate mergers – whether they "substantially lessen or prevent competition" – is also used by U.S. authorities and has essentially become the world standard.¹² In practice, the substantive assessment is very similar to those undertaken by authorities in the U.S., Europe and many other jurisdictions. The general focus is on the merger's impact on price and output.

The *Competition Act*'s statutory "efficiency defence" is unique to Canada. While it rarely makes a difference to the outcome, the CBA Section believes that the defence is appropriate for Canada's economy, that it is illustrative of the importance of economic efficiency as an underpinning of the *Competition Act*, and that it represents an example of Canadian leadership in the competition law area. The manner in which the test ought to be interpreted has been the subject of litigation and extensive academic debate, including several submissions from the CBA Section.¹³ Debate about the issue has

¹¹ The CBA Section has proposed to the Competition Bureau a number of housekeeping and minor amendments to the Act to improve its structure and eliminate minor drafting errors, but they do not raise policy issues and we expect that this level of detail is beyond the Panel's mandate.

¹² The substantive test for merger review in many jurisdictions is identical, or similar in substance, to the substantial lessening of competition test used in Canada. These jurisdictions include: Australia, Belgium, Croatia, Denmark, Estonia, the European Union, France, Greece, Ireland, Israel, Italy, Japan, Lithuania, Morocco, Norway, the Netherlands, New Zealand, Poland, Portugal, Romania, Slovenia, South Africa, Sweden, Turkey, Ukraine, the United Kingdom and the United States.

¹³ Including *Bill C-249 Competition Act Amendment on Efficiency Gains* (November 2003) and *Treatment of Efficiencies in the Competition Act* (December 2004).

somewhat subsided following statements by the Commissioner that she does “not consider that, in the short term, it is either desirable or advisable to seek amendments relating to efficiencies.¹⁴” We understand that the Commissioner’s preferred approach is to work with the existing case law to assess efficiencies on a case-by-case basis. The CBA Section believes that this pragmatic approach works well in practice and would not recommend reopening the issue at this time.¹⁵

If a criticism were to be leveled at the merger provisions of the *Competition Act*, it would be that there may be a degree of over-enforcement in marginal cases. Parties often have a strong incentive to settle cases which raise competition law issues, even where they believe that the proposed transaction is not likely to substantially prevent or lessen competition. This is largely because of the time, cost and uncertainty of proceedings before the Competition Tribunal. This could result in “Type I errors” – beneficial transactions being prohibited or subject to unnecessary remedies – that are harmful to competition in the sense that they prevent efficiency enhancing mergers. These errors could place Canadian firms at a competitive disadvantage to expanding globally. For instance, they could be required to sell assets that may be important in their efforts to expand globally.

Empirical study would be useful to determine whether there is material over (or under) enforcement of the merger provisions of the *Competition Act* (and, if so, what reforms might address this issue). The Commissioner is currently conducting an internal review of remedies in previous merger cases. We applaud this initiative, and hope that the Bureau's review will include consideration of this issue.

The consultation paper notes that a “challenge for competition authorities in Canada and around the world is to internationalize their policies” to better deal with globalization. As a general proposition, the CBA Section supports international convergence where appropriate, and notes that merger enforcement already reflects a considerable degree of coordination, cooperation and harmonization of approach. The Commissioner, foreign competition regulators, and private sector representatives from around the world have devoted and are devoting significant time and resources to harmonizing the merger regimes of national competition laws.¹⁶ This has been done largely through the International Competition Network,

¹⁴ Speaking Notes for Sheridan Scott Commissioner of Competition, Canadian Bar Association Annual Fall Conference on Competition Law, Gatineau (September 28, 2006) at p. 12.

¹⁵ In its December 2004 submission to the Commissioner on efficiencies the Section took the position that the efficiencies defence ought not to be amended without further serious economic study. Although the Commissioner has undertaken further study in the area since the December 2004 Section submission, the Section does not believe that there is evidence that legislative reform is necessary or desirable (or, if it were, what form it would take).

¹⁶ There is a considerable degree of co-operation in particular cases, with agencies including the Bureau frequently exchanging information in order to advance each other’s investigation and coordinate approach.

an international association of competition law authorities and NGAs that the Commissioner currently chairs. The CBA Section strongly supports these initiatives. Having said that, there will be appropriate occasions for Canadian merger policy and practice to diverge from that in other jurisdictions. Canada is a small economy relative to some of our major trading partners, operating within a geographically large area. Sensitivity to this might, for example, call for greater recognition of the need to achieve efficiencies, or flexibility and openness to non-structural or behavioural remedies to address local competition issues while allowing Canadian firms to better compete in global markets.

