



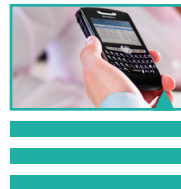
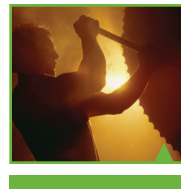
Government
of Canada

Gouvernement
du Canada

Compete to Win

Final Report – June 2008

Competition Policy Review Panel – Groupe d'étude sur les politiques en matière de concurrence



Compete to Win

Final Report – June 2008

Competition Policy Review Panel – Groupe d'étude sur les politiques en matière de concurrence



For a print copy of this publication, please contact:

Publishing and Depository Services
Public Works and Government Services Canada
Ottawa ON K1A 0S5

Tel. (toll-free): 1-800-635-7943 (Canada and US)

Tel. (local): 613-941-5995

TTY: 1-800-465-7735

Fax (toll-free): 1-800-565-7757 (Canada and US)

Fax (local): 613-954-5779

Email: publications@pwgsc.gc.ca

Website: www.publications.gc.ca

This publication is available upon request in accessible formats. Contact:

Multimedia Services Section
Communications and Marketing Branch
Industry Canada
Room 264D, West Tower
235 Queen Street
Ottawa ON K1A 0H5

Tel.: 613-948-1554

Fax: 613-947-7155

Email: multimedia.production@ic.gc.ca

This publication, together with an executive summary and additional information on the Panel, is also available electronically on the World Wide Web in HTML format at the following address:

www.competitionreview.ca

Permission to Reproduce

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from Industry Canada, provided that due diligence is exercised in ensuring the accuracy of the information reproduced; that Industry Canada is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of, Industry Canada.

For permission to reproduce the information in this publication for commercial redistribution, please email:

copyright.droitdauteur@pwgsc.gc.ca

Cat. No. Iu173-1/2008E-PDF

ISBN 978-0-662-48962-7

60481

Aussi offert en français sous le titre *Foncer pour gagner : rapport final*.

Contents

Transmittal Letter	iv
Preface	v
1. Our Mandate and Approach	1
2. Creating Wealth: Competitiveness and Productivity	3
3. Globalization and the Pace of Change	6
4. What We Heard and What We Learned	14
5. How Well Is Canada Positioned to Compete to Win?	22
6. A Competitiveness Agenda for Canada	26
7. Competitiveness Agenda: The Legal Foundations	28
The Investment Canada Act	28
Sectoral Regimes	38
Air Transport	40
Uranium Mining	43
Telecommunications and Broadcasting	45
Financial Services	50
The Competition Act	53
8. Competitiveness Agenda: Public Policy Priorities for Action	62
Taxation	63
Attracting and Developing Talent	66
Head Offices and Cities	71
Fostering Growth Businesses	74
Strengthening the Role of Directors in Mergers and Acquisitions	76
The Canadian Economic Union	79
Canada–US Economic Ties	84
International Trade and Investment	86
Regulation	90
Innovation and Intellectual Property	92
9. Driving Change: A Canadian Competitiveness Council	96
10. Conclusion	103
Endnotes	107
List of Panel Recommendations	123

Transmittal Letter

June 26, 2008

The Honourable Jim Prentice
Minister of Industry
235 Queen Street
Ottawa, Ontario
K1A 0H5

Dear Minister:

As members of the Competition Policy Review Panel, we are pleased and honoured to transmit our final report.

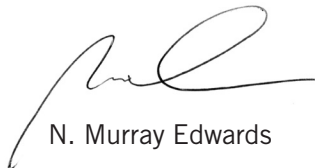
This report reflects almost a year of study and examination of the issues we feel are most central to Canada's competitiveness. We are encouraged by the interest in these issues. We are grateful to the many Canadians and others who submitted their views to us and who committed the time to meet with our Panel as we carried out our work.

We wish to acknowledge the assistance and able support of public servants representing a number of governments and departments. Our report benefits from their knowledge and advice.

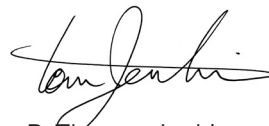
Sincerely,



L. R. Wilson, Chair



N. Murray Edwards



P. Thomas Jenkins



Isabelle Hudon



Brian Levitt

Preface

This report is about our children and our grandchildren as well as the economy, the society and the nation they will inherit. It is about how Canada can succeed in the face of rapid global change and intense competition.

The Competition Policy Review Panel's mandate was to examine and report on the laws and policies that will underpin Canada's continued economic growth and development.

How can we continue to provide the well-paying, challenging and fulfilling jobs that recent generations have enjoyed? What career opportunities will be available for our most talented and ambitious young men and women? Where will we find leadership in all sectors of our society and the determination to “compete to win”? Do we as Canadians have what it takes to be the best?

In the course of our deliberations and in submissions, research reports and consultations, it has been made clear that economic activity is increasingly being organized on a global basis. New and more aggressive competitors are emerging, and new technologies are reshaping entire industries. In this context, standing still is not an option. As a Panel, we have no doubt about the need to adapt and move forward.

How do we meet the challenges and capitalize on the opportunities presented by these changes?

We believe that we must embrace competition as savvy and determined players with a focus on Canada's interests. We must skate harder, shoot harder and keep our elbows up in the corners, to use a recognizably Canadian metaphor.

We believe that Canadians need to become more active and willing participants in competitive markets here at home and around the world. We must not seek to insulate or protect ourselves from global competition, but to capitalize on it and harness it for our benefit.

Competition matters. It brings dynamism to our economy. It means good jobs for our citizens. It is not merely an economic concept. Being open to competition serves Canada's national interest. This is the principle that anchors our report and informs our recommendations to the government.

That said, we want to be clear that we are not unmindful of the anxiety that relentless competition can produce. Such unease is understandable in the face of rapidly changing circumstances and uncertain outcomes. However, as Canadians,

we have stepped up our game and our competitive aspirations in the past, and we have succeeded. We can do it again.

What will it take to deliver to our grandchildren the same measure of progress we have enjoyed? We believe that it will take a more competitive mindset. We need to view competition as being a necessary means to an end. We must become more engaged with enhanced competition domestically and with increased efforts to penetrate global markets.

While this report is centred on what governments at all levels can and must do in the public policy domain, our agenda is also addressed to the private sector. Like governments, we believe that the private sector has a central role to play in improving our competitiveness as a nation. We call on our business leaders to be ambitious, raise their sights, seek out and capitalize on new opportunities, and relentlessly focus on improving how their businesses operate.

Along with an increased focus on competition, we as a country need to regain our ambition to be the best. We cannot be content with simply being in the top ten or top twenty among our international competitors. Globalization and the accelerating pace of change will continue whether or not we step forward to address these fundamental transformations. If we want to control our destiny, we must acknowledge these issues and deal with them.

It is the Panel's view that this means working more closely and more successfully together as Canadians. It means better collaboration between and among all levels of government, the business community, our educational leaders and, indeed, all Canadians. We in Canada represent one team competing against many other, bigger teams. This means we must work together with a common agenda, a Competitiveness Agenda for Canada.

We offer this report as a contribution to that effort. We make a number of recommendations, point to several important areas for action, and propose a process and a new institution to sustain momentum on a long-term Competitiveness Agenda.

We very much hope that Canadians will share a commitment to the agenda we have laid out.

This report is not about remedies for today's short-term challenges. It is about how we position Canada for tomorrow.

Ultimately, we believe that Canadians must be better prepared to compete in the global economy. We are confident that we can and will win.

1. Our Mandate and Approach

On July 12, 2007, the Ministers of Industry and Finance announced the creation of the Competition Policy Review Panel. The Panel is chaired by L. R. Wilson, and includes N. Murray Edwards, Isabelle Hudon, P. Thomas Jenkins and Brian Levitt. We were mandated to review Canada's competition and foreign investment policies and to make recommendations to the Minister of Industry, on behalf of the Government of Canada, for making Canada more competitive in an increasingly global marketplace.¹ The Panel was tasked with conducting research, holding consultations and producing a report by June 2008.

Panel members represent diverse regions and sectors of this country and a range of business and professional expertise. We bring our collective experience to this mission and our shared passion to make Canada more successful. All of us have a strong interest in better understanding the economic forces at work in Canada and the world as well as the implications for our economy and our quality of life. We believe that Canada can compete and will win, if the conditions are right and barriers are removed.

Our report is about one simple proposition: **raising Canada's overall economic performance through greater competition will provide Canadians with a higher standard of living.** Strong economic performance translates into more and better jobs and higher earnings, which in turn mean higher government revenues to support the services and programs that Canadians have come to expect. Our recommendations are meant to address the slow growth in personal earnings in Canada. Our goal is to create the conditions that will sustain a robust economic legacy for future generations of Canadians.

In this report, we put forward a national Competitiveness Agenda to meet this goal. Pursuing it will strengthen competitiveness across our economy and support the emergence of new Canadian global success stories. Our recommendations are designed to promote the two-way flow of talent, capital and innovation between Canadian markets and world markets. Our approach requires a strong commitment to openness and is underpinned by collaboration and effective harmonization between governments, businesses and educational institutions.

Competitiveness involves much more than government policy. There is a clear and key role for other stakeholders—including businesses, labour groups, educational institutions and all Canadians—in advancing Canada's competitiveness. We believe that the role of government is to provide the framework that sets the right

conditions for competitiveness. This includes removing legal, regulatory and policy impediments to competition and providing the conditions to better enable Canadian companies to compete in global markets. The challenge for all Canadians is to be ambitious, show initiative, take risks, make investments and pursue the opportunities in the global economy for creating jobs and wealth for Canada.

In our deliberations and consultations, our Panel has journeyed widely to seek out the best ideas to better equip Canada to compete globally.

Our Consultation Paper, *Sharpening Canada's Competitive Edge*, released in October 2007, set out questions and invited submissions.² In response, we received 155 submissions from businesses, law firms, governments, individuals, academics, unions, cultural and public interest organizations in Canada as well as interests based abroad. We have benefited greatly from the range and breadth of advice offered us.

We also reviewed international best practices with US and Australian officials, and with representatives of the Organisation for Economic Co-operation and Development and the European Union. In addition, our Panel conducted a program of research to supplement its consultations and deliberations as well as research by other organizations. We commissioned more than 20 research studies on policy areas that affect both Canada's ability to attract capital and talent, and the international competitiveness of Canadian firms.

Between January and March 2008, we met across Canada with business groups and leaders, federal, provincial, territorial and civic leaders, public sector officials, unions, academics and policy experts, associations and public interest organizations. During 13 full-day sessions of consultations and round tables, our Panel heard from more than 150 individuals and organizations in a number of cities across Canada. We were impressed by the enthusiasm and commitment to improving Canadian competitiveness.

Our views and recommendations have been shaped by the submissions we received, by our deliberations, consultations and research, and by our experience.

2. Creating Wealth: Competitiveness and Productivity

We begin with a brief overview of the basic economic concepts that underlie the analysis necessary to deal with the issues before us. These are competition, competitiveness and productivity.

What Is Competition?

