An Agenda for Change: Report of the Competition Policy Review Panel

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Introduction

On June 28, 2008 the Competition Policy Review Panel ("**Panel**") provided its report to the Government of Canada, titled *Compete to Win*. The report sets out a broad range of policy recommendations aimed at improving Canada's competitiveness. The focus of this paper is to review those recommendations most closely aligned with competition policy, namely amendments to the *Competition Act* ("**Act**") and the creation of a new Canadian Competitiveness Council.

Competition Act Reforms

The Panel found that the Act is generally in keeping with international norms and that it does not constitute an impediment to Canada's overall competitiveness. However, the Panel supports the Competition Bureau's ("**Bureau**") initiative to fundamentally reform the criminal conspiracy section of the Act as well as propose the adoption of a merger review process more closely aligned with that used by U.S. authorities. It also proposed changes to the pricing provisions as well as other changes to the Act. Many of the recommendations appear to be driven by the Panel's desire to harmonize our laws with those in the U.S. Each of these recommendations are examined below.

Dual Track Conspiracy Enforcement

The Panel agreed with the Bureau that the conspiracy provisions are in need of a fundamental change. The concept is to have a *per se* conspiracy law that would apply to agreements to fix price, allocate markets or customers or reduce production, regardless of the possible competitive effects of any such agreement. All other types of agreements between competitors would be reviewed under civil law with a competitive effects test.

The Bureau believes that the current conspiracy provision is under-inclusive in that it is very difficult show beyond a reasonable doubt that an agreement would unduly lessen competition.[1] In support of this argument, the Bureau notes that the Crown has succeeded in

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[1] R. Pierce, "*Reform of Section 45-The Bureau's Perspective*" Langdon Hall Competition Law Invitational Forum, May 2002 at p.1. See also S. Scott, Commissioner of Competition, "*Submission to the Competition Policy Review Panel*", January 11, 2008 at p.6, available from www.cb-bc.gc.ca.

only 3 of 21 contested conspiracy cases since 1980. However, in 6 of these cases, the reason for dismissal was related to the inability to show an agreement, not undue competitive effects[2].

More importantly, the record of conspiracy enforcement in Canada is something of a paradox. While it is true that the government has been very unsuccessful in prosecuting contested cases, it has been successful in obtaining numerous guilty pleas and large fines as result of the immunity program and coordination with other competition law agencies around the world. Between 1980 and 2000, for example, there were 29 guilty pleas[3] in addition to the 3 contested cases where guilty verdicts were obtained, resulting in a conviction rate of approximately 65% in the conspiracy cases pursued by the Attorney General of Canada in this period. Since 1998, fines have exceeded $190 million, (including $48 million against F. Hoffmann-La Roche Ltd. concerning bulk vitamins). If the current conspiracy law is ineffective in Canada, it is something of a mystery that so many companies have found it better to plea guilty than contest the case. Nevertheless, the lack of success in contested prosecutions is troubling.

Some commentators, including the Bureau, have also argued that the conspiracy law needs to be amended as it does not take into account efficiencies and can chill efficiency-enhancing agreements among competitors, such as strategic alliances, where counsel cannot give an unqualified opinion that there is no risk of criminal prosecution.[4] The extent of any such "chilling effect" is unknown.

If the proposed dual criminal and civil approach to agreements among competitors proceeds, it will be a difficult exercise to find the right statutory language that will focus the criminal law on truly egregious cartel activity, while subjecting all of the other agreements to the normal competitive effects analysis carried out in the key civil law provisions of the Act. The

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[2] H. Chandler and R. Jackson, "*Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act*", paper for Insight Roundtable on Competition Act Amendments, May 2000, at p.1

[3] *Ibid.* at p.1

[4] See, for example the paper prepared by McCarthy Tétrault for the Competition Bureau, "*Proposed Amendments to Section 45 of the Competition Act*", at pp.9-11. See also the Bureau's submission to the Panel, noted at footnote 1, at pp.5-6.

drafters will try to incorporate the learning built over 100 years of U.S. jurisprudence on when to apply a *per se* standard and when to use a "rule of reason" analysis.

The Bureau has suggested that the new law should incorporate an ancillary restraints defence where no criminal liability would flow from the ancillary agreement unless the court finds the principal agreement alone is *per se* anti-competitive.[5] This defence would not be available if the restraint is not truly ancillary to the main purpose of the agreement and if other less restrictive alternatives to the restraint are available to implement the agreement. In addition, the Bureau has indicated that it may provide for the ability for create exemptions by regulation for *per se* treatment, for example for particular classes of agreements or by industry activity or sector.[6] Finally, it is likely that any new *per se* criminal conspiracy law will include the ability to request clearance certificates and binding written opinions.[7] These mechanisms will provide greater certainty and would be welcome additions, although they will not resolve in all cases the potential of *per se* criminal treatment for conduct that may be efficiency enhancing or insignificant in its anti-competitive effects. In this regard, it would be helpful to have guidelines on how enforcement discretion would be exercised with respect to pursuing cases under either a criminal or civil law track.

