

Lang Michener LLP

Lawyers – Patent & Trade Mark Agents

BCE Place, 181 Bay Street, Suite 2500
P.O. Box 747
Toronto ON M5J 2T7
Canada

Telephone: 416-360-8600
Facsimile: 416-365-1719

Reply to:
James B. Musgrove
416-307-4078
jmusgrove@langmichener.ca

VIA MAIL & E-MAIL : COMPETITIONREVIEW@IC.GC.CA

January 10, 2008

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

Dear Sirs/Mesdames:

Re: Sharpening Canada's Competitive Edge – Submission to the Competition Review Panel

Further to the October 30, 2007 invitation to provide submissions to the Competition Review Policy Panel, I am pleased to take this opportunity to do so.

I have been engaged in the practice of competition law in Canada for approximately 19 years. I head the competition law group at the law firm Lang Michener and I have been involved in a number of organizations related to competition law, including serving as a current member of the Competition Tribunal/Bar Liaison Committee. I have served as Chair of the National Competition Law Section of the Canadian Bar Association (CBA) and I continue to serve on the Executive of the CBA Section. In that capacity I participated in preparation of the CBA's submission to this Panel.

The CBA submission is lengthy, covering a variety of topics. By the nature of such an association effort it is unlikely that any person would agree fully with everything in such submission. Nevertheless I support the thrust of that submission. Many of the specific ideas and details contained therein will, if put in place, give rise to a more competitive, more efficient and ultimately wealthier national economy. Consequently I urge that submission up on you.

In particular, the CBA submission argues that while the *Competition Act*, like any legislation, could be improved, it is working well and that amendments to the Act should not be a focus of the Panel's work. The CBA submission also notes that the *Investment Canada Act* is not particularly useful or efficient in advancing Canadian economic interests, and indeed may on balance be harmful to our economy. I endorse both of those points – addressed at some length in the CBA submission.

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The purpose of this letter is to highlight two items of paramount importance, as reflected in the CBA submission, and to urge on you consideration of these matters.

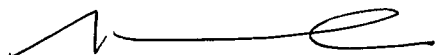
One suggestion in the CBA submission, which I believe would be very useful for the Panel to undertake, would be to articulate what it sees to be the key goals of Canadian competition policy. While detailed, specific suggestions for statutory amendments are probably not appropriate for the Panel, articulating the overarching goals of competition legislation should be. As noted in the CBA's submission, Section 1.1 of the *Competition Act* contains four, disparate policy objectives; including promoting the efficiency and adaptability of the Canadian economy, expanding opportunities for Canadians to participate 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 goals do not always live harmoniously one with the other, as noted in Appendix A, which is a brief description of the issue in the CBA's book "Fundamentals of Canadian Competition Law".

It would be valuable, in my view, for the Panel to articulate its view of the overarching goals of competition policy. My own view is that these should include two of the four above – that is, promoting the efficiency of the economy and providing consumers with competitive prices and product choices. Those goals are consistent with antitrust themes around the world, and the approach of Canada's trading partners. More importantly, these are the apparatus most likely to promote a prosperous Canadian economy.

A second important undertaking which the Panel might recommend would be increasing the role of the Commissioner of Competition as an advocate for competition within government. Insofar as the Competition Bureau and Commissioner of Competition were mandated to express opinions about legislation and regulation which may affect competitive issues, at an early stage in the legislative process, I believe this would represent a significant impetus, over a continuing period, for more competition sensitive policies and legislation. Indeed, I think this single change is likely to be the most effective practical recommendation which the Panel may advance to benefit the competitiveness of the Canadian economy over the mid to long term.

Once again I commend the Panel for its work and thank you for the opportunity to advance this submission.

Yours very truly,



James Musgrove

JBM/ab

Chapter 1

Introduction and Overview:

The Purpose of Canadian Competition Law

James Musgrove
With the assistance of Janine MacNeil

This book is designed to provide a brief overview of Canadian competition (or as Americans call it, antitrust¹) law for lawyers and law students who are interested but not yet expert in the area. The book is organized into various subject chapters, which provide a summary of both the applicable statutory provisions found in the *Competition Act*² as well as the relevant jurisprudence, guidelines and policy statements relevant to the specific subject areas.