Economic competition is the contest between parties to grow and create wealth. At the firm level, the winners are those who consistently and constantly innovate, invest wisely and adapt quickly to the ever-changing social, demographic, technological, economic and political trends and forces bearing on their industry. Firms that fail to keep up do not survive. Firms that succeed provide superior returns for their investors, better jobs for their employees and the best value for their customers.

For **employees**, competition provides the opportunity to work for more productive, innovative companies, to earn higher wages and to pursue rewarding careers.

For **customers**, it means better products, lower prices, more choice and better service.

For **countries**, competition is the strongest spur to innovation and value creation, which leads to a higher standard of living for all.

A considerable economic literature documents the central role of innovation in driving productivity growth and the importance of competition in driving innovation.¹ Greater competition is the key to increasing productivity and prosperity.

The benefits of investment and innovation are not achieved without financial cost or personal dislocation and uncertainty. These actions entail the assumption of financial risk and respond to the unceasing pressure to improve and change. It is the lure of economic gain and personal success as well as the spectre of economic loss and personal failure as a result of competition that provide the incentive to motivate these behaviours and thereby capture their benefits.

What Is Competitiveness?

While competition refers to the nature and quality of rivalry, competitiveness refers to the outcome — who wins and who loses. In any industry, the most competitive firms survive and provide the benefits of competition to their investors, employees, customers and host societies. Public policy must deal with competitiveness in developing policies designed to enhance a country's ability to achieve its primary economic goal, which is to assure a rising standard of living for its citizens.

What Is Productivity?

Productivity measures the efficiency with which the resources available to an economy, such as labour, capital and business expertise, are being used to produce goods and services. The challenge for any country is to strengthen the

key determinants of productivity growth — in colloquial terms, to get “more bang for the buck.” Productivity is **not** about working harder for less. It is about working smarter to earn more.

Working smarter in terms of labour productivity can be achieved in many ways, for example, by equipping employees with more machinery and equipment, by having employees acquire greater skills through education, training or on-the-job experience, or by adopting advanced technologies.

Overall productivity growth at the firm level is the key determinant of increases in prosperity and opportunity for the citizens of a country.² The primary drivers of productivity growth are the investment, innovation and adaptation fostered by openness and competition. Economic research, confirmed by our Panel's experience, demonstrates

that increases in productivity are not achieved without risk, stress and cost. The benefits outweigh the costs because successfully competitive firms provide better jobs, higher investor returns and more value to customers.

THE POWER OF PRODUCTIVITY

William Lewis of the McKinsey Global Institute measured employee productivity in individual industries within 13 countries over more than a decade. He found that productivity varies enormously around the world and, more importantly, that differences in productivity explain virtually all of the differences in national gross domestic product per capita.

Strong competition in product markets is critical to increasing productivity and prosperity. It is just as important for wealth creation as a sound macroeconomic foundation, a flexible labour market or top-class education.³

The greater the level of competition in an economy (competitive intensity), the better off its citizens will be and the better its successful firms will be able to compete beyond the boundaries of the domestic economy. Opening an economy to the free entry of goods, services, competitors and capital increases competitive intensity in the economy and, as a result, its productivity.

It is important to recognize that it takes time to realize the benefits of the interactions between competition, competitiveness and productivity. Just as we invest for the future by educating our children today, so too must we invest now in fostering greater competition for benefits to accrue in the future. Moreover, we cannot shy away from taking the tough decisions required to enhance productivity today because the benefits will be realized tomorrow.

The foregoing is a brief and high-level summary of the conclusions of an entire field of economic research. As befits any area of academic enquiry, there is ongoing debate about the nuances of these matters. However, our Panel's experience in business is consistent with the general thrust of this research. Accordingly, we base our analysis, views and recommendations on these basic premises.

3. Globalization and the Pace of Change

Canada is competing with other nations in a global economy in which powerful secular trends are changing the competitive landscape at an ever-quickening pace. An appreciation of these trends is essential to an analysis of Canada's position and to the development of measures to improve Canadians' standard of living. The Panel's recommendations have been developed with these trends in mind.

Economic globalization is not a new phenomenon. However, over the past 50 years, global economic forces have accelerated significantly in pace and intensity. Canadians must adapt to a global market that is undergoing rapid transformation

as individuals and firms take advantage of the opportunities created by new enabling information and communications technologies, a substantial decrease in transportation costs, the spread of market-based economic ideologies, and countries' increased openness to trade and investment.

Technological developments, including containerization, improvements in information processing and the introduction of lower-cost, more reliable systems for communicating voice, data and video, have greatly facilitated the internationalization of businesses. Over four decades, transportation and warehousing costs have declined by about a third as a share of the cost of the inputs used to produce goods and services in Canada.¹

THE INCREASING PACE OF TECHNOLOGICAL ADVANCE

“Capitalism is taking us toward a future of accelerating change. The first twenty years of the twentieth century saw as much technological progress as the entire nineteenth century. Currently, industrial societies appear to be doubling their rate of technological progress every ten years. If this continues, and there is every reason to suppose that it will, the twenty-first century will experience the equivalent of twenty thousand years of ‘normal’ human progress.”

— Walter R. Mead, *God and Gold: Britain, America and the Making of the Modern World* (Knopf: New York, October 2007).

These forces have changed the frame of reference for economic activity from local to regional to continental and now to global. The notion of whom we compete with has changed. Today, Canadian firms compete against others not only in their city or region, but also across Canada, the continent and the world.

Globalization has increased the incentive for firms to search out the lowest-cost suppliers of materials and services, no matter where they are located. For the most part, multinational enterprises need no longer establish separate production

CANADA'S WINE INDUSTRY — THE IMPORTANCE OF OPENNESS

The Canadian wine industry had long been relying on hardy native species of grapes, producing low-quality wines that were protected from foreign competition. The Canada–US Free Trade Agreement (FTA) put an end to industry protection and required wine growers to innovate or perish. They uprooted the native grape varieties and planted high-quality European grapes. They introduced Vintners Quality Alliance (VQA) standards, which enhanced the reputation of Canadian wines. Canadian vineyards became tourist attractions and promoted new, unique products, further building the world-class reputations of Canadian wineries. Increased foreign competition can drive innovation and enhance competitiveness.²

facilities within a country to overcome tariff barriers. They base activities in a country or purchase materials and services from independent suppliers in a country only where this contributes to the overall efficiency of their operations.

The transition to a larger marketplace has been foreshadowed for a generation. For Canada, the 1965 Auto Pact with the US signalled the evolution of economic activity from a national to a continental scope. The 1989 Canada–US Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA) in 1994 advanced the integration of Canada into a North American economy anchored by the US. As a result, Canadians began to compete not only with other Canadians, but also with firms and workers from across North America.

The international community has implemented similar agreements governing world trade, beginning with the General Agreement on Tariffs and Trade (GATT) in 1948 and continuing to the World Trade Organization (WTO) in 1995. They opened up huge new market opportunities and increased global competition.

The Fundamentals of Global Competition

As firms and countries rethink their strategies for achieving success, they must recognize the following key trends arising from the current wave of globalization.

Greater Mobility of People and Capital

International migration has increased markedly as people seek the best jobs and opportunities. The US, Germany and Canada are expected to be the top three net recipients of international migrants over the next half-century.

Table 1 — Top Six Net Immigration and Net Emigration Countries, 2005–2050

Net Immigration Countries			Net Emigration Countries		
Rank	Country	Migration (thousands)	Rank	Country	Migration (thousands)
1	United States	1107	1	China	-327
2	Germany	202	2	Mexico	-293
3	Canada	200	3	India	-241
4	United Kingdom	130	4	Philippines	-180
5	Italy	120	5	Indonesia	-164
6	Australia	100	6	Pakistan	-154

Source: United Nations Economic and Social Affairs, *World Population Prospects: The 2006 Revision*.

The availability of skilled talent is a key determinant of investment decisions and the location of economic activity. Many countries have increased their focus on immigration to acquire needed skills. The availability of skilled labour is a key to ensuring sustained growth in all regions and sectors.

Slowing population growth and the aging of the population in developed countries will become an important factor in labour mobility. In the future, new skilled labour will come increasingly from developing economies.³

Global foreign direct investment (FDI) flows have grown a hundredfold from 1970 to 2006.⁴ FDI expansion significantly outpaced growth in gross domestic product and trade over this period.⁵ This FDI growth has been largely driven by cross-border mergers and acquisitions, and has featured an increasing involvement of private equity funds and sovereign wealth funds.⁶

Going forward, being an attractive destination for skilled immigrants and foreign investment will be a critical success factor for developed countries.

Broader Competition for Raw Materials and Natural Resources

Accelerating global growth has increased world demand for raw materials ranging from food to base metals. Prices have increased rapidly over a broad range of commodity groups.⁷ The growing demand for resources and the rise in associated prices, notably for energy and food, has had wide-ranging impacts, driving up the relative value of commodity-weighted currencies, raising costs for individuals, and obliging businesses and industries to find new strategies to adapt.

“Scale” Can Now Be Defined in Global Terms

In industries that benefit from economies of scale, large multinational enterprises increasingly dominate because they are able to achieve scale on a global basis. This scale in turn permits global operations, attracts talent and increases each firm’s capacity to make investments and take political risks.

For example, the mining sector has recently experienced major structural change, with consolidation at all levels and the emergence of very large privately owned diversified corporations. For them, acquisitions are critical for securing new projects and diversifying portfolios in terms of commodities and geography. Canadian giant Alcan was acquired in 2007 for US\$43 billion by Rio Tinto.⁸

Companies that have built global efficiencies often establish global and regional product mandates within their enterprise. A company may have several divisional or regional offices. A nation’s productivity and competitiveness are important factors in helping business units dispersed across the world win global product mandates.