Merger Enforcement

In the area of merger enforcement, the Panel found that substantive merger provisions were appropriate for the Canadian economy. While the Panel did not support any change to the efficiencies exception, it did indicate that the Bureau should consider efficiencies at the outset of its examination and not limited to cases where the merger is likely to prevent or lessen competition substantially.

The Panel did, however, recommend a major change to the merger notification process to adopt a U.S. style notification system that would have a single type of notification with a 30 day

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[5] Presentation by R. Taylor, "*Proposed Amendments to the Conspiracy Provisions*", Annual CBA Competition Law Conference, Oct. 2003

[6] *Ibid.*

[7] *Ibid.*

waiting period and that could be extended by the Commissioner of Competition ("**Commissioner**") by initiating a second stage review through the issuance of a "second request" for information. If a second request is issued, the waiting period would end 30 days following full compliance with the second request. According to the Panel, this recommendation should be adopted because it would better harmonize our merger review process with that of the U.S. and it would avoid the necessity of seeking court orders to obtain information or to obtain an extension of the waiting period.

Replacing the option of a short form notification with a 14 day waiting period or a long form notification with a 42 day waiting period with a single notification with a 30 day waiting period is somewhat less advantageous for merger timing. However, if there is a mechanism for early termination of the waiting period in non-complex cases as there is in the U.S., the practical effect on timing for these type of cases is unlikely to be significant.

One clear advantage of the current Canadian notification system over the U.S. system is the ability to avoid notification entirely by requesting an advance ruling certificate ("**ARC**") or in the alternative seeking a waiver from notification if the ARC is not granted because substantially similar information was provided for in the ARC request. This option is frequently used in Canada for non-complex cases because the ARC request can be prepared more quickly and cost effectively than a notification while providing the Bureau with the relevant information to make a decision. As the notification form is common to all mergers, it often requires information that is not relevant or particularly useful, while not asking for other information that is relevant in the particular case at hand. Thankfully, the Panel recommended that the ARC procedure be retained.

Of more significance is the recommendation to adopt a second request mechanism. The advantage for the Commissioner in such a system is that she would not need to seek court orders to compel information or seek a Competition Tribunal ("**Tribunal**") order to extend the waiting period for closing. From a business perspective, however, the second request mechanism has some significant drawbacks. Since closing is delayed until 30 days after full compliance, and the Commissioner would get to issue only one second request, the Bureau staff would have an incentive to ask as many questions as possible in the broadest possible terms to ensure they have

covered all possible avenues of inquiry and to deny closing of the proposed transaction for several months while the examination is ongoing.

The experience in the U.S. has been that compliance with a second request is a very costly and time-consuming exercise. I understand that parties often take from 3 to 6 months to comply with a second request at a cost of several million dollars per party. The U.S. Department of Justice and Federal Trade Commission have adopted process reforms[8] to reduce the burden of second requests, for example, by limiting the number of people whose files need be searched, but it remains a very onerous exercise with potentially long delays to closing. Another problem is that the antitrust agencies may have a moderate complexity case that requires some further investigation beyond 30 days but unlikely to require a full second stage review. For timing reasons alone, parties in such cases may be faced with the prospects of the antitrust agencies issuing a second request. A practice has developed in the U.S. in such cases of pulling and refiling a notification in order to effectively extend the time for review without triggering a second request. While this procedure may provide a work-around in this scenario, it comes at the cost of additional filing fees and removes any certainty of deal timing.

There is no doubt that the current system in Canada of using section 11 orders to compel information can also be a costly, time consuming and frustrating experience for both the respondents and the Bureau. Nevertheless, Mr. Gover in his recent report,[9] has made a number of useful recommendations that would improve the current section 11 process, including discussion with the respondents before issuing the order unless document destruction or timing issues were real concerns. The purpose of pre-order discussions would be to tailor the scope of the order, determine the respondent's record-keeping practices, limit the number of custodians required to search for records, limit the information required to be produced to a manageable size and limit the relevant period for which record and information are required. He has also recommended that language be included in the order that would allow the Bureau some flexibility to "read down" the scope of production following post-service discussions with the

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[8] U.S. Department of Justice, Antitrust Division, "*Merger Process Initiative*", available at www.usdoj.gov.