VII. FOREIGN INVESTMENT REVIEW

While the CBA Section believes that the *Competition Act* is, broadly speaking, functioning well and benefiting the Canadian economy, the same cannot be said for the *Investment Canada Act*. We wish to make the following points:

1. It is not apparent that the ICA is of net benefit to Canada. It potentially discourages or inhibits the influx of capital to Canada, and serves to make investments in Canada less efficient. It is not clear that distinguishing between investors on the basis of nationality is likely to benefit the economy. Business owners, whatever their nationality, should be presumed to operate in a profit-maximizing fashion. Other than in sectors of the economy where there may be specific concerns, consideration should be given to eliminating the general review of foreign investment, or to reversing the onus in the ICA so that investments are presumed to be beneficial to Canada unless there is evidence to the contrary. This would encourage investment in Canada, and bring Canada into closer alignment with the approach of its major trading partners.
2. Investment restrictions inherently reduce competition and economic efficiency. Establishing and maintaining restrictions, such as sectoral investment restrictions, should be pursued only where there is a clear, demonstrable need, and with awareness of the negative efficiency tradeoff in such restrictions. We urge an elimination of duplicate review of investments under the ICA and sector-specific statutes.
3. If the ICA regime is maintained, there are a number of process/administrative and substantive improvements which should be undertaken. Reviews of investments in the cultural sector, in particular, are very restrictive and could be significantly improved. These are outlined below. As well, review of investments in the “Sensitive Sectors” is largely duplicative of other statutory reviews which occur in these sectors, and should be eliminated.

We now turn to the specific questions posed by the consultation paper.

What impact has the ICA had on the Canadian economy and Canadian competitiveness and specifically on our ability to attract Foreign Direct Investment (FDI)?

(a) Non-Cultural Business Investment

All restrictions on investment, and any requirement that investment occur only on approved terms, potentially discourages investment and makes it less efficient. However, the application and impact of the ICA on foreign investment differs significantly depending on whether the investment involves businesses related to Canada's national identity and cultural heritage ("cultural businesses"). Under the ICA, FDI in cultural businesses is subject to considerably greater scrutiny by the Minister of Canadian Heritage than FDI of comparable size in other sectors of the economy. In certain cultural businesses, FDI is prohibited outright. As a consequence, the impact of the ICA on the Canadian economy is different depending on whether cultural businesses are involved.

The purpose of the ICA, set out in section 2 of the ICA is "to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for review of significant investments in Canada by non-Canadians to ensure such net benefit to Canada". However, nothing in the ICA or its operation encourages FDI. The ICA establishes a potentially onerous regulatory regime for notification of investments in Canada by non-Canadians and for pre-closing review and Ministerial approval of direct acquisitions of control of significant businesses in Canada by non-Canadians. This distinguishes Canada from most of its major trading partners.

It is not clear that the ICA actually achieves any objective at all – it is not reasonable to assume that Canadian owners are likely to manage a business in a way more beneficial to the Canadian economy than foreign owners. Both are equally likely to pursue profit maximization and act in their economic self-interests.

While the CBA Section is not aware of the Government disallowing any transaction pursuant to the ICA (outside the cultural sector), and believes that very few transactions have been abandoned as a result of

potential ICA implications, the ICA discourages foreign bidders in auction settings.¹⁷ In addition, it involves a time-consuming, burdensome and costly process. Foreign investors must demonstrate to the Minister that the acquisition will be of “net benefit to Canada” having regard to statutory criteria, so the Minister typically requires foreign investors to provide legally enforceable commitments or “undertakings”.¹⁸ The binding nature of the undertakings may make it difficult to execute a change of direction or strategy while they are in place. The undertakings therefore may have the effect of making the Canadian business less nimble in changing circumstances. As well, since businesses should be presumed to act in their own best interests, the undertakings are likely, if they have any effect at all, to make the Canadian economy less efficient and productive than it would be absent the undertakings. When investors are compelled to make economic decisions to obtain a net benefit determination by the Minister, the ICA imposes costs on firms wanting to do business in Canada, rather than improving the business environment to encourage further investments in Canada.