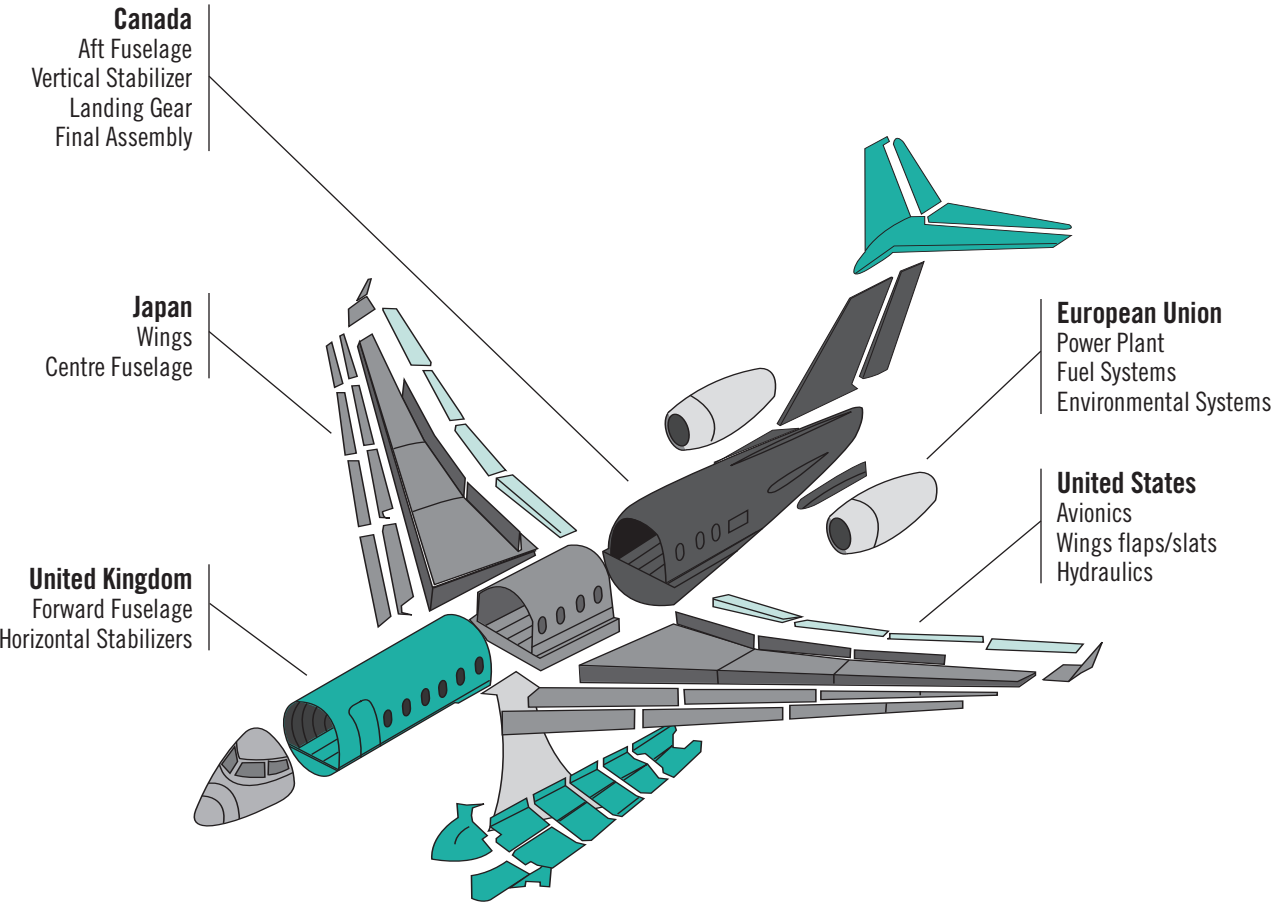
The Growth of “Global Value Chains”

Changing business dynamics are putting additional competitive pressures on firms. Cost pressures have increased as production cycles shorten to more quickly respond to changes in consumer demand. As new competitors emerge from anywhere in the world, business lines can move from profitability to loss with unprecedented speed.

Firms have responded to these challenges by casting aside the traditional paradigm of firms offering finished goods produced in a country for sale domestically or across a border. More firms now seek to organize their activities or position themselves within “global value chains.”

A global value chain is the process whereby the production of increasingly complex goods and services is organized across international borders.⁹ The term “value chain” captures the linkages in activity required to bring a product from conception through final production to market. This can include design, production, marketing, distribution and support activities. Whether a complex product like an aircraft or BlackBerry, or something as “simple” as a fashionable article of clothing, firms are competing for participation in successive stages of production.

Figure 1 — Bombardier's Global Express, Component Source by Country



Source: Industry Canada.

Many of the same phenomena described above that have contributed to globalization (e.g., declining trade barriers, burgeoning investment flows, decreasing transportation costs) have also contributed to the growth in global value chains.¹⁰

Firms have become more flexible, horizontally organized enterprises, converting from geographically concentrated production networks to geographically dispersed networks.¹¹

SIEMENS MEDICAL BODY SCANNERS

SIEMENS has been global since the 19th century. Today it operates in 190 countries, with 80 percent of its sales, 70 percent of its factories and 66 percent of its workers abroad. Siemens “goes further than mere off-shoring of low-value-added work; [it] also does much of its research and product development abroad. For instance, a lower-cost version of one of its expensive medical body scanners, tailor-made for the Chinese market, was initially developed jointly at its headquarters in Munich and in China, where it is also being manufactured; but the latest version was developed entirely in China. This Chinese Siemens product is now sold in developing countries round the world.”¹²

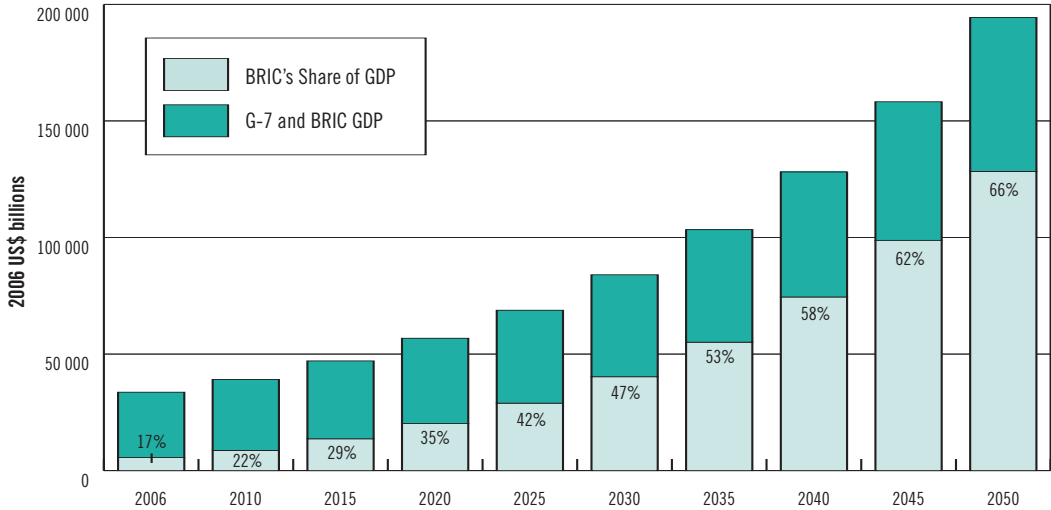
New Competitors Are Emerging

Economic relations between developed and developing countries are being altered by globalization. Capital no longer flows primarily from developed countries to developing countries. Capital today also flows from developing countries into developed countries.

In the past, developed countries maintained their advantage by using their advanced technology and skilled labour to export manufactured goods to developing countries. Then, companies reoriented their operations, designing products in developed countries but assembling products in lower-cost developing countries. Now, competition can come from anywhere, and high-tech products can be designed and engineered in what was formerly referred to as the developing world and disseminated via global distribution networks.¹³

In 2007, emerging economies produced just over half of world output and accounted for more than half of the increase in global gross domestic product.¹⁴ These economies are rapidly becoming a major force in the world economy. As their prosperity increases, so will their demand for resources. Since the early 1990s, for example, China’s shares in world consumption of oil, aluminum and steel have doubled.¹⁵

Figure 2 — Brazil, Russia, India, China (BRIC) Projected Share of Gross Domestic Product, 2006–2050



Source: Goldman Sachs Global Economics Paper No. 153, “The N-11: More Than an Acronym,” March 28, 2008.

The Internet as an Agent of Change

The Internet is the dominant technology platform for a growing number of information and communications products that are radically changing how people around the world live and work and how businesses operate and generate wealth.¹⁶ The Internet’s pervasiveness is being felt across developing as well as developed countries. In 1997, nearly three quarters of the world’s population living in developing countries accounted for just 5 percent of the world’s Internet users. Now they account for over 30 percent.¹⁷ Global mobile connections passed the one billion mark in 2004 and reached the three billion mark in 2008, with much of this growth occurring within developing countries. Today, new connections are being added to global mobile networks at the rate of 15 per second, 1.3 million per day.¹⁸

The Internet is bringing new competition into Canadian and global markets. Both buyers and sellers have more easily accessible information on market conditions and prices. Transaction costs for buying and selling goods and services are reduced, often significantly. New online businesses are being created, and the borders of formerly isolated national markets are more permeable. The Internet is also a force for productivity growth because it promotes the more efficient use of business resources.

A country's competitiveness depends on governments welcoming, rather than seeking to control, the new freedom and choices brought by the Internet as an agent of change.

The Challenge of Globalization and Change

Globalization has become a critical challenge to Canadian competitiveness. Canadians cannot be shielded from global forces. To chart our future, we must confront these forces and deal with them. This will require us to challenge some long-held notions that harken back to a different era. Strategies that were successful in the past must be replaced with new strategies that respond to a larger global marketplace.

In the new world economy, Canada must be ready to keep pace with change and develop a global mindset that is open to two-way trade, investment and talent. Canada's economic success will be determined by how well we deal with the economic, social and political forces that are driving globalization. The future well-being of Canadian businesses, jobs and incomes depends on concerted and continuing actions by all Canadians.

4. What We Heard and What We Learned

In developing our recommendations, we relied on what we heard during our consultations and what we learned from existing and original research, tempered by our own experiences as business people in competitive markets.

Canadians can take great pride in our economic performance over the past decade as Canada enjoyed economic growth and prosperity. We saw unprecedented budget surpluses, falling unemployment, strong growth in the service sector and the creation of millions of new jobs. In financial markets, Canadians experienced stable and low rates of inflation, falling interest rates and a rising Canadian dollar against other currencies, particularly the US dollar. More recently, as a resource-rich nation, Canada has benefited from growing world demand and rising natural resource prices.

But we heard from Canadians that they are worried about the current economic outlook and are less confident about the future. They spoke to us of risks and uncertainties arising from an array of indicators such as plant closures and job losses, little growth in earnings, escalating prices for basic staples such as food and energy, and the threats of new global rivals whose population and productivity are growing at a faster pace than Canada's. Canadians believe that something is wrong.

However, it became clear to us that Canadians do not perceive that there is an imminent crisis. What they want to avoid is a decline in Canada's standing in the world as other more nimble and aggressive countries rise to displace Canada. But Canadians do not appear to have a view about what needs to be done to avoid this outcome, nor a common view of the root causes of their unease. In the balance of this chapter, we set out the Panel's view of the key warning signs that Canadians told us they see and our conclusions about the underlying issues.

Hollowing Out—the Loss of Canadian Icons

We heard concern that Canadian businesses are being swallowed by foreign competitors in an era of global consolidation. The recent increase in foreign direct investment (FDI) in Canada, particularly through mergers and acquisitions (M&As), has raised concerns in many quarters about diminished control and influence by Canadians over the domestic economy. As multinational enterprises have consolidated, foreign investors have acquired a number of well-established Canadian companies, including Alcan, Falconbridge, Inco and Hudson's Bay Company. Such firms have been significant employers and anchors of Canadian communities.