[9] Opinion Letter of Mr. B. Gover to J. Sims and S. Scott regarding review of s.11 of the *Competition Act*, dated June 19, 2008, available from www.cb-bc.gc.ca.

respondents, while recognizing there must be a clear limit to this flexibility to avoid a delegation of judicial authority. These improvements could be made today without the adoption of a second request system.

As noted above, the second request system has the disadvantage of creating an open-ended period for closing of a proposed transaction. In Canada, at least in theory, there is greater certainty in that the Commissioner must seek additional time from the Tribunal to conduct her review under s.100, unless the parties agree to extend voluntarily the waiting period beyond that provided for in the Act. As a practical matter, the great majority of parties will voluntarily extend closing in the hopes of having the Bureau complete its review before closing. Nevertheless, the timelines provided for in the Act provide an external discipline to the Commissioner and her staff. In addition, the Act provides the parties with an option to close at their own risk if they have satisfied the notification requirements and the Commissioner has not obtained a s.100 order or sought to prohibit closing as part of a s.92 application to challenge the proposed transaction.

As the *Labatt/Lakeport*[10] case demonstrated, obtaining a s.100 order is not automatic as the Tribunal needs to be persuaded that closing will impair the Tribunal's ability to remedy the anti-competitive effects of the merger. In addition, the time period set out in s.100 of 30 days, with a limited possibility of extension for a further 30 days, is too short a period for a complex merger examination to be completed. In order to address these issues, perhaps s.100 should be amended to make it available whenever the Commissioner indicates she is on inquiry and needs more time to complete her review and the time period could be expanded to 60 or 90 days.

The Panel also suggested that the Government consider raising the party-size threshold for notification and look at creating more exemptions from merger notification that do not raise competition concerns. There is a strong case to be made for both of these recommendations. As the Panel noted in its report, in the 2002-2007 time period, only 15 mergers or approximately 1%

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[10] *The Commissioner of Competition v. Labatt Brewing Company Limited, Lakeport Brewing Income Fund, Lakeport Brewing Limited Partnership, Teresa Cascioli and Roseto Inc*., (Competition Tribunal 2007-003), decision dated March 28, 2007 available at www.ct-tc.gc.ca.; *Canada (Commissioner of Competition) v. Labatt Brewing Company Limited*, Federal Court of Appeal, decision dated January 22, 2008, available from www.fca-caf.gc.ca.

of the 1431 mergers reviewed in this period were found to be anti-competitive.[11] The Bureau's service standard report for 2007 shows that over the last 7 years about 87% of all mergers reviewed were non-complex, requiring 2 weeks or less to review.[12] As is evident from these numbers, the great majority of mergers that are required to notify raise no competition issues at all. It is clearly an imperfect system that imposes non-trivial compliance costs on the parties to proposed mergers in the economy. This is perhaps inevitable if one concludes that a mandatory merger notification system is required and that notification should be based on objective financial criteria unrelated to subjective factors that relate to a competitive assessment, such as market definition and market share.

Nevertheless, efficiency improvements could be made by limiting the application of the notification obligation. As the Panel noted, while the target-size threshold was adjusted from $35 million to $50 million in 2002, there has been no adjustment to the party-size threshold since the merger provisions were enacted in 1986. A simple adjustment for inflation would take the current $400 million party-size threshold to $703 million, while an inflation adjustment on the target-size threshold would increase it to $58 million. Given the over-inclusive nature of the notification obligation, consideration should be given to increase the financial thresholds beyond this inflation adjustment. Moreover, it is clearly the case that there are certain types of transactions that rarely require more than a cursory look and which are ripe for exemptions, such as most real estate transactions, the acquisition of mortgages and upstream oil and gas mergers. It is important to note that an exemption would only relate to the notification obligation and the Commissioner would retain her jurisdiction to review proposed or completed mergers in these areas.

Another improvement that was not raised by the Panel would be to remedy the lack of jurisdictional nexus that currently exists with the financial thresholds in relation to the acquiring party. Under the notification provisions that exist today, a notification obligation can arise where the target and its affiliates alone cross the financial thresholds, even if the acquiring party has no assets in Canada or no sales in or into Canada. With the purchaser and its affiliates having no

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[11] Competition Policy Review Panel, "*Compete to Win*" Final Report , June 2008, ("**Panel Report**"), at p.55

[12] Competition Bureau, "*Merger Review Performance Report*" (2007), Table 5, available from www.cb-bc.gc.ca.

economic connection to Canada, there is no case to be made that any such proposed transaction would substantially lessen competition in Canada. While the possibility of a substantial prevention of competition case would remain open, such cases are sufficiently rare as to not warrant the imposition of merger notification compliance costs on the overwhelming majority of cases where there is no competitive effect when the purchaser and its affiliates have no presence in Canada.