The overall impact of the ICA on FDI in Canada must also be assessed in light of the effect of the ICA process on the investment. The ICA process includes both the negotiation of the undertakings as well as the implementation stage. The burden of the ICA process at the negotiation phase is significant, as the same executives who are intensely involved in the negotiation of the deal, diligence and other fundamental transaction steps divert considerable time to the ICA filing.

For all of these reasons, the CBA Section believes that the ICA does not likely provide a net benefit to Canada. The ICA process can be a frustrating, time-consuming and costly process. It may discourage FDI, and reduce the number of bidders for Canadian assets. It makes such investments less efficient.

¹⁷ While transactions have not generally been abandoned transactions involving multiple bidders at least one of whom is Canadian and one of whom is non-Canadian, are significantly affected. In these circumstances, where time is of the essence, the ICA favours the Canadian bidder. In addition to being an extra cost for the non-Canadian bidder, generally the timeline to closing the transaction is an important factor for the seller in differentiating among bidders. If there are no other regulatory hurdles to closing a transaction with a timeline longer than the ICA approval process, the non-Canadian bidder is at a disadvantage to the Canadian bidder as it must obtain Ministerial approval prior to closing. While there is generally no practical concern about whether Ministerial approval will be obtained, there is invariably considerable concern about the timing of such approval. For this reason, the non-Canadian bidder may choose not to bid, thus shrinking the market available to the seller. Or, if the non-Canadian does bid, all other elements being equal among bidders, the seller may not select the non-Canadian’s bid simply because of the timing uncertainty posed by the ICA.

¹⁸ These Undertakings typically have a term of three to five years and set forth annual benchmarks and expenditure targets with respect to such things as: employment levels in Canada; production or manufacturing activity in Canada (i.e., additional investment such as expansion of facilities, level of capital expenditures); research and development in Canada (in terms of expenditures and activities); technological, product or service innovation; export activity; the level of Canadian participation in senior management; and other subject areas.

(b) Cultural Business Investments

The ICA has not encouraged FDI in cultural businesses. Rather, it debilitates FDI in Canada's cultural businesses. The ICA prohibits significant FDI in businesses involved in the production, distribution, sale or exhibition of film and video products, and severely curtails FDI in the book publishing and distribution businesses.

In contrast to the situation in non-cultural sectors, the CBA Section is aware of investments by non-Canadians in the cultural area that have been abandoned or significantly modified, in order to secure approval from the Minister of Canadian Heritage. Cultural sector undertakings generally require the investor to do considerably more than it otherwise would but for the application of the ICA, thereby undermining the efficiency of the investments.

In certain cultural businesses, Government policy prohibits foreign investors from acquiring control of a Canadian business. Therefore only Canadian investors can control these cultural segments of the economy. Accordingly, the ICA's discouragement of FDI in these segments of the cultural sector may appear to create greater investment opportunities for Canadians in these segments, but these are counterbalanced by negative consequences for Canadians selling the cultural businesses. Further, the limited market for the sale of such cultural businesses may discourage investment in such businesses even by Canadians who may view the scope for recovering their investment as too limited.

It is not clear to the CBA Section that discouraging FDI in the cultural sector of Canada's economy achieves the objectives underlying the Government's cultural policies administered under the ICA. The prohibitions and restrictions on FDI in the cultural area are denying these businesses access to foreign capital (and possibly domestic capital) and may be inhibiting the growth and expansion of these businesses and their competitiveness in the global marketplace.

If the principal policy objective is to promote the creation, dissemination and preservation of diverse Canadian content and the Canadian cultural community (authors, artists, actors, filmmakers, producers, journalists, etc.), the focus of the policy should be on modifying behaviour rather than on restricting FDI in the sector. For example, if the Government's objective is to ensure that book retailers sufficiently promote Canadian authors, this concern exists whether the retailer is owned by a Canadian or a non-Canadian. Moreover, the current book policy and film and video policy penalizes Canadian distributors of these products by precluding them from selling their businesses to the highest bidder. Reviews are triggered regardless of the actual content but rather by the form of the product. For example, a telephone directory and a book of poetry are both considered books and will trigger a cultural business review.