RESEARCH IN MOTION

When Mike Lazaridis and Doug Fregin started their electronics company in 1984 with a small government grant and a family loan, they could hardly have predicted what the future had in store for Research In Motion (RIM). The pair knew only that they were pretty handy with a circuit board. Within four years, their electronics company focused on the transmission of wireless data. Co-chairman Jim Balsillie came on board in 1992 and began driving RIM's series of inventions to market. In 1998, RIM introduced the first BlackBerry with basic email, which it has turned into a popular consumer and corporate product for CEOs and soccer moms alike. The BlackBerry reached 1 million subscribers in 2004 and 10 million subscribers in 2007. RIM is expanding to Europe and Asia-Pacific. RIM is now the most valuable company in Canada, based on its market capitalization of nearly \$60 billion.⁴

These transactions sparked questions regarding Canada's foreign investment policies as well as about the effect of losing corporate head offices and associated high-value jobs and services. The transactions have also highlighted the global nature of industry restructuring. Canada's biggest recent M&A transactions were initiated by firms based in the US, the United Kingdom, Switzerland, Brazil, Australia, the Netherlands and the United Arab Emirates.

The debate over the "hollowing out" of the Canadian economy has been emotionally charged. In the first half of this decade, Canada was the world's second most popular site for foreign takeovers.¹ It has been argued that, relative to the size of its domestic capital market, Canada has been both the biggest net seller of companies in the world and the easiest country in which to acquire firms.² Yet overall, the data indicate that the share of assets in Canada's non-financial industries under foreign control has not changed noticeably in recent years.³

SNC-LAVALIN

SNC-Lavalin (a leading group of engineering and construction companies) shows how an international orientation can provide access to large markets and hedge against economic downturns in a company's home economy. SNC-Lavalin leveraged its world-class technical expertise to develop an international network and a strong global supply chain. It consciously built on Canada's good reputation abroad.⁶

In fact, we see the increasing success of Canadian companies growing on the global stage. The number of Canadian-owned and headquartered firms that ranked in the top five of their respective industries grew from 15 to 40 over the past two decades.⁵ Indeed, this period witnessed world-leading Canadian-based multinational enterprises such as Manulife Financial, Research In Motion (RIM) and SNC-Lavalin succeed in growing their international presence. While Canada has lost a number of leading companies in recent years, we are also the host country for a number of growing Canadian champions.

We do not believe that it is desirable — or possible — to stop the natural rhythm of creative destruction and renewal, which is a key tenet of a market-based economy. The benefits of competition are too great. However, we share the concern of Canadians about the effects on Canada and on opportunities for Canadians.

Declining Share of Foreign Investment

In contrast to the concern about foreign takeovers of Canadian companies, some analysts have noted that, over recent decades, Canada has become less successful in attracting international investment. Canada's share of the world FDI stock has fallen from almost 16 percent in 1970 to just over 3 percent in 2006. In terms of FDI relative to gross domestic product, Canada over the past 25 years has experienced the greatest decline in the Organisation for Economic Co-operation and Development (OECD).⁷

New Labour Market Dynamics

As business competition has become more global and companies have shifted some operations to lower-cost locations, many Canadian workers have faced painful labour market adjustments. Overall, Canada's economy has adjusted well, adding many more new jobs, benefiting from the recent commodity boom and registering an unemployment rate near a three-decade low. In some sectors, strong economic growth has created significant skills shortages, a problem that will worsen as our population ages and indigenous workforce growth declines.

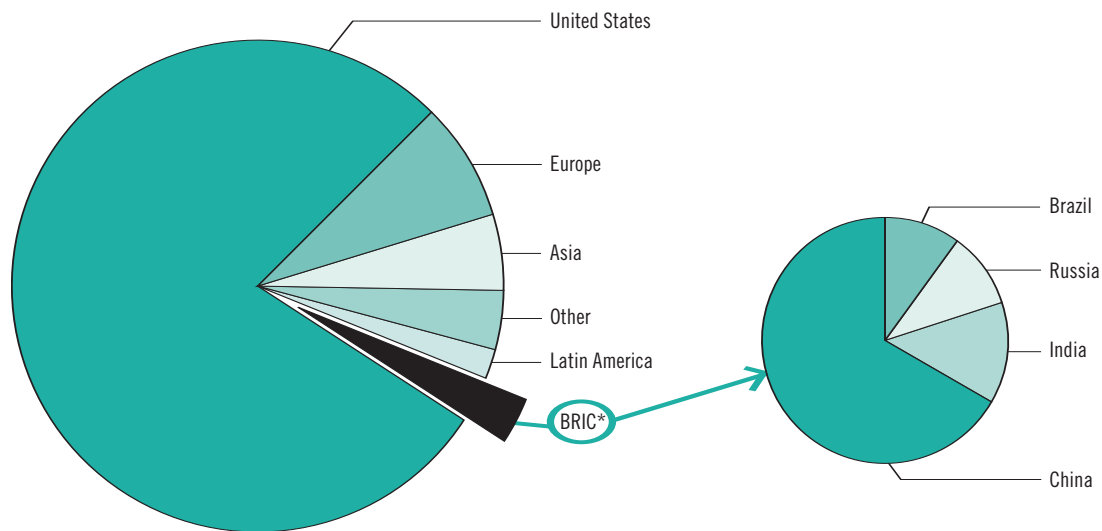
Workers in some sectors have been hard hit by recent global changes, particularly in sectors such as forestry and manufacturing, which have been heavily affected by the rapid appreciation of the Canadian dollar against the US dollar and other challenges.

Canada Has a Limited Presence in Markets Other than the US

Canada's primary trading partner is, and for the foreseeable future will continue to be, the United States.⁸ But growing markets in the expanding European Union, South America and Asia present new opportunities.

For example, strong growth is forecast in developing markets, including the so-called "BRIC" countries (Brazil, Russia, India and China), where Canada has very limited presence.⁹ There are expected to be significant opportunities in these markets, driven by the emergence of a vast middle class of many millions of new consumers that their economic growth represents. It is estimated that these new markets may account for as much as 50 percent of the world economy in the coming generation. However, priorities will have to be established to avoid deploying our efforts so widely that they become ineffective in specific markets.

Figure 3 — Geographical Distribution of Canadian Exports, 2007



*BRIC excluded from Asia, Latin America and Europe.

Source: Industry Canada Trade Data Online.

In part, our lack of presence in growing markets is due to the structure of the Canadian economy, which is characterized by small and medium-sized enterprises (SMEs) that tend not to be "first movers" into new markets.¹⁰ In a world of global integration, the necessity to trade, invest and create strategic alliances will only intensify, and larger enterprises are better placed to meet these challenges. Pressure from low-cost, knowledge-oriented firms elsewhere means increased competition for Canadian firms at home and abroad.¹¹

Canada's Cost Advantage Relative to the US Has Eroded

Canadian productivity is lagging behind that of the US, our biggest trading partner. When our dollar was valued as low as 63 cents per US dollar,¹² some Canadian companies grew complacent. Canada enjoyed a large trade surplus as the advantage went to Canadian exporters. The increase in our dollar relative to the US dollar occurred so quickly that firms have struggled to make the necessary adjustments to their operations at the same pace, and some have not been able to cope. Now, with exchange rate parity, the cost advantage is gone and Canada's poor productivity performance is exposed. This challenge is compounded by the "thickening" of the Canada–US border as a result of a US preoccupation with security and international terrorism.

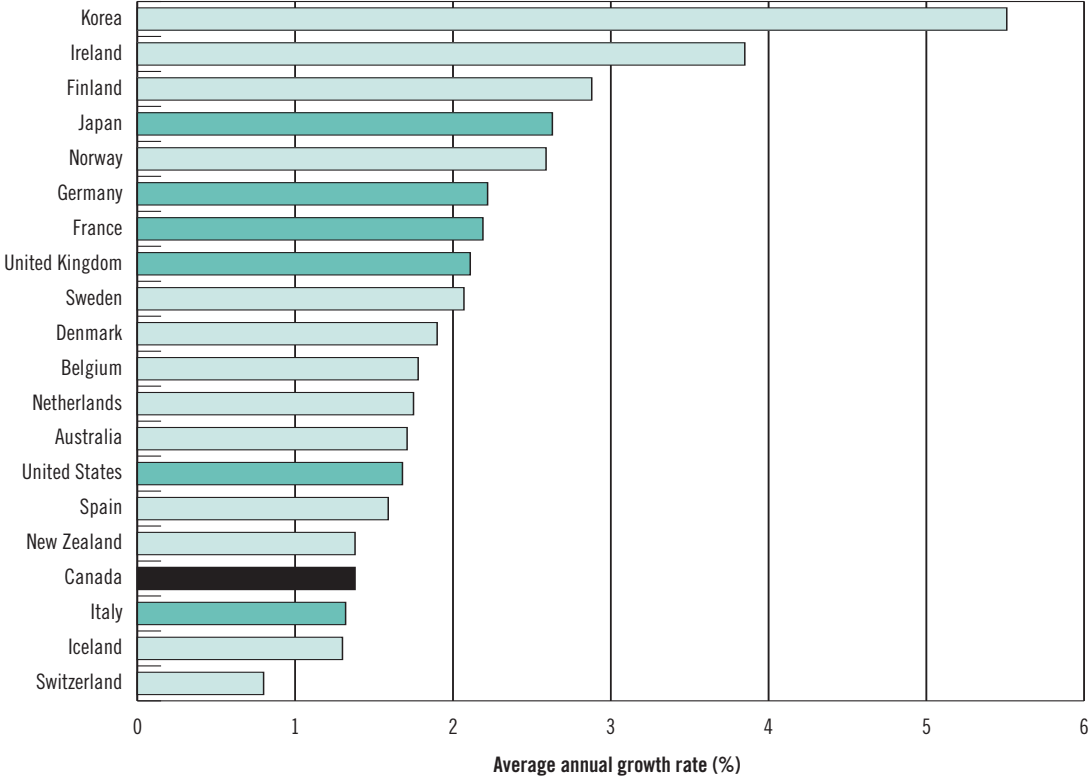
Weak Innovation

Much of Canada's poor productivity performance can be attributed to the comparatively poor performance of Canadian firms with respect to innovation. We rank poorly across almost all aspects of innovation: the creation of knowledge, the diffusion of knowledge, the transformation of knowledge and the use of knowledge through commercialization. This is seen by the Conference Board of Canada as "a serious weakness in Canada's overall performance and [an] alarming portent for the future."¹³ Other research also indicates that Canadian firms lag behind firms in other major industrialized countries on a number of measures of innovation.¹⁴

Weak Productivity Growth

A number of these issues relate to one underlying problem — productivity. Figure 4 illustrates the deeply troubling fact that Canada's productivity growth lagged behind that of most industrialized countries over a 25-year period.¹⁵

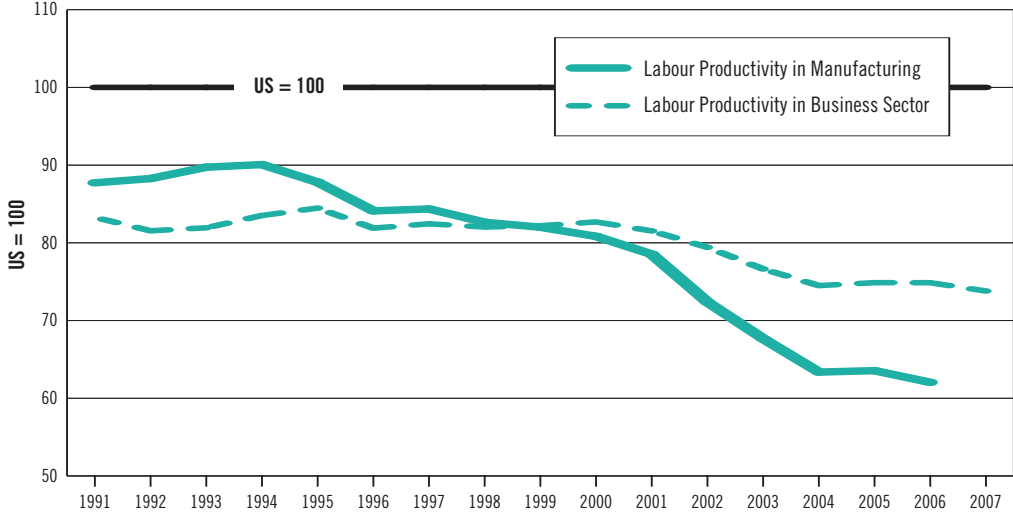
Figure 4 — Labour Productivity Growth,^a Selected OECD Countries, 1981–2006



^aReal gross domestic product per hour worked.
 G7 countries shaded.
 Source: OECD, Labour Productivity Database, July 2007.