In addition, it would be useful for the Bureau to have a discretionary power to waive notification in order to avoid the application of the notification obligations for purely technical reasons where there are obviously no competitive issues and it would be a waste of public and private resources to require a filing.

Finally, the Panel also recommended the three-year period after substantial completion of the merger in which the Bureau has to challenge a merger be reduced to a one-year period. The Panel argued that such a change would provide more certainty for the Canadian business community and international investors. While this change may create more certainty in many cases, it could also have unintended consequences in some cases. For example, in a close case where the Bureau believes there are some competition concerns but due to changing market conditions those concerns may be remedied in the near future, such as projected new entry, technological change or proposed regulatory changes, it has the option of letting the merger close and monitor its effects for the three-year period. If, on the other hand, it will lose jurisdiction in a year, which may be insufficient time for the improved conditions to play out, the Bureau may decide to require a remedy immediately.

Pricing Provisions

The Panel was of the view that the criminal law should be reserved for conduct that is unambiguously harmful to competition and where clear standards can be applied that are understandable to the business community.[13] This is clearly not the case with respect to price discrimination, promotional allowances and predatory pricing which can be competitively neutral or, in fact, a sign of vigorous competition and output-enhancing. The Panel echoed the

[13] Panel Report, note 11, at p.58

majority of commentators, including the Bureau[14], in recommending that such conduct should be addressed as a civil matter that is reviewable by the Tribunal. In Bill C-19, a bill to amend certain provisions of the Act that was introduced in 2004 but was never passed, it was proposed that these criminal provisions be repealed, leaving such practices be examined under the abuse of dominance provisions.

The Panel also recommended that the price maintenance provision be decriminalized for the same reasons, noting that the Canadian approach to price maintenance was more restrictive than the comparable U.S. law. As the Panel pointed out, other vertical restraints, such as exclusive dealing and refusal to deal, are dealt with as civil matters in the Act and subject to a competitive effects test. They recommended creating a new civil provision that would deal with resale price maintenance where it has an anti-competitive effect. The Panel further recommended that private parties be able to initiate cases under this new provision before the Tribunal. There are circumstances where vertical price maintenance can be pro-competitive or efficiency-enhancing, for example, by supporting retailers where high levels of service or expertise is required, and it is appropriate to conduct a full competitive effects analysis based on a civil standard of review.

Decriminalization of price maintenance did not appear in Bill C-19. The price maintenance provision as currently drafted can be used as a supplementary tool or alternative to the conspiracy provision as it creates a *per se* prohibition on attempting to influence upwards or discouraging the reduction of the price at which another person sells in Canada, if such influence is by agreement, threat or promise or any like means. There is no requirement that the person be in a vertical relationship and it can apply equally to competitors at the same level of trade. While the case for decriminalization of vertical price maintenance is strong, the Bureau may be reluctant to lose this tool from its arsenal until s.45 is amended to create a *per se* criminal prohibition.

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[14] *Ibid.*

Abuse of Dominance

In relation to abuse of dominance, the Panel recommended that the Tribunal should have the ability to award an administrative monetary penalty ("**AMP**") of a modest amount ($5 million) in order to provide a deterrent. The Panel declined to recommend private access to the Tribunal for this provision. These policy choices were also found in Bill C-19 (although the AMP suggested there was $10 million for the first violation and $15 million for subsequent violations).

Critics of the use of AMPs have argued that the civil provisions are different than the criminal provisions in that the criminal provisions are targeting conduct that is, in most cases, unambiguously harmful to competition, while the civil provisions require a careful analysis of all of the facts and circumstances to determine if the conduct is pro-competitive, neutral or anti-competitive.[15] Arguments have also been raised that AMPs are creating essentially fines for a civil provision, without a criminal standard of proof and the attendant due process protections built into criminal law, and may therefore violate the *Canadian Charter of Rights and Freedoms*.[16] On the other hand, one can question whether the current remedies (prohibition of the conduct or other structural remedies) are sufficient to deter conduct that may have been in place for many years, generating large additional profits from the anti-competitive effects of the practice.

While the Panel did not support the ability of private parties to initiate an abuse of dominance case before the Tribunal, such a right already exists with respect to exclusive dealing, tied selling, market restriction and refusal to supply. All four of these practices could also be examined under the abuse of dominance provision. There appears to be no principled basis for allowing private access to the Tribunal for some types of abusive conduct but not others. Creating such a right is unlikely to generate a flood of cases for the same reasons it has not with

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[15] See for example, Response of the National Competition Law Section of the Canadian Bar Association to the Recommendations on the April 2002 Report of the Standing Committee on Industry, Science and Technology, "*A Plan to Modernize Canada's Competition Regime*", dated August 2002, available from www.cba.org.