Canada's competition laws, unlike those of the United States, are strongly statute-based, with a relatively detailed code contained in the *Competition Act*. Much of American antitrust law is set out in general statutory language, and the detail has been developed over time by the courts. In contrast, a Canadian lawyer seeking to understand whether or not particular conduct is circumscribed by the *Competition Act*, or carries with it risk of competition law challenge, often does not have the benefit of extensive jurisprudence. Canadian lawyers will, however, have recourse to a fairly detailed Act, usually at least some developing jurisprudence, and of course the commentary found in this book and other secondary sources.

Despite the statutory detail available in the *Competition Act*, there is a larger question as to what competition law is, or indeed should be, about. What is the law trying to achieve, and how is one supposed to think about what the law is designed to control, in order to develop a sense as to whether particular

1 The somewhat peculiar term "antitrust" law is the result of the fact that when the U.S. *Sherman Act* was proposed, in the late 1880s, a number of significant business enterprises were held under common beneficial ownership by means of trusts.

2 *Competition Act*, R.S.C. 1985, c. C-34.

conduct is likely to raise competition law concerns or not? The question is challenging because the goal(s) of competition law are not always obvious or intuitive. Indeed, they are not always consistent. This book provides specific guidance as to particular provisions of the law; this chapter provides a suggestion or two of ways to think about the law's underlying goals.

In the United States, competition or antitrust law enforcement has been a significant aspect of the judicial and business landscape for a longer period of time than in Canada. There, the antitrust laws are generally thought to have two broad purposes. The first is often referred to as a "populist" goal of helping to reduce, or prevent the concentration of wealth and power for broadly political purposes. The second is a more "economic" goal. Richard Posner described the tension between these two goals:

The framers of the *Sherman Act* [. . .] seem to have been concerned with low prices harmful to small-business competitors [. . .] and with discriminatory pricing [. . .] that placed [. . .] small-business competitors at a disadvantage [. . .] as well as with high prices harmful to consumers, but their concern with high prices focused on the wealth-redistributive rather than the allocative effects of monopoly pricing. Protecting competitors from low prices and consumers from high prices are incompatible objectives, with a few rare exceptions.³

In Canada, while there is some recognition of this "populist" concern,⁴ the goal of limiting power has not generally been seen as the primary underlying

3 R. A. Posner, *Antitrust Law*, 2nd ed. (Chicago: University of Chicago Press, 2001) at 34.

4 See *Ravenshoe Services Ltd. v. Canada (Commissioner of Competition)* (2001), 15 C.P.R. (4th) 543 (Ont. S.C.J.) at ¶15:

The Act is really aimed at the regulation of the economy and business, with a view to preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity. It also has broad political overtones in that it is aimed at preventing concentration of power, of critical importance in the present case as it involves control of the press. It must be remembered that private organizations can be just as oppressive as the state when they gain such a dominant position within their sphere of operations that they can effectively force their will upon others.

Also see *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.) at 338-340:

[O]ne traditional purpose [of competition law] has been to protect the consumer from being charged supra-competitive prices. While one can argue that this is insignificant from the point of view of loss to the economy as a whole, Whish notes that there is a powerful political argument for preventing such accretions of wealth at the consumer's expense. Another purpose which has traditionally been seen as served by competition law is to encourage the dispersal

purpose of Canada's competition laws. In *The Objectives of Canadian Competition Policy 1888-1983*,⁵ the authors note that in the century or so preceding the establishment of Canada's *Competition Act*, in 1986, they were able to identify three major objectives of Canadian competition policy, as well as a half dozen lesser objectives. The major objectives were identified as: (1) maintaining free competition and preventing abuses of economic power; (2) protecting consumers; and (3) achieving economic efficiency. The lesser objectives were identified as: (1) declaring the common law; (2) fighting inflation; (3) protecting small business; (4) preserving the free enterprise system; (5) ensuring fairness and honesty in the marketplace; and (6) competition policy as a political compromise.