In the business sector, labour productivity in Canada was only about 75 percent of the level in the US in 2007 (Figure 5). The gap has been growing, especially in the manufacturing sector. By 2007, the gap between Canadian and US labour productivity levels in manufacturing was estimated to be close to 40 percent.

Figure 5 — Relative Labour Productivity Gap in Canada, 1991–2007¹⁶



Source: Industry Canada calculations based on data from Statistics Canada, CANSIM VI409153, and US Bureau of Labor Statistics, BLS: PRS840006093.

The impact of Canada’s weak productivity growth has been dramatic — the median real earnings of Canadian workers have not grown in a quarter-century.¹⁷ Even during a period when the economy grew and Canadians became more educated, average earnings remained virtually the same. In fact, for the bottom fifth of earners, real earnings dropped by about 20 percent, and earnings of immigrants to Canada fell even further. Of course, much of this coincided with a period of rising employment and participation in the workforce, particularly for Canadian women. Consequently, total family incomes rose over this period, to some extent masking individual performance.

More recently (2002–2006), Canada’s standard of living has increased faster than that of the US.¹⁸ An important underlying factor was the takeoff in commodity prices after 2002 and the consequent improvement in Canada’s terms of trade. This resulted in a strong increase in Canadian purchasing power, which benefited Canadians relative to Americans, who were largely unaffected by movements in their own country’s terms of trade. In addition, the labour market has been much more buoyant in Canada than in the US during the past decade, making it easier for more of the population who want to work to obtain jobs. This favourable performance over a short time period does not change the long-term picture.

To sum up, Canada's weak personal earnings growth is cause for concern. This trend will be exacerbated in coming decades as Canada's population ages and labour force growth slows. This can be turned around only if Canadian businesses and governments urgently take steps to increase productivity performance.

When we assess what we heard and what we learned in the light of our premises about the benefits of productivity growth and the central importance of competition in achieving those benefits, we conclude that improving Canada's competitive position is the key to ensuring that future generations of Canadians will enjoy the levels of opportunity and prosperity that Canadians have come to expect. We also conclude that the factors driving the changes described above are unavoidable and irreversible, and represent either a serious threat or a great opportunity, depending on whether Canada rises to the challenges of globalization. Finally, we conclude that the longer Canada waits to address these issues, the greater will be the costs and dislocation arising from their resolution. Time is of the essence.

5. How Well Is Canada Positioned to Compete to Win?

How well is Canada positioned to create better jobs, more wealth and an improved standard of living in a changing world?

In evaluating Canada's prospects, we look at the strengths and weaknesses in those factors that most directly affect Canada's ability to attract investment and build competitive companies, and thereby produce quality jobs and opportunities for Canadians.

Our country gets mixed reviews from various studies of competitiveness rankings relative to other countries.¹ Overall, no simple or actionable conclusion can be drawn from the findings. The following is our assessment of Canada's strengths and weaknesses.

Competitive Strengths

Canada has many strengths. Our primary advantages lie in location, natural resources, a diverse economy, high-quality public education, and institutional and political stability.

Canada's proximity to, and unique relationship with, the US are definite advantages in accessing the large US market. This is bolstered by our trade agreements with the US, which gives preferential treatment for goods and services. Moreover, the location of our ports gives us closer access to key central US regional markets than US ports for both Asian and European sourced and destined goods.

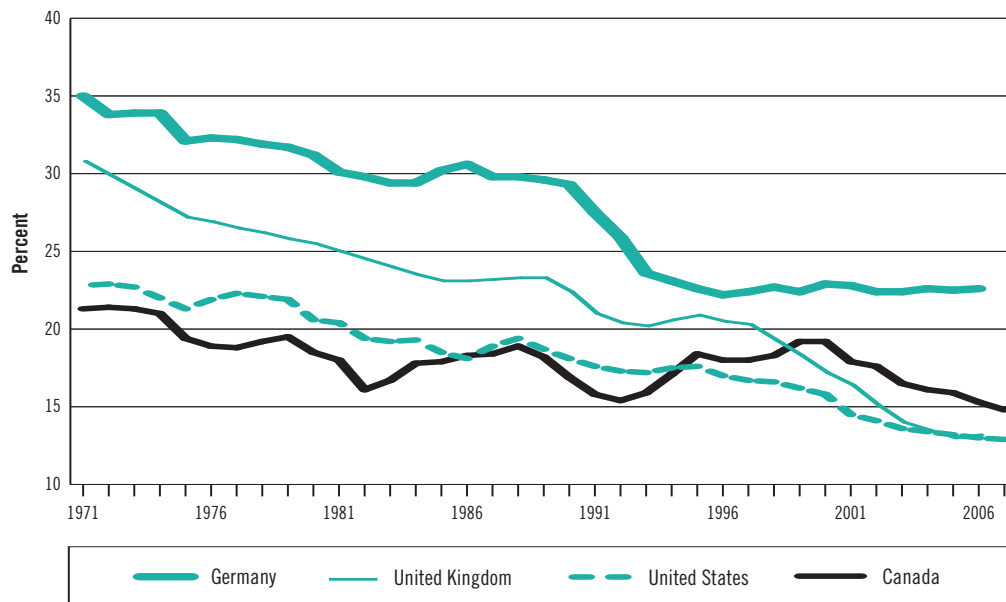
We have abundant natural resource wealth.² We are the world's largest producer and exporter of uranium, with the world's third largest reserves. Canada is also the world's largest producer of potash. We are the world's second largest generator of hydroelectricity. We are the world's third largest producer of natural gas. Canada is the largest supplier of crude oil, petroleum products and natural gas to the US. As much as \$300 billion in private capital investment in Canadian resource projects is under consideration for the next five to ten years.³

As conventional sources of crude oil and natural gas continue to decline, we have the opportunity to develop unconventional sources, including the oil sands. Currently, the oil sands produce 1.2 million barrels per day. By 2030, this has the potential to increase to 5 million barrels per day. The proven reserves in the

Canadian oil sands rank second in the world only to Saudi Arabia. The potential goes well beyond the Alberta oil sands. Pipeline projects from the Mackenzie Delta can provide access to large and secure supplies of natural gas for the North American market.

Canada's economic base is diverse. In addition to our mineral and petroleum resources, Canada is among the world's leaders in fisheries, forestry and agriculture. Canada's traditional strengths in manufacturing have been challenged by recent exchange rate shifts. We believe that the appropriate adjustments will be made to pursue greater productivity and that our manufacturing sector will adapt. Our economy derives further strength from its burgeoning services sector. The mix of traditional and emerging products and services is a powerful basis on which to compete.

Figure 6 — Manufacturing's Declining Share of Gross Domestic Product in Developed Economies, 1971–2007



Source: Department of Finance Canada estimates based on data from Statistics Canada, US Bureau of Economic Analysis, United Kingdom Office of National Statistics, and OECD, as cited in Department of Finance Canada, Budget Plan 2008: Responsible Leadership, p. 41.

Canada has a highly educated population. Our students perform well in international skills assessments, and many Canadians possess college and university degrees. Canadians also have high rates of labour force participation, and are skilled and adaptable workers with a strong work ethic. Many Canadians have successfully

learned new labour market skills and have seized new opportunities, which are key assets in a value-added, knowledge-based economy. In addition, Canada's cultural diversity, tolerance and high level of acceptance of immigration are important attributes in a global world.

Canada has earned an international reputation for integrity and credibility through strong leadership and diplomacy. This record and reputation as an “honest broker” allows Canada to “punch above its weight” in key political and economic organizations. Canada's linguistic duality enables a strong presence in both La Francophonie and the Commonwealth. Canada is a well-respected member of the G7, and stands out in the world for its prudent fiscal policy (which has generated consistent surpluses), complemented by credible monetary policy. Canada also provides political stability through strong institutions and a commitment to the rule of law, an increasingly important competitive asset for economic and resource development.

Competitive Weaknesses

At the same time, there are factors on the opposite side of the ledger. These can be classified broadly as population density and geography, scale, jurisdictional fragmentation and regulatory burden, taxation and the cost of capital, and insufficient entrepreneurial ambition.

Although Canada's land mass is the second largest in the world, its population and economy are small by world standards. Canada accounts for 0.5 percent of the world's population and 2 percent of the world's economic activity. Canada ranks last in the G7 in terms of population size and share of total world economic activity.

Complicating this is our cold climate and dispersion of a modest population over a large area. Canada's large size imposes high infrastructure costs and places heavy demands on borders, ports and transportation corridors. Our small domestic market means that Canadian firms must look beyond our borders to achieve the scale necessary to compete on a more equal footing with their global rivals. Canada's firms must also overcome the tendency to remain small in a decentralized federation. Compounding these difficulties, Canada lacks effective mechanisms for addressing federal–provincial differences, leading to market fragmentation.

A multitude of internal barriers constrain the mobility of goods, services and people and make a small market even smaller. Canada also suffers from a “tyranny of small differences”⁴ created by a regulatory approach that puts us at a competitive

disadvantage with even our closest trading partner, the United States. For example, Canada exports 90 percent of its manufactured motor vehicles to the US market.⁵ Nevertheless, a number of automobile manufacturing regulations are not harmonized between Canada and the US. Such unnecessary differences operate as *de facto* barriers to trade, resulting in higher prices for Canadian consumers for the same vehicle.

Unnecessary regulations and procedures “slow down innovation, frustrate new product launches, operate to protect domestic producers from foreign competitors, and create a drag on competitiveness, productivity, investment and growth.”⁶

There is too little interchange between the public and private sectors. Economic competitiveness is the result of a productive partnership between government and business, and our competitors have a better grasp of how important these types of relationships can be. As SECOR concludes in its analysis of Canada’s competitiveness, “Competing jurisdictions have better aligned international business and public policy, and have clear and shared international ambitions.”⁷

A recent study shows that in 2008 Canada’s cost advantage over the US in manufacturing was only 0.1 percent, down significantly from 2002 when Canada had a 10 percent cost advantage in manufacturing.⁸ Mexico has a 16 percent cost advantage relative to Canada. The same study notes the sensitivity of these results to exchange rates.