[16] See, for example, K. Thomson, "*Dual Tracking: Do the Railroad Tracks lead to the Brink of a Cliff?*", Northwind Professional Institute Competition Law and Policy Forum, Langdon Hall, May 4-6, 2005; Testimony of P. Hogg before the Standing Committee on Industry, National Resources, Science and Technology on Bill C-19, October 25, 2005, available from www.cmte.parl.gc.ca.

respect to the current provisions where it is available (costs of litigation and the inability to receive damages). Private access provides an option for complainants to seek relief where the Bureau has declined to proceed with the matter.

Airline-Specific Provisions

The airline-specific provisions were introduced in 2000 and 2002 to address the fallout of the merger of Air Canada and Canadian Airlines, which created a very dominant domestic airline accounting for over 90% of domestic passenger revenues and in excess of 80% of domestic passengers carried. As market conditions changed and new entry and expansion has occurred, the rationale for having specific airline provisions has eroded. Consequently, Bill C-19, supported by the Bureau[17], would have eliminated these provisions, consistent with a competition law of general application. The Panel supported this non-controversial position.

Canadian Competitiveness Council

Unlike the Panel's other recommendations, the Panel's call for the creation of a new Canadian Competitiveness Council ("**Council**") is a policy option that has not already been thoroughly discussed and debated in the Canadian competition law community[18]. Impressed by Australia's experience, among others, the Panel would create a Council whose mandate would be to examine, report on and advocate for measures to improve competitiveness in Canada.

The Panel envisioned that the Council would examine such issues as the impact of existing laws and regulations, studies of private sector activity affecting competition (outside of competition law enforcement) and the progress toward the elimination of internal barriers to the free flow of goods, service, people and capital. In essence, it would take over the role of the Bureau with respect the development of competition policy and regulatory intervention. The Bureau would focus on its core function, which is the enforcement of the Act, while the Council

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[17] *Speaking Notes for S. Scott, Commissioner of Competition*, appearing before the Standing Committee on Industry, Natural Resources, Science and Technology, November 18, 2004, available at www.competitionbureau.gc.ca.

[18] The Commissioner has advocated for a greater role for competition policy in the economy and in government regulation and law-making. See, for example, Speaking Notes for S. Scott, "*Competition Bureau Priorities*", presented at the Competition Law Spring CBA Conference, May 26, 2006. However, the Panel has gone further by recommending the creation of a separate federal agency that would take on the role of competition advocate.

would become the principal advocate for competition and competitiveness issues within the economy.

Conceptually, it would appear that the Panel believes that a stronger public voice for changes to enhance competitiveness can be created by setting up a separate federal institution, with sufficient independence and resources, to focus on this task. According to its report, the Panel believes that this recommendation over time will rival the impact of all other measures it has advocated in its report.[19]

One potential drawback to creating a separate institution for competition policy is breaking the synergy between enforcement and policy. The Bureau's ability to make effective regulatory interventions and other competition policy recommendations to governments is enhanced by the experience and industry knowledge that is gained by working on enforcement matters in particular industries. This knowledge gap could be lessened by frequent interchanges of staff between the Bureau and the Council.

While the Panel recommended that private sector activities be studied, it is not entirely clear if they envisioned a full market study type process that is carried out in other jurisdictions, such as in the U.K. and by the Federal Trade Commission in the U. S. While the Bureau today can certainly conduct such studies by using publicly available information and asking market participants to voluntarily provide information, it has no means to compel the production of documents or information in pursuit of such studies. It is a contentious issue whether such powers should be available, given the compliance costs that may be imposed as a result. In my view, such information would be valuable to any serious examination of market activities.

Conclusion

The Panel has surveyed the policy options that have been debated for reform of the Competition Act and competition policy in the past decade and has found that many of the reforms proposed by the Bureau, the Government and others to be well founded. It has added its support to the efforts of the Bureau to fundamentally reform the cornerstone conspiracy law.

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[19] Panel Report, note 11, at p.98.

More uniquely, it has advocated for a U.S. style merger notification system and the creation of a new federal institution that would take over the competition policy aspects of the Bureau's work.

While many, including this author, will continue to debate the merits of these recommendations, it has been interesting and worthwhile to have a fresh perspective from a distinguished group of individuals drawn from outside the competition law community as represented by the Panel.