The policy creates an incentive for Canadian cultural businesses that are mobile (such as on-line books) to move to the US in advance of a sale in order to avoid the ICA. Thus, the ICA may also have negative repercussions for Canadian employment. For example, the book policy restricts foreigners from acquiring or establishing a book distribution business in Canada, to encourage Canadians in this business. There are no restrictions on investors establishing book distribution operations in Buffalo and shipping the books to Canada. Canadians may be denied employment in Canada because foreign distributors must work around the ICA policies. Another consequence is that the cultural division of a larger Canadian (non-cultural) business may be closed to avoid the delays, prohibitions or undertakings under the ICA and Canadian Heritage policies.

In the CBA Section's view, the Government should revisit its policies affecting FDI in the cultural sector to determine if they are the most effective means to achieve its desired objectives.

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

(a) Generally

To begin with, any process should review only investments in defined "sensitive" sectors, and not in other industries. Second, sectoral investment restrictions should be no broader than needed to achieve the desired outcomes. Third, even in sectors subject to review, the process ought not to presume that the nationality of the investor is relevant.

Fourth, a number of significant process improvements would assist in this area. The CBA Section believes that measures should be implemented to improve the transparency and predictability of the process. At a minimum, these measures should include the publication of guidelines which go well beyond the existing interpretation notes under the ICA, and articulate with examples as necessary:

- How the net benefit criteria are applied in practice, and the relative weight of the ICA section 20 factors. For example, current practice (in the CBA Section's experience) demonstrates that the impact of the investment on employment and capital expenditures is viewed as much more important than the impact on increasing the efficiencies of the Canadian business and, therefore, its international competitiveness. Guidelines, or other forms of guidance, should consider the legal and public policy basis for applying the relative weights to each of the factors.
- The Government's position on matters where legal interpretation or advice has been given to investors or their counsel in the past. As part of this process, consider recommending the publication of generic opinion summaries similar to those published by the Investment Review Division in the 1980's.
- The consultation process undertaken by Industry Canada and the role that the provinces and territories and other departments play in the ICA review process.

- The Government's position on undertakings, and in particular:
- The current practice typically requires undertakings. In the CBA Section's view, undertakings should be reserved for only the most significant cases or those cases raising national security concerns. Further, the CBA Section believes that only certain undertakings may be relevant to a particular transaction, and it should not be necessary for an investor to provide an undertaking on all or almost all of the factors when one or two undertakings can satisfy the net benefit test.
- Baselines or benchmarks for undertakings should be clarified. For example, in defining the baseline for employment or capital expenditures for the term of the undertakings, barring unusual circumstances, the relevant baseline should be defined with reference to the employment levels or capital expenditures that would have prevailed over the next three years based on pre-existing plans of the target or reasonable projections.
- The undertakings that will be expected where the investor intends to engage in substantial rationalization or closures should be outlined. The Canadian government invests significant resources in understanding and reducing Canada's productivity gap with the U.S. and other countries. Rationalization efforts contribute to the improvement of industrial productivity, and should be assessed in light of their positive (not just negative) effects.
- Sample or model undertakings, with a detailed commentary similar to those published by the Department of Canadian Heritage for book publishing and distribution, should be published.
- The ICA should be amended so that the Minister cannot unilaterally divulge undertakings, given the commercially sensitive nature of such information.

Finally, CBA Section believes that the efficacy of the Government's policies and guidelines should be reviewed periodically to ensure that they are meeting the Government's current objectives.

(b) Sensitive Sectors

Most FDI reviews under the ICA are triggered either by the size of the transaction (asset value in excess of \$295 million for 2008) or by the "sensitive" nature of the industry being acquired. Currently, the ICA broadly defines and subjects four sectors of Canada's economy to substantially lower review thresholds and greater regulatory scrutiny: uranium, transportation, financial services and cultural businesses (collectively the "sensitive sectors"). With the exception of uranium production and cultural business, it is unclear why the ICA has special rules for these sectors.

To the extent the Government has concerns about FDI as well as merger and acquisition activity in these sectors (excluding uranium production and certain segments of the cultural sector), it can and has largely chosen to address its concerns in specific legislation. The transportation sector is governed by the *Canada Transportation Act*. That legislation specifically limits foreign acquisitions of control of certain

federal transportation undertakings and includes a public interest review for all transactions (regardless of whether the investor is Canadian or foreign controlled) involving transportation undertakings for which a notification is required under the *Competition Act*.