In the immediate period leading up to the enactment of the *Competition Act* in 1986 it is fairly clear that the dominant motivation for the law had become the promotion of an efficient Canadian economy. That was strongly reflected in the seminal report of the Economic Council of Canada in 1969.⁶ That report is replete with references to the goal of economic efficiency. One or two quotations may suffice:

It will be a recurrent theme of this Report that Canadian competition policy should aim primarily at bringing about more efficient performance by the economy as a whole. *Competition should not itself be the objective* but rather the most important single *means* by which efficiency is achieved . . .⁷

. . . essentially, we are advocating the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste, with a view to enhancing the well-being of Canadians. In conjunction with other policies, competition policy should seek to develop an economic environment in which beneficial change will be initiated and carried through, and in which real income will be maximized.⁸

of power and the distribution of wealth [citation omitted]:

Aggregations of resources in monopolists or multinational corporations or conglomerates could be considered a threat to the whole notion of democracy, individual freedom of choice and economic opportunity. This argument has been influential in the U.S. where for many years there was fundamental mistrust of big business, and it was under the antitrust law that the world's largest corporation, AT and T was eventually dismembered.

5 P. K. Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy 1888-1983*, (Montreal: The Institute for Research on Public Policy, 1984).

6 Economic Council of Canada, *Interim Report on Competition Policy*, (Ottawa: Queen's Printer, 1969).

7 *Ibid.* at 9 [emphasis in original].

8 *Ibid.* at 19.

The Economic Council of Canada therefore advocated a focus on economic efficiency to increase Canada's total output and the efficiency of resource usage. It also noted in particular the importance of dynamic efficiency in achieving this outcome. This theme was picked up and echoed by Skeoch and McDonald in their 1976 *Dynamic Change* report.⁹

Given this history, when the *Competition Act* was enacted in June 1986 it was generally thought that economic efficiency was to be the dominant underlying purpose of the *Act*. The Director of Investigation and Research (as the Commissioner of Competition – the chief enforcement official under the *Competition Act* – was then known) at the time made a number of speeches to that effect¹⁰ and asserted that Canada enjoyed the most modern and economically literate law in the world.¹¹

When the *Competition Act* was introduced into Parliament, however, the economic efficiency goal was not given lone pride of place. The Minister of Consumer and Corporate Affairs, Michel Côté, had the following things to say about the purpose of the legislation:

[t]he purpose of Bill C-91, as stated in the purpose clause in the Bill, is to maintain and encourage competition in Canada. However, the clause makes it abundantly clear that competition is not to be considered an end in itself. Rather competition is sought for its effects on the Canadian economy.

There are four main objectives set out in the Bill. The first objective is to promote the efficiency and adaptability of the Canadian economy. This law will help the expansion of the economy and ensure that it can adapt to changing market conditions and create new jobs.

The second objective is to give us a law which allows Canadian companies to compete effectively in world markets and better meet foreign competition in the Canadian market. The Government is committed to making the Canadian economy world competitive.

The third objective in maintaining and promoting competition is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and there is an urgent need for this ...

9 L.A. Skeoch and B.C. McDonald, *Dynamic Change and Accountability in Canadian Market Economy - Proposals for the Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Ottawa: Ministry of Supply and Services, 1976).

10 See for example C.S. Goldman, Q.C. "The Impact of the Competition Act of 1986" (Address to the National Conference on the Centenary of Competition Law in Canada, 24 October 1989).

11 See for example C.S. Goldman, Q.C. "The Competition Act: Our Track Record to Date" (Address to the Natural Resources Section, Canadian Bar Association, 29 March 1989).