Our level and system of taxation and the associated impact on the cost of capital for Canadian enterprises are also drags on Canadian competitiveness. There is insufficient harmonization in federal and provincial consumption and business taxes. Canadian taxes on business investment in certain provinces discourage productivity-enhancing investment and reduce the attraction of Canada as a desirable destination for FDI.

A final weakness for Canadian competitiveness is the lack of sufficient entrepreneurial culture and ambition. A Panel research study concludes, “Canada lacks today the ‘virtuous cycle’ of talent creation that is driven by successful entrepreneurship, which generates positive financial returns which, in turn, generates a healthy risk capital market, which then generates a new round of entrepreneurs.”⁹ While the entrepreneurial spirit exists in certain companies and industries, Canada needs more aggressive and ambitious business leaders with the global mindset necessary to compete to win in the twenty-first century.

The Panel believes that Canada should build on its strengths and take steps to cope with its weaknesses. Having laid the foundation and set forth our analysis of the issues, we now turn to our agenda, findings and recommendations.

6. A Competitiveness Agenda for Canada

What we have heard consistently and what we learned through our work as a Panel is that competition in the global context is becoming more intense as powerful new competitors emerge. We heard this from those who had taken on new global challenges, as well as from those who expressed deep concerns about the potential for lost markets, lost companies, lost jobs and a reduction in living standards.

The biggest impediment to success for Canada lies in the lack of consensus about what the problem is, what needs to be done to solve it, and whether it constitutes the “imminent crisis” referred to earlier. Many voices argue for the status quo, which makes it even more difficult for us to recognize that difficult but important choices are required for Canada to keep pace with the rest of the world.

In this report, the Panel lays out the evidence underlying its conclusions about the nature of the problem and the urgent need for changes to Canadian public policy and the mindset of Canadians.

In the past, Canadians faced changing and adverse economic conditions, overcame risks and took great strides to improve our competitiveness, beginning with the implementation of the Canada–US Free Trade Agreement in 1989, the introduction of the Goods and Services Tax in 1991 and the signing of the North American Free Trade Agreement in 1994. We eliminated the federal government deficit by 1997. We can do great things again.

However, we have rested on the laurels of these successes. In the ensuing years, our public policy and political debate has been more about dividing the spoils, much of it due to past decisions and the good fortune of our natural resource endowments, rather than to increasing wealth and expanding opportunity. Global forces are putting pressure on Canada, like all nations, to revisit its economic position. Canada must take concerted action to remain current with competitive realities. We must plan and prepare for the future. We must act.

The Panel wants to establish the right conditions for Canada to ensure a high and rising standard of living for its citizens. These include:

- a world-class business environment to attract talent and capital
- strengthened businesses through competition, the essential driver of productivity and innovation
- more effective collaboration between businesses and all levels of government.

Such conditions will create more and better-paying jobs for Canadians now and for the next generation, and will generate more wealth to support our national objectives, including social and environmental goals. We are not saying that this will be achieved instantly by changing specific policies or without economic stress and dislocation. We are saying that the benefits will far outweigh the costs and that failure to act will result in declining opportunity and prosperity for Canadians.

Canada must improve its productivity by increasing competitive intensity. 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 freer flow of goods and services will import greater competition into our domestic markets. Canadian firms will have to sharpen their “competition tools” to take on the increased competition from outside. Greater competitive intensity domestically will translate into more success in world markets.

We turn now to the Competitiveness Agenda proposed in this report. Our Agenda focuses on talent, capital, innovation and an ambitious mindset. These are the areas that we believe require the most attention. Underlying our Agenda are the principles of openness and collaboration.

The remaining chapters of this report deal with our views and findings as well as the actions we recommend to address the concerns we have raised.

Chapter 7 reviews the legal underpinnings for competition in Canada. We look first at the core elements of our mandate — the *Investment Canada Act*, a number of sectoral regimes and the *Competition Act*. In public policy areas where market forces are constrained by regulation, the government must ensure that the objectives remain relevant and that the least restrictive mechanisms required to achieve them are being utilized.

In Chapter 8, we provide our views on public policy priorities for action that were raised during our deliberations and that we consider to be critical for Canadian competitiveness.

In Chapter 9, we recommend a powerful voice for competition advocacy in Canada. It is our hope that competitiveness will become a central pillar of Canadian economic policy and will be sustained long after the publication of this report.

At the outset, we state that this report is about one basic idea — raising Canada’s economic performance through greater competition to provide Canadians with a higher standard of living. The balance of the report sets out an agenda to achieve this goal.

7. Competitiveness Agenda: The Legal Foundations

The Investment Canada Act

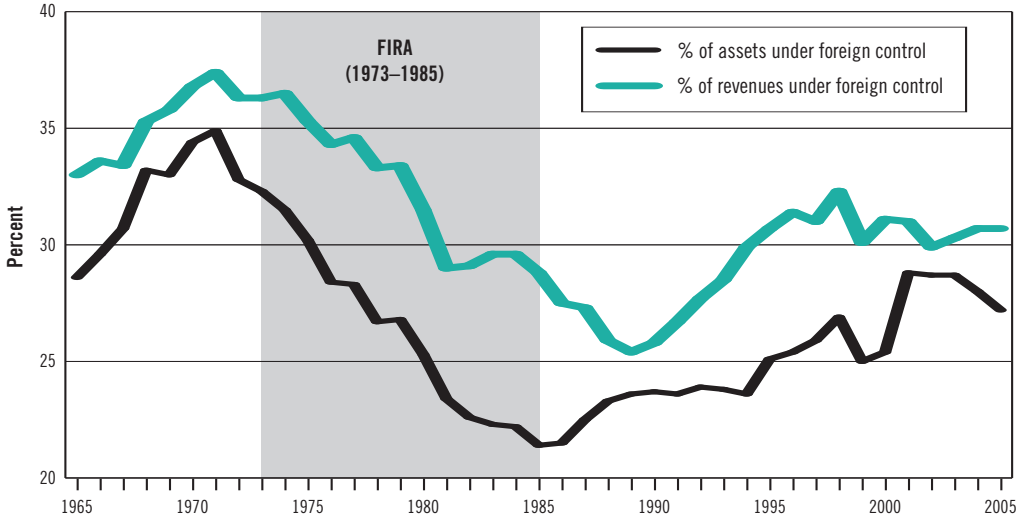
Foreign Investment Review

The *Investment Canada Act* (ICA) provides for federal government review of foreign investments in Canada. Under the ICA, direct acquisitions of control of Canadian businesses by non-Canadians are subject to notification to Industry Canada or the Department of Canadian Heritage. Investments are subject to review and the need for ministerial approval if they exceed the 2008 monetary threshold of \$295 million in gross asset value of the acquired business.¹ Reviews of foreign investment at the \$5-million threshold level are required in the case of financial services, transportation services (including pipelines), uranium mining and cultural businesses.²

A proposed acquisition is approved where the relevant minister is satisfied that the investment is likely to be of “net benefit” to Canada. The criteria used to assess net benefit, as set out in section 20 of the ICA, include employment, exports, productivity, technology development, and compatibility with Canada’s national industrial, economic and cultural policies. Industry Canada reviews typically involve foreign acquirers providing specific undertakings to address these criteria. However, such undertakings are seldom made public for reasons of commercial confidentiality.

The ICA replaced the *Foreign Investment Review Act* (FIRA) in 1985. FIRA was enacted on the premise that the ability of Canadians to maintain effective control over their economic environment was a matter of national concern. The ICA changed course, seeking to reduce actual and perceived protectionism, and acknowledging that foreign investment typically delivers important economic benefits. Greater focus on Canada’s investment review regime was achieved by raising review thresholds, changing the test of “significant benefit” to one of “net benefit,” eliminating reviews for greenfield investments outside the cultural sector, and establishing stricter time limits for reviews.

Figure 7 — Percentage of Assets under Foreign Control, 1965–2005



Source: John R. Baldwin, Guy Gellatly and David Sabourin, *Insights on the Canadian Economy: Changes in Foreign Control under Different Regulatory Climates: Multinationals in Canada*, March 2006, Statistics Canada Cat. no. 11-624-MIE — No. 013.

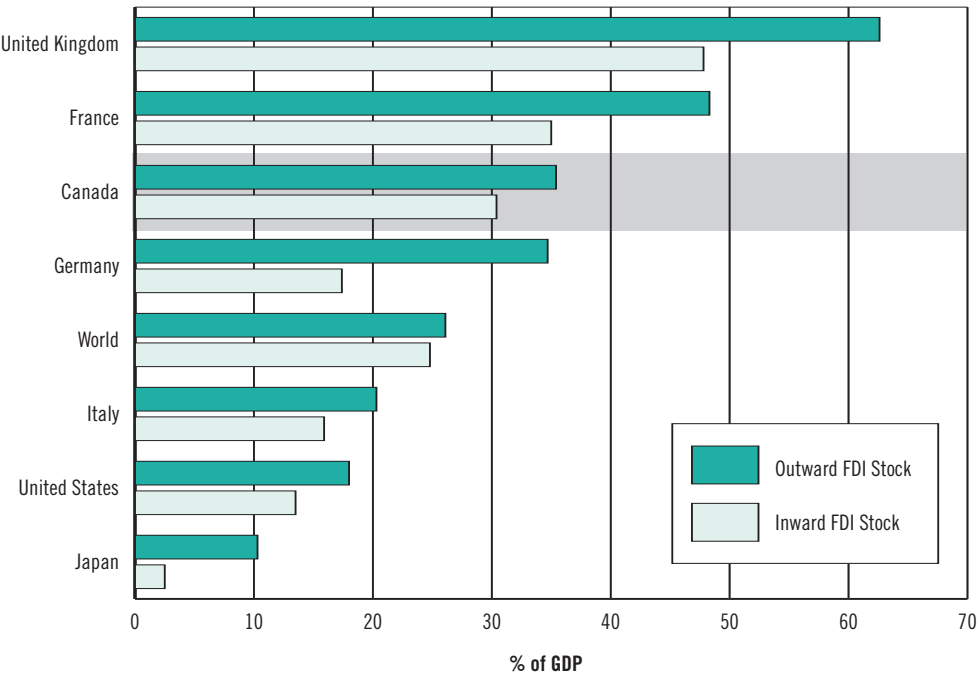
The ICA has not been an obstacle to foreign direct investment. Of the over 1500 non-culture sector reviews undertaken by the Minister of Industry under the ICA since 1985, only one proposal has been disallowed. Since 1999, the Minister of Canadian Heritage has reviewed and approved 98 cultural investments, while disallowing three proposals.³

Canada’s Openness to Investment — Perception and Reality

Despite this track record, the ICA has been criticized as being unduly restrictive of foreign investment. In particular, the OECD has consistently ranked Canada as having among the most restrictive barriers to foreign direct investment among industrialized nations.⁴

This perception is not supported by the facts, and the Panel rejects it. Although Canada’s global share of foreign direct investment (FDI) has fallen, Canada’s total stock of inbound FDI as a proportion of gross domestic product is relatively high among industrialized countries, being more than twice the level in the US and over 12 times the level in Japan.⁵ A recent Conference Board of Canada report indicates that, when the actual practices regarding foreign investment are taken into account, the impact of Canadian government intervention is not materially different from that of other industrialized countries.⁶

Figure 8 — Foreign Direct Investment Stock as a Percentage of Gross Domestic Product, 2006



Source: United Nations Conference on Trade and Development, *World Investment Report 2007*.