The financial services sector is governed at the federal level principally by the *Bank Act*, the *Insurance Companies Act* and the *Loan & Trust Companies Act*. The Minister of Finance and Superintendent of Financial Institutions review any material acquisition of control of a business governed by these Acts, regardless of whether the investor is Canadian or foreign controlled. There is a myriad of provincial legislation governing provincial financial institutions, including licensing requirements designed to protect any prudential or consumer protection concerns.

The broadcasting segment of the cultural sector is subject to comprehensive regulatory regime established by the *Broadcasting Act*. Currently the *Broadcasting Act* prohibits acquisitions of control of broadcasting undertakings and also subjects any acquisition of control of a broadcasting undertaking to review and approval by the CRTC.

We have cautioned generally against over-use of sectoral restrictions, but the application of the ICA in these sectors imposes a duplicative layer of regulatory oversight on the foreign investor. In the CBA Section's view, the ICA should not duplicate the review of acquisitions governed by specific legislation. To the extent that the federal government (or for that matter a provincial government) has chosen to regulate acquisitions of control of a sensitive sector business, that legislation should govern the acquisition process. A duplicative process for these sensitive sectors is unnecessary.¹⁹

Therefore, with the possible exception of certain segments of the cultural business (other than broadcasting) and uranium (where no duplicative federal acquisition review laws are in place), the sensitive sectors defined in the ICA should be eliminated.

¹⁹ The CBA Section recognizes that, alternatively, duplication could be eliminated by the ICA being the only statute that gives rise to a review. However, this assumes that review of an acquisition by a domestic investor is not required. The CBA Section believes that, because of the very low threshold for review for sensitive sectors (businesses with a book value of \$5 million in assets), the current broad scope of the definition of the sensitive sectors under the ICA results in filings and reviews of small acquisitions not consistent with the spirit or intent of the ICA (e.g., a small local transportation business). For example, the acquisition of a shuttle business or baggage handling operation at an airport has been considered a transportation undertaking and, therefore, subject to review. It is unclear why the acquisition of such a small business merits greater scrutiny than a myriad of other small businesses in Canada's economy. The ICA has no *de minimis* exceptions, with the result that a retailer that sells a few magazines will be considered to be a cultural business and will be subject to the lower (\$5 million) threshold which takes into account all of the assets of the retailer.

Alternatively, if the application of the ICA to sensitive sectors is maintained, the Government should improve the process as follows:

- raise the review thresholds which have not changed since 1985 and should be increased to recognize at a minimum increases in Consumer Price Index;
- confirm that, in determining whether the sensitive sector review threshold is exceeded, only the assets related to sensitive sector activities should count; and
- confirm that the ICA does not apply to an investment simply because the target is engaged in sensitive sector activity that is incidental or ancillary to its principal business (i.e., establish a de minimis test)

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

The CBA Section generally questions the logic of subjecting foreign investments to review. If, however, foreign investments continue to be subject to scrutiny, we believe there should be a presumption that investment is positive or neutral, and should be blocked only if the Minister is satisfied that it is harmful to specific interests. The investor should not have to prove the investment is of net benefit.

Second, the net benefit test focuses in practice on “hard” criteria for evaluation of whether a proposed investment is of net benefit to Canada, such as the number of employees, the amount of capital expenditures and the amount spent on research and development, without regard for all of the criteria in section 20 of the ICA. However, the real drivers of the economy and the real fruits of foreign investment – such as technology transfer, managerial know-how, increased efficiency, increased competitiveness, or better access to global capital markets – are viewed as “soft” criteria that are difficult to quantify and appear to be accorded relatively less weight in making a net benefit determination. This approach should be changed.²⁰

Third, the net benefit test is difficult to apply because the criteria in section 20 often conflict, and the decision to prioritize some criteria over others appears arbitrary. For example, efficiency and competition in Canada are two listed factors that could be part of a benefit to Canada. Making a business more efficient and competitive often requires that expenses be reduced through job cuts or reductions in expenditures. In the experience of the CBA Section, arguments that reductions in expenses will increase the competitiveness and efficiency of the Canadian business are given little, if any, weight in the current

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A recently published Statistics Canada study found that foreign companies operating in Canada have generated two-thirds of the productivity growth over the past three decades, paid out higher wages and hired more white-collar workers in the key manufacturing sector, and contributed more to research and development than their domestic counterparts. See John R. Baldwin and Guy Gellatly: *Global Links: Multinationals in Canada: An Overview of Research at Statistics Canada*, Statistics Canada catalogue no. 11-622-MIE, no. 014, November 2007.

review process. Any issues relating to anti-competitive effects of an investment should be addressed exclusively by the Commissioner under the merger provisions of the *Competition Act* and not under the ICA review process.

