Appendix D of complaint of Gus Van Harten to the Canadian Judicial Council

Opinion article by then Mr. Paul Crampton providing pre-appointment public commentary on relevant areas of Canada’s foreign investment law and policy

1. Paul Crampton, “A critical step forward” in the Globe and Mail

A critical step forward

2 July 2008

Last week's final report of the Competition Policy Review Panel provides a long overdue blueprint for helping Canada evolve beyond our outdated, 19th century, protectionist economic framework. The panel's vision of a more market-oriented system would force Canadian businesses to sharpen the skills they need to compete in increasingly global markets, encourage beneficial foreign investment, and ultimately help us to reclaim our place near to the top of the list in the "standard of living" rankings of OECD countries.

Governments and policy makers in other countries increasingly recognize that the path to greater productivity and a brighter future for their children is not one lined with fences that shield local market participants from global competitors. The steps that they have taken have resulted in huge reductions in input costs and consumer prices, as well as substantial increases in innovation and product quality. Canadian political and business leaders often talk about the benefits of global competition, but the awkward reality is that barriers remain, even to internal competition, thanks to the persistence of restrictive provincial laws and regulations in a number of sectors.

The panel's report casts a strong spotlight on the link between greater competition, enhanced economic performance and higher standards of living. The most important recommendations in the report may be those that relate to regulatory reform in certain infrastructure sectors and the creation of a Canadian Competitiveness Council.

The report recommends that individual ministers responsible for sectors such as telecommunications and broadcasting, financial services and air transportation, should be required to conduct a periodic review of the existing regulatory regime with a view to, among other things, minimizing impediments to competition. With respect to a new Canadian Competitiveness Council, the report recommends that its mandate "should be to examine and report on, advocate for measures to improve, and to ensure sustained progress on, Canadian competitiveness."

These recommendations alone have the potential to yield enormous benefits. But why stop there? Reform principles recommended by the OECD and by APEC Ministers encourage eliminating all government distortions of competition, not just those in
infrastructure sectors, except where they are necessary to achieve paramount public interests.

And if we are prepared to be really serious about helping our businesses to become more globally competitive, why not give some real power to any new competitiveness council or commission that may be established? Australia has shown us how this can be done. Australia's National Competition Policy Council played a central role in the administration of a much more comprehensive and action-oriented national competition policy program that included incentives and penalties for Australia's state and territorial governments to achieve concrete results. That program produced reforms to over 600 statutes and regulations at all levels of government which are estimated to have resulted in an increase of approximately $7,000 (Australian) in average household annual income. Key reforms included the liberalization of capital market controls, the abolition of import quotas and tariff reductions across a broad range of sectors.

Turning to some of the panel's other recommendations, the proposed amendments to the Investment Canada Act will be widely welcomed, as they would significantly narrow and increase the predictability of a non-transparent regime that has mixed support in the business community and arguably has had little positive impact on Canada. In addition to significantly reducing the number of transactions that would be subject to review, the amendments would require the Minister of Industry to conclude that a proposed transaction would be contrary to Canada's national interest, before being able to disallow a transaction. This would help to improve significantly the external perception of Canada as a place to invest and make it more difficult for the Investment Review Division of Industry Canada to extract undertakings in a number of cases each year. This latter exercise sometimes has been embarrassing for the Canadian advisors involved, as investors have had difficulty identifying any principled basis for the undertakings being sought. The lasting perception left with investors is neither flattering nor consistent with our perception of what it means to be a G7 country. It is hoped that the panel's recommendations will be endorsed by the government and be reflected in amendments in the not-too-distant future.

The recommended amendments to the Competition Act will generate a more mixed reaction. On merger review, the panel's desire to streamline the Competition Bureau's processes and reduce the burden on merging parties is laudable. However, the recommendation to move to a U.S.-style merger review regime would be a nightmare for businesses in one important respect. This relates to the notorious "second request" for information. With only one formal opportunity to request additional information in connection with transactions that are not cleared after an initial 30 day review period, the U.S. agencies often issue information requests that capture several hundreds of boxes of documents and many gigabytes of e-mails and other electronic correspondence. The process of responding to these requests can virtually paralyze the businesses of the merging parties for many months. It should therefore come as no surprise that this aspect of the U.S. system has been widely, and appropriately, criticized. A much better approach would be to allow the Bureau to make smaller, more tailored and less formal, requests for
information as it proceeds through any second stage review that it may initiate in connection with a very complex transaction.

Regarding the criminal provisions in the Competition Act, the panel's recommendations all make good sense. The provisions in question date back to the middle of the last century, and in one case to 1889. They do not belong in a modern law. No one would recommend them to a country that is developing a domestic competition law, and they do not resemble anything in any of the significant number of effective domestic competition laws that have been enacted over the last decade in countries around the world.

Paul Crampton is partner in the Competition Law Group at Osler, Hoskin & Harcourt LLP. During 2002-2004, he was responsible for the OECD's work in the competition field with transitioning and developing countries.