Canada is one of only a few countries (Australia being another) with a formal investment review process for foreign acquisitions that exceed prescribed monetary thresholds. This approach is more explicit and visible than the approach adopted in many other countries that employ informal barriers to foreign investment. These range from state-owned enterprises and special government rights in certain companies to overt political interference in the engineering of “national champions.”⁷

The Panel subscribes to the widely held view that Canada benefits from openness to the world and that attracting greater foreign investment is in Canada’s economic interest. Given that there has been no policy review of the ICA in more than 20 years, we believe that it is timely to update Canada’s foreign investment policies to make Canada more competitive and align the appearance of such policies with the reality.

In addition, the Panel believes that it is in Canada’s interests in a post-9/11 world to have in place an explicit national security test to support its trade and investment policies. As such, we support the Minister of Industry’s statement that the government intends to carefully consider the creation of a new review requirement

for transactions that raise “national security” concerns.⁸ We respectfully suggest that the scope of this review requirement should be aligned with that of the investment review process used by the Committee on Foreign Investment in the United States.⁹ This would bring Canada into line with other countries that have introduced a national security screening procedure, including the United Kingdom, China, Japan and Germany.

The Panel also welcomes the Minister of Industry’s recent clarification concerning the ICA’s application to state-owned enterprises. We believe that the new guidelines will improve transparency in the administration of the ICA.¹⁰

The Panel believes that Canada should retain an investment review process, but it should be one of exceptional application in keeping with the practices of similarly situated industrialized countries. Consistent with Canada’s legal traditions and our international reputation for sound governance practices, the review process should be predictable, timely and transparent.¹¹

To deal with the perception issue that clearly exists, the Panel concludes that the scope of the ICA should be narrowed in the manner set forth below. Based on the submissions we received and on our consultations, research and experience, we are confident that implementing our recommendations will enhance Canada’s attractiveness to foreign capital without undermining our capacity to safeguard our national interests on a basis consistent with that of other industrialized countries.

Raise Thresholds

We recommend raising the ICA’s minimum review threshold to \$1 billion in enterprise value from the current level of \$295 million in gross assets of the acquired business, except for cultural businesses. We make this recommendation for two reasons. First, a higher threshold is consistent with the scope for intervention being narrower, and thus more exceptional, than under the current ICA. Second, a higher threshold would be aligned with Canada’s underlying premise that foreign investment is, except in unique circumstances, beneficial to Canada.

The use of gross assets as the standard in the ICA for measuring the significance of Canadian businesses subject to foreign investment proposals is out of date. The concept of enterprise value¹² better reflects the increasing importance to our modern economy of service and knowledge-based industries in which much of the value of an enterprise is not recorded on its balance sheet because it resides in people, know-how, intellectual property and other intangible assets not recognized in a balance sheet by current accounting methods.

The dollar amount of the review threshold should continue to be indexed for inflation in accordance with the current NAFTA formula. Furthermore, the revised threshold should also apply to non-WTO investors.

The Panel also recommends eliminating the current separate threshold of \$5 million that applies to foreign investment in non-federally regulated financial services,¹³ transportation services (including pipelines) and uranium mining. Unlike the case of cultural businesses, the Panel has not been presented with any compelling policy rationale that would serve to distinguish foreign investment in these sectors from any other investment, given the broad array of other industry specific regulation as well as the forthcoming national security safeguards on foreign investment.

In the same connection, other than for cultural businesses, the Panel does not see the utility of mandatory reporting of foreign investment that does not exceed the review threshold in the ICA. If there is considered to be a continuing need to collect statistical information regarding foreign investment that is below the review threshold, the Panel is of the view that this activity should be undertaken by Statistics Canada.

The Net Benefit Test

The ICA currently requires applicants to demonstrate “net benefit” to Canada. We recommend narrowing the ICA by reversing the onus to require the relevant minister to assume the burden of being satisfied that the standard for disallowing a proposed foreign investment transaction has been met. The Panel also recommends narrowing the disallowance standard by changing it from “net benefit to Canada” to “contrary to Canada’s national interest.”

A number of issues would be addressed by these changes. First, it would align the test with Canada’s basic policy premise that FDI generates positive benefits for the country. Second, it would counter the negative and misleading perception that the ICA discourages—and that Canada does not welcome—FDI.

In concrete terms, the change in the disallowance standard would mean that an investment that would not have been able to meet the former net benefit test would be able to proceed without intervention from the minister, unless it was a case where the minister’s concern with regard to the factors required to be considered under the ICA rose to the level of the national interest.

In recommending this and other changes to the ICA, the Panel is mindful that, under NAFTA and other international treaty commitments, Canada may amend the ICA only to narrow, not broaden, the scope of its application.¹⁴ The changes to the ICA that we are recommending would satisfy these commitments because, as explained above, the intention and effect of the recommendations is to narrow the scope of the ICA's application and to raise the standard for disallowance. In this report, the Panel is making policy recommendations. We leave it to the appropriate authorities to give legislative expression to them.

Improve Transparency and Predictability

In our consultations, the Panel heard criticisms that the administrative provisions of the ICA are deficient. In the fast-moving world of modern business, where significant investment decisions are made on a global basis, regulatory clarity and administrative efficiency are among the significant factors considered by foreign investors. As such, we believe that a key objective of the changes to the ICA should be to improve the transparency, predictability and timeliness of decision making in the review process. We recommend requiring ministers to report publicly on the disallowance of any individual transaction under the Act and, in doing so, to give reasons for the disallowance. The current inability of ministers to articulate the reasons for allowing or disallowing a foreign investment proposal does not meet contemporary standards for transparency.

In addition, the Panel recommends that ministers should publish annually a report on the operation of the ICA. The annual report should provide information on the development of any new policies or guidelines as well as an overview of all transactions subject to the ICA and undertakings provided by foreign investors in relation to the disallowance test under the legislation. The report should be required to provide sufficient detail, without breaching commercial confidences, to allow the Canadian public to assess whether the Act is meeting its objective of ensuring that foreign investment proposals are not contrary to Canada's national interests.

To further improve the administration of the ICA, we believe that the government should also make increased use of guidelines and other advisory materials to provide information concerning the review process, explain the basis for making decisions under the Act, and clarify interpretations by Industry Canada or the Department of Canadian Heritage regarding its application. The research finding that it generally takes longer to obtain a binding ministerial opinion than to conduct a complete review of a foreign investment proposal is perverse.¹⁵ Therefore, the procedures and timelines for issuing compliance instruments under the ICA need to be streamlined.

Preserve a Distinct Approach for Cultural Businesses

We received many submissions regarding the importance of protecting and nurturing Canadian culture. We affirm the importance of Canadian culture, and believe that the review of foreign investment related to cultural businesses should continue to be administered separately by the Department of Canadian Heritage.¹⁶ At the same time, the Panel believes that greater openness to two-way trade, foreign investment and talent would increase competitive intensity and ultimately ensure the long-term vitality of Canadian cultural businesses. Forgone competitive intensity may increase prices and reduce choice as well as incentives to innovate and seek out new markets. New technology and increased international exposure create new opportunities for Canadian cultural businesses in global markets, and the current Canadian cultural policy framework will need to be updated in light of this new economic reality.

The application of the ICA to cultural businesses differs in many respects from the general application of the Act. The threshold for review is set at \$5 million in gross assets and has not been changed since the inception of the ICA in 1985. Foreign investment proposals involving Canadian cultural businesses are assessed against specific cultural business policies of the Department of Canadian Heritage. These policies are applied by the Minister of Canadian Heritage to foreign investment proposals involving cultural businesses whether they are above or below the \$5-million threshold. Unlike in other sectors, these policies also apply to a review process governing the establishment of a new cultural business.

Over the past two decades, the federal government has issued a number of policy statements setting out its foreign investment policies for Canadian cultural businesses. Some of these policies are implemented through the ICA. For example, the 1988 Film Distribution Policy includes a prohibition on foreign takeovers of Canadian-owned and controlled film distribution businesses. The 1992 Revised Foreign Investment Policy in Book Publishing and Distribution includes provision for review under the ICA of all transactions involving book publishing, distribution and retailing businesses. The direct acquisition of Canadian-owned firms within the book publishing, distribution and retail sectors by non-Canadians is prohibited except in specific circumstances. In 1999, following the Canada–US Agreement on Periodicals, there was some liberalization of foreign investment restrictions in the periodical publishing, distribution and sales sector. However, Canada continues to prohibit foreign acquisitions of Canadian-owned periodical publishing businesses.¹⁷

Significant issues that emerged from the oral and written submissions received by the Panel as well as in the research conducted for the Panel included overreach of the review process to activities and transactions of minimal cultural significance, a lack of clarity on what constitutes cultural products, perverse incentives and outcomes, and adverse impacts on the ability to raise capital and on competition. The Panel believes that greater use of exemptions and guidelines and a more receptive approach to greenfield investment in the cultural sector would go a long way to resolving the deficiencies that have developed over the past two decades without eroding the ability of the ICA to serve as a tool to preserve Canada's cultural sovereignty.

While the current \$5-million threshold seems to the Panel to be inordinately low with regard to purely economic considerations, the Panel has insufficient evidence and experience to suggest the magnitude of an increase in the threshold with confidence that the change would not undermine the ability of the Minister of Canadian Heritage to discharge responsibilities under the ICA. Accordingly, we are

not recommending any change in the \$5-million review threshold or the minister's ability to reach below it to review transactions involving cultural businesses. However, the Panel also believes that a change in the standard of measurement from gross assets to enterprise value would better reflect the economic value of cultural businesses, and this change should be considered along with an increase in the review threshold by the Minister of Canadian Heritage.

The Panel doubts that a review is needed where cultural activities of a commercial nature are only an ancillary part of the business operations proposed to be acquired. Business activities that are currently prescribed under the ICA as being related to Canada's cultural heritage or national identity should be clarified.

There is also a need to differentiate activities that directly relate to the creation and distribution

of cultural products as opposed to other incidental commercial activities and products. It should be made clear that products such as telephone directories or technical manuals are not cultural products. Similarly, the Panel believes that

WHAT IS A CULTURAL BUSINESS?