Finally, some of the criteria used in assessing net benefit may be outdated. If unemployment is low in Canada, it may not be appropriate that employment be the key driver of a net benefit determination. The requirement to keep all head office functions in Canada can conflict with modern management structures for international businesses that manage product lines globally and not necessarily through a centralized head office structure.

Some specific comments

1. National Security

Currently, national security does not appear to be a factor considered by the government in a review under the ICA. This makes Canada an outlier in the global marketplace. However, in the view of the CBA Section, any proposed amendment to the ICA in this regard should be clear, predictable and applied to avoid an unnecessarily expansive interpretation of the scope of national security.²¹ Canada's national security, and economic interests, would be ill-served if amendments unnecessarily interfere with the promotion of investments that contribute to economic growth and employment and restrict the flow of foreign capital, technology and know-how to Canadian businesses.

2. The Anomaly of Businesses with Few Assets in Canada

The ICA requires the review and Ministerial approval of acquisitions of businesses in Canada with a book value of assets meeting or exceeding a prescribed threshold (for 2008, that threshold is \$295 million). Where a business is headquartered in Canada but all or substantially all its operations are outside Canada, the ICA approval process may apply because the book value of the business assets are over the threshold, despite the company as a whole having little, if any, commercial operations in Canada (e.g., mining companies listed on a Canadian exchange with most or all mining assets outside Canada). The purpose of reviewing the acquisition of control of a company that does not have a significant presence in Canada is questionable. If Canada wishes to be an attractive head office location for companies with operations elsewhere, this objective will be undermined with acquisition of control rules that apply whether or not the revenue-generating activity of the business is in Canada or outside. Rather than subject themselves to

²¹ For instance, it is not obvious that there are national security concerns if foreign owners were to acquire resource properties in Canada.

additional regulatory review (and added delay and cost to potential purchasers), these companies may choose to establish their headquarters outside Canada.

In the CBA Section's view, only if a business has a significant presence in Canada and impact on Canadians, should there be any basis for reviewing its acquisition by a non-Canadian.

3. Businesses Now Owned by Non-Canadians

Review under the ICA does not distinguish between Canadian-controlled business being sold to a non-Canadian, and a transaction where the Canadian business is already controlled by a non-Canadian.²² Even if there may be good reasons to carefully consider the impact on Canada if a substantial Canadian-controlled business is acquired by a non-Canadian, it is less clear why review is appropriate if control of a business in Canada shifts from one non-Canadian to another non-Canadian (assuming that the replacement non-Canadian does not otherwise give rise to concerns)

4. Duplicate Review under the Competition Act and Investment Canada Act

The ICA should not be used as an instrument to enforce competition policy. Under the *Competition Act*. The Commissioner of Competition has the power and expertise to review any merger (even if the merger does not amount to an acquisition of control or meet the notification thresholds). Furthermore, the Commissioner must be notified of most substantial mergers. If the Commissioner believes that closing a merger needs to be delayed or prohibited, she may apply to the Competition Tribunal for an interim order if the criteria in the Competition Act are met. The ICA should not be used as another process to review mergers for competitive impact and should it be used as a tool to delay or enjoin a merger on competition grounds where the Commissioner is unable or unwilling to apply to the Competition Tribunal and meet the criteria for an injunction.

VIII. CONCLUSION

This CBA Section appreciates the opportunity to provide its views to the Competition Policy Review Panel. The CBA Section would be pleased to participate in the Panel's regional and thematic consultations and to respond to any comments or questions the Panel may have. We invite you to contact Barry Zalmanowitz, Chair, National Competition Law Section at (780) 423-7344 or at barry.zalmanowitz@fmc-law.com.

²² We note that some of the restrictive policies of the Department of Canadian Heritage (such as those for book and film distribution) only apply to the sale of a Canadian-controlled cultural business to a non-Canadian. If the business is already controlled by a non-Canadian, it can be sold to another non-Canadian without the restrictive policy applying, but such sales are subject to ICA review and undertakings.