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The fourth but not least objective is to provide consumers with competitive prices and product choices. As such this objective becomes the common denominator in what we are trying to achieve. This is the ultimate objective of the Bill.¹²

Thus the *Competition Act* arrived with four somewhat disparate goals, two of which appear to have been of primary importance. The promotion of an efficient economy underlay the genesis of the Bill and the provision of benefits to consumers through the competitive process was significantly emphasized when the Bill was introduced into Parliament.

The Act contains a “purpose” clause that reflects the goals discussed above. Section 1.1¹³ of the *Competition Act* provides:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Not surprisingly, the *Competition Act's* uncertain background has presented the courts with some difficulty in determining the primary focus of the law.

In a relatively early merger case under the *Competition Act*, *Hillsdown*, both the merging parties and the Commissioner of Competition argued for an interpretation of the law which promoted overall economic efficiency. Despite this unanimity by the parties, in *obiter dicta* comments the Tribunal disagreed:

The interpretation of s. 96 which both parties adopt requires a selective reading of that clause. It requires that one give precedence to the instruction that the Act be interpreted “in order to promote the efficiency ... of the Canadian economy” over the instruction that the Act be interpreted “in order to provide consumers with competitive prices”. Equally, the instruction that the Act be interpreted “in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy” is accorded lesser significance. The tribunal has not been referred to any jurisprudence which indicates that in a listing of objectives in the purpose clause of a statute that which is listed first is to be given greater weight than those which follow. Also, there is nothing in the text of the purpose section which indicates that such preference

12 *House of Commons Debates*, (7 April 1986) at 11926 (Hon. Michel Côté).

13 At the time the *Competition Act* was being developed, Lawson Hunter, Q.C., was Director of Investigation and Research. Mr. Hunter has noted that the fact that this section of the Act is numbered 1.1 is some indication that it was somewhat of an afterthought.

is to be given. Indeed, in debates in the House of Commons, the Minister responsible for the Act indicated that it was the fourth objective [providing consumers with competitive prices and product choices] which was of overriding concern.¹⁴

What is clear is that there is no unanimity or certainty as to the goal(s) to be achieved by the *Competition Act*. However, courts have been reasonably consistent in finding that purely non-economic goals are beyond the purview of the Act. In the *Southam* case, the Supreme Court of Canada considered the relationship between the aims of the *Competition Act* and the genesis of the specialized Competition Tribunal:

The aims of the Act are more “economic” than they are strictly “legal”. The “efficiency and adaptability of the Canadian economy” and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge.¹⁵

However, within the realm of such broad economic goals, it is far from clear exactly which goal should prevail in a particular context. In a recent case involving an alleged abuse of dominant market position, the Tribunal specifically declined to give effect to the purpose of ensuring equitable opportunities for small and medium-sized enterprises, at least in the context of the abuse of dominance provisions of the Act:

...in support of its argument, the Respondent cites the Act, and especially Section 1.1, which in describing the purpose of the Act includes the statement the purpose is in part “. . . to ensure that small and medium-sized enterprises have an equitable opportunity participate in the Canadian economy. . .”. While the Tribunal acknowledges this to be enunciated purpose of the Act, the Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance.¹⁶

The Superior Propane/ICG merger has led to the most thorough judicial discussion of the purpose of the *Competition Act* to date.¹⁷ That merger led to

14 *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.) at 339-340.

15 *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Competition Trib.) at ¶209, reversed (2006), 2006 CarswellNat 1762 (F.C.A.), leave to appeal refused (2007), 2007 CarswellNat 1107 (S.C.C.), reversed (2006), 2006 CarswellNat 4554 (F.C.A.).

16 *Ibid.*

17 *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Competition Trib.), reversed (2001), 11 C.P.R. (4th) 289 (F.C.A.), leave to appeal to S.C.C. refused (2002), 14 C.P.R. (4th) vii (S.C.C.), reconsidered (2002),

two decisions by the Competition Tribunal and two appeals to the Federal Court of Appeal (the matter was referred back to the Tribunal after first appeal, and the second Tribunal decision was appealed). The Tribunal found that the merger was likely to substantially lessen and prevent competition (for example, resulting in price increases to consumers), but was also likely to give rise to significant efficiencies. In attempting to assess whether or not those efficiencies offset the anti-competitive effects of the transaction (as required by the efficiency defence in section 96 of the *Competition Act*), the Competition Tribunal and the Court of Appeal had to determine what anti-competitive effects were relevant, and therefore consider the underlying purpose of the *Competition Act*.

