

Blakes Bulletin

Competition Review Panel Report

Competition Policy Review Panel Releases Final Report

On June 26, 2008, the Competition Policy Review Panel released its Final Report, entitled *Compete to Win*. The Review Panel, which was established by the federal government on July 12, 2007, was mandated to review Canada's competition and foreign investment policies and to develop recommendations to make Canada more competitive. Blakes understands that the federal government has established an internal task force to consider the Review Panel's recommendations and its next steps.

The Report sets out the Review Panel's recommendations, which are "designed to promote the two-way flow of talent, capital and innovation between Canadian markets and world markets." In particular, the Report contains recommendations regarding potential amendments to, and the administration of, the *Investment Canada Act* and the *Competition Act*. The Report also includes recommendations regarding ownership restrictions in a number of specific sectors of the economy, as well as recommendations relating to international trade, intellectual property and take-over defences. The guiding principle behind the Review Panel's recommendations appears to be the belief that "a precursor to succeeding internationally is the need to ensure that domestic markets are healthy and that unnecessary barriers to entry are reduced or eliminated."

The following are a number of significant recommendations from the Report, which will be of interest to both Canadian and international businesses:

- **Investment Canada Act.** The Report addresses the misperception that Canada does not welcome foreign investment by narrowing the scope of the *Investment Canada Act*, primarily by increasing the general financial threshold for the review of foreign investments from C\$295-million to C\$1-billion and reversing the onus in the review process. The Review Panel also supports the federal government's statements regarding the creation of a new review requirement for transactions that raise "national security" concerns. The Review Panel further recognizes the need for transparency and predictability and recommends the issuance of additional guidelines and amending the *Investment Canada Act* to provide for public reporting on the operation of the legislation.
- **Competition Act.** The Review Panel recommends repealing certain criminal offences under the *Competition Act* and amending the conspiracy provisions to create a *per se* criminal offence to address cartels and a civil provision to deal with other types of agreements between competitors. The Review Panel further recommends aligning the Canadian merger review process with the merger review process in the U.S., by increasing the initial time period for reviewing a proposed merger. At the same time, the Review Panel acknowledges that the Competition Bureau should reinforce its commitment to giving timely decisions and give appropriate weight to the realities of the global marketplace.
- **Financial Institution Mergers.** The Review Panel recommends the removal of the current policy prohibition against mergers between large Canadian banks, large Canadian insurers and cross-pillar mergers involving different types of large financial institutions, subject to prudential and competition safeguards enforced and administered by the Superintendent of Financial Institutions and the Competition Bureau. The proposal is founded on the Review Panel's views that: Canadian financial institutions require scale to compete effectively in international markets; low costs exist today for banking services in Canada (compared with international prices), indicating the existence of robust competition in Canada; and Canadian banks are slipping in relative size internationally. The Review Panel hints that such mergers might merit a public interest review. We note that such a process, depending on its length and nature, might impose a practical barrier to the willingness of large institutions to attempt a merger.
- **Financial Institution Ownership Limits.** The current widely-held rule for banks and demutualized insurers having more than C\$8-billion in equity (which sets absolute ownership limits of 20% of voting shares and 30% of non-voting shares for each such institution) is seen as appropriate, in order to deal with governance and self-dealing concerns. In making the recommendation to retain this requirement, the Review Panel notes that most large international financial institutions are widely held. The Report makes no comment on the fact that the existing rule has the practical effect of precluding the takeover of large Canadian institutions by foreign banks or insurers.

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- **Intellectual Property.** The Report states that innovation is the driver for productivity and competition in this century and recognizes intellectual property as one of four key factors to improving innovation. However, while recognizing the important role that intellectual property plays, the Report warns that such rights must not be so all encompassing as to impede further innovation and create barriers to new market entrants. In this respect, the Report recommends that the federal government ensure that new copyright and patent laws sufficiently reward creators while, at the same time, stimulating competition and innovation in the Internet age.

- **International Trade Agreements.** The Report states that Canada needs to improve in its development of markets outside of the U.S. and recommends that the federal government set priorities for the negotiation of new trade agreements. While the Report does not identify countries that Canada should target as priorities for potential agreements, it does make reference to the European Union, South America, Asia, and the BRIC countries (Brazil, Russia, India, and China). To build accountability into the negotiation process, the Review Panel recommends that the Minister of International Trade report at least annually on trade and investment liberalization initiatives.

- **Canada-U.S. Trade.** The Review Panel recognizes the vital contribution of Canada-U.S. trade to Canadian prosperity and urges the federal government to prioritize efforts with the U.S. government to increase the free movement of people, goods, and services across the border.

- **Telecommunications and Broadcasting.** Consistent with the *Telecommunications Policy Review Panel Final Report*, dated March 2006, the Report recommends that the federal government adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. During the first phase, which would last for a period of five years, foreign telecommunications companies would be permitted to establish a new Canadian business or acquire an existing telecommunications company with a market share of up to 10 per cent. The second phase would provide for even broader liberalization of foreign ownership.

- **Take-over Defences.** The Report identifies the involvement of Canadian securities regulators in the review of defensive tactics adopted by Canadian target boards as relegating boards to the role of auctioneer. Specifically, in the case of shareholder rights plans (or "poison pills"), the Review Panel notes that the expectation that Canadian regulators will terminate a poison pill within 40 to 70 days results in limited leverage to a target board seeking to negotiate with a potential acquirer as well as, presumably, insufficient time to pursue an optimal alternative transaction. The Review Panel recommends the U.S. model of target board action being subject to review by the courts, and not by the SEC, as one that should be adopted, given the development of Canadian markets and courts over the past 20 years. The Report also refers to the defences available to directors of Delaware companies and indicates that Canadian directors should be placed on the same footing. Delaware target boards may adopt poison pills and other defences that survive court review if they are within the range of reasonableness and proportionate to the perceived hostile threat, and not coercive or preclusive.

The Report is available on Industry Canada's Web site at: www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/Home. Should you have any questions regarding the Report, please contact one of the individuals below or any lawyer listed on blakes.com.

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