In its original decision of August 2000, the Tribunal found no hierarchy amongst the four objectives listed in section 1.1 of the Act. It concluded that arguments about which of the various objectives in section 1.1 are most important do not serve a useful purpose, and stated “. . .the true goal specified in the purpose clause is the maintenance and encouragement of competition. It is noteworthy that the Act does not give the Tribunal the power to achieve the objectives individually”. Thus, the Tribunal noted, the list of objectives set out in section 1.1 represent a rationale for maintaining and encouraging competition, but establishes no hierarchy amongst the objectives. The Tribunal also commented that other objectives could have been advanced, such as the distribution of income and wealth in society, but those are not the types of objectives intended to be advanced by the Act. Indeed, as the Tribunal stated, to do so would “place competition policy at war with itself”.¹⁸

The Court of Appeal disagreed with the Tribunal’s conclusion that the list of objectives set out in section 1.1 is merely a legislative rationale for the statutory purpose of maintaining and encouraging competition. In its view Section 1.1 is:

. . . a typical statutory purpose clause, and should be construed accordingly. As is not uncommon in such clauses, not all of the stated purposes or objectives can be served at the same time, nor are all necessarily consistent.¹⁹

The Court of Appeal also commented that some of the objectives contained in section 1.1 may be irrelevant to certain types of situations or conduct. It concluded that, given its interpretation of section 1.1, when attempting to

18 C.P.R. (4th) 417 (Competition Trib.), affirmed (2003), 223 D.L.R. (4th) 55 (F.C.A.).

18 *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Competition Trib.) at ¶411, reversed (2001), 11 C.P.R. (4th) 289 (F.C.A.), leave to appeal to S.C.C. refused (2002), 14 C.P.R. (4th) vii (S.C.C.).

19 *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001), 11 C.P.R. (4th) 289 (F.C.A.) at ¶105, leave to appeal to S.C.C. refused (2002), 14 C.P.R. (4th) vii (S.C.C.).

trade off the anti-competitive effects of a merger against its efficiency gains, the anti-competitive effects considered should involve all of the statutory objectives to be served by the encouragement of competition, including the ability of medium and small-sized businesses to participate in the economy and the ability of consumers to acquire goods at competitive prices. The Court of Appeal also referred to the above-noted statement of the Minister of Consumer and Corporate Affairs in introducing the legislation that the objective of providing consumers with competitive prices and product choices is the “common denominator”.²⁰

In summary, what can be said is that the *Competition Act's* purposes are not capable, at least at this stage, of precise and final articulation. To some degree the Act appears to be aimed at conflicting goals. That said, as a guide to interpretation and comprehension – as a way to think about whether conduct is likely to be risky – counsel will not go too far wrong in starting with the premise that the Act is aimed primarily at economic, not political or social concerns. Furthermore, two of the four articulated goals in section 1.1, that is the promotion of an efficient economy and the provision of competitive prices and product choices for consumers, are dominant themes. While any given activity, agreement or practice must be assessed in light of the specific wording of the relevant provisions of the *Act*, and in light of case law and commentary, conduct which is likely to promote the efficient operation of the economy or which will likely result in significant consumer benefits is unlikely to attract sanction under the *Competition Act*. Conduct which tends to restrict output, raise prices or limit consumer choice will likely attract closer scrutiny. Business practices which are both efficiency enhancing and have some negative consumer welfare effects, as in the *Superior Propane* case, are likely to be the most challenging. As a guiding mindset for counsel, this is not a bad start. The remainder of this book provides the detail necessary to analyze specific conduct or practices.

20 *Ibid.* at ¶109 (F.C.A.).