Future Shop sells electronic equipment for home and office use. Yet when American retailer Best Buy acquired the Canadian company in 2001, the acquisition was reviewed by both Industry Canada (because the value of assets being acquired was over the existing review threshold) and the Department of Canadian Heritage (because Future Shop sold books as well as audio and video recordings). Foreign ownership in book retailing is subject to review, whatever the proportion of business this activity represents. Nevertheless, in another decision the following year, the Department of Canadian Heritage determined that the activities in Canada of the Internet book retailer Amazon were not subject to review under the ICA because Amazon does not own nor did it acquire a Canadian business.

investment review requirements ought to be eliminated in cases where other government policies actively encourage foreign investment in a specific cultural industry. This is the case in the film production industry, where tax incentives encourage foreign investment in specific film projects.

The Panel's attention was drawn to current foreign investment policy for book publishing, which prohibits the direct acquisition of Canadian publishing companies by foreign investors. The Panel questions the necessity to apply this prohibition so broadly as to capture even those companies that publish virtually no Canadian authors, sell the vast majority of their books outside Canada, and have no printing and distribution activities in Canada. This is likely to have the unintended consequence of driving investment, opportunity and talent outside Canada.¹⁸

The commercial reality of cultural businesses is changing. Scale and the ability to export Canadian cultural products are key competitiveness factors for the future. At the same time, the Internet is undermining business models and creating new markets and competitive pressures. Maintaining a "closed" regulatory system for the creation, distribution and consumption of cultural products is no longer feasible in the Internet age. Accordingly, Canadian cultural policies require urgent and systematic review in light of the changes wrought by new technology.

Investment Promotion

Finally, we suggest a further step to narrow the scope of the ICA by changing the Act's purpose clause to remove Industry Canada's responsibilities to promote foreign investment in Canada. These responsibilities for a number of years have been performed elsewhere within the federal government.

The Panel recommends that:

- 1. The Minister of Industry should introduce amendments to the *Investment Canada Act* as follows:**
 - a) raise the review threshold to \$1 billion, replace gross assets as the standard of measurement with enterprise value of the acquired business, and continue to index this threshold for inflation in accordance with the current NAFTA formula;**
 - b) raise the threshold for the review of foreign investment in the transportation sector (including pipelines), non-federally regulated financial services and uranium mining from \$5 million to the \$1-billion threshold recommended above;**
 - c) change the applicable review standard and reverse the onus within the ICA, which currently requires applicants to demonstrate "net benefit to Canada," to require the relevant minister to be satisfied that consummation of the proposed transaction would be contrary to Canada's national interest, before disallowing the transaction;**

- d) remove the obligation under the ICA to notify Industry Canada with regard to an acquisition that falls below the threshold for review or for the establishment of any new business;
 - e) state that neither recommendation 1.a, 1.b nor 1.d would apply to the administration or enforcement of the ICA as they relate to cultural businesses; and
 - f) revise the ICA's purpose clause (section 2) to remove Industry Canada's responsibilities to promote foreign investment in Canada.
2. The Minister of Industry and the Minister of Canadian Heritage should increase the use of guidelines and other advisory materials to provide information to the public concerning the review process, the basis for making decisions under the ICA, and interpretations by Industry Canada and the Department of Canadian Heritage regarding the application of the ICA. Additionally, amendments to the ICA should require the Ministers to:
- a) report publicly on the disallowance of any individual transaction under the ICA, giving reasons for such action being taken; and
 - b) table an annual report to Parliament on the operation of the ICA.
3. The Minister of Canadian Heritage should establish and make public a *de minimis* exemption clarifying that the acquisition of a business with cultural business activities that are ancillary to its core business would not be considered a separate cultural business nor be subject to mandatory review by the Department of Canadian Heritage. For the purpose of applying this exemption, the cultural business activities would be considered *de minimis* if the revenues from cultural business activities are less than the lesser of \$10 million or 10 percent of gross revenues of the overall business.
4. Consistent with recommendations for other sectors, the Minister of Canadian Heritage, with advice from stakeholders and other interested parties, should conduct a review every five years of cultural industry policies, including foreign investment restrictions. The first such review should be launched in 2008. As a matter of priority, the first review should consider:
- a) increasing and revising the threshold for the review of acquisitions of cultural businesses; and
 - b) the desirability of the Minister of Canadian Heritage continuing to have the right to require the review and approval under the ICA of any new cultural business establishments by foreign investors.
5. In administering the ICA, the ministers of Industry and Canadian Heritage should act expeditiously and give appropriate weight to the realities of the global marketplace and, in appropriate cases, the ministers should provide binding opinions and other less formal advice to parties concerning prospective transactions on a timely basis to ensure compliance with the ICA.

Sectoral Regimes*

As part of its core mandate, the Panel was asked to review Canada's sectoral restrictions on foreign direct investment having regard to their impacts on competition and other economic, social or security goals as well as the compatibility of Canada's policies with those of other countries. Canada has a multitude of laws and regulations governing ownership in specific sectors as well as a number of company-specific statutes. Many company-specific statutes had their genesis in the mid-1980s to early 1990s, when they were enacted for the purpose of privatizing former Crown corporations.¹⁹

The Panel's mandate includes a focus on sectoral foreign ownership restrictions, which led to our review of the air transport, uranium mining, telecommunications and broadcasting, and financial services sectoral regimes. Directly or indirectly, each one of these ownership regimes has an impact on the degree of foreign investment in these sectors and the overall economy. Liberalization of existing sectoral ownership restrictions raises complex questions about domestic control of some of Canada's largest and best known companies and the integrity of other economic, security and cultural policies deemed essential for the nation.

Each sectoral ownership regime was established to address particular policy objectives, originated at different times, and has undergone varying degrees of regulatory and policy changes over the past three decades or so. Each of these sectors is heavily influenced by technological change and globalization. Consequently, the Panel welcomes the opportunity to review each sector from the perspective of advancing Canadian competitiveness.

As discussed elsewhere in this report, other countries maintain formal as well as informal controls on ownership in these as well as other industry sectors. The long-term trend internationally has been to liberalize market access by various means, including reducing restrictions on foreign ownership. Other countries have realized substantial economic benefits where greater market access has led to increased competition, innovation and investment and has attracted new talent.

* Recusal Statement: The Panel Secretariat has received legal advice to the effect that since this report constitutes advice to government in the form of recommendations in a public report, Panel members need not recuse themselves from any of the Panel's deliberations. Notwithstanding this, Panel members reviewed their personal circumstances and decided to recuse themselves from discussion and finalization of recommendations concerning sectoral investment regimes where they have business relationships of a material nature, as follows:

- N. Murray Edwards – Air Transport; Telecommunications and Broadcasting
- Brian Levitt – Telecommunications and Broadcasting

The Panel notes that, for liberalization to achieve these positive outcomes, it must result in greater competitive intensity and bring new technology, know-how and entrepreneurial spirit. The Panel takes a realistic approach to sectoral regimes. We advocate liberalization where and to the extent that we are satisfied it will enhance Canada's competitive advantage.

A number of oral and written submissions maintained that Canada will eventually have to reduce certain sectoral ownership restrictions because other jurisdictions may adopt reciprocal policies or take other measures that could have an adverse impact on the ability of Canadian companies to compete abroad. Indeed, some argued that Canada should unilaterally and pre-emptively reduce or eliminate its ownership restrictions without obtaining any corresponding market access concessions on the part of other countries. However, the Panel questions whether it is appropriate for Canada to change the playing field in a way that disadvantages Canadian companies or competitiveness in Canada while foreign governments protect companies in the same industry from takeovers by Canadian investors. The Panel believes that reciprocity may be a relevant consideration for the assessment of liberalization in some sectoral regimes.

Other than with regard to the *Bank Act*, there has been no regular or comprehensive public review of these sectoral ownership restrictions for some time. The submissions received by the Panel and our work underscore the wisdom of mandated periodic reviews.

The Panel recommends that:

6. Individual ministers responsible for the sectors addressed in this report should be required to conduct a periodic review of the sectoral regulatory regime with a view to minimizing impediments to competition as well as updating and adapting the regulatory regime to reflect the changing circumstances, needs and goals of Canada. This review should be modelled on the *Bank Act* process and should occur on a five-year cycle. Ownership restrictions should be reviewed on the basis of:
 - a) a statement of policy goals that reflect the current Canadian reality;
 - b) an understanding that limitations on competition and investment may be required to address a market failure, a paramount social policy or a security objective;
 - c) an understanding of the costs and benefits of any such restriction on competitive intensity; and
 - d) an evaluation of whether existing restrictions — or alternative approaches — are the optimal means of achieving the stated policy goals.

Air Transport

Since the 1980s, the federal government has deregulated many economic aspects of the air transportation industry. The industry continues to be regulated with respect to public safety and security.

Canada limits foreign ownership of Canadian air carriers to 25 percent of voting equity. In addition, foreigners may own non-voting equity subject to the overall requirement that they are not permitted to control a Canadian air carrier. Basically, the same restrictions are in place in the US. Some countries have eased restrictions to allow up to 49 percent foreign ownership of their carriers. A few (e.g., Chile) have no restrictions on foreign ownership of their air transport industry. Still others permit 100 percent foreign ownership for carriers offering domestic services only, referred to as a “right of establishment.” Right of establishment carriers are currently permitted in Australia and New Zealand. As well, the European Union (EU) functions as a common market in air transport. There are no ownership restrictions governing investment in air carriers between member states, whereas a 49 percent limit is applied to foreign ownership by non-EU investors.

Table 2 — Foreign Ownership Limits, Selected Countries, 2002

Jurisdiction	Domestic Routes (%)	International Routes (%)	Special Rule for Flag Carrier
Australia	100	49	n/a
New Zealand	100	49	n/a
Korea	50	50	n/a
China	35	35	n/a
Japan	33	33	n/a
Taiwan	33	33	n/a
India	n/a	40	26
United States	25	25	n/a
Canada	25	25	15
Brazil	20	20	n/a

Source: Chang and Williams (2004) as cited by David Gillen, “Foreign Ownership Restrictions in the Canadian Aviation Industry: A Review and Assessment,” research paper prepared for the Competition Policy Review Panel, March 2008.

Notwithstanding ownership restrictions, integration through marketing alliances among international air carriers (e.g., Air Canada is a member of the Star Alliance) allows participating air carriers to use common reservation systems and serve a larger range of international destinations. More formal integration involving mergers of national flag carriers, such as the recent takeover of Swiss Air by Lufthansa and the merger of Air France and KLM, is creating larger global air carriers. The legacy of flag air carriers has contributed to industry overcapacity. There are over 1000 airlines globally. Industry experts predict a wave of consolidation in the large US and EU markets.

Internationally, air transportation is largely governed by bilateral agreements that include flyover, in-transit and landing rights between nations. Canada has concluded bilateral air transportation agreements with approximately 75 countries.

There is a nascent international trend of entering into “Open Skies” treaties, which provide for expanded landing rights on international routes. The EU and the US “Open Skies” agreement came into force in March 2008 and is expected to increase the degree of competition on intercontinental flights.²⁰ As a second stage in this liberalization process, the US and the EU are scheduled to embark on discussions regarding reciprocal reductions on foreign ownership restrictions in air transportation in 2008. The market integration effects of “Open Skies” agreements, particularly if combined with efforts to allow foreign ownership beyond 49 percent, will provide further impetus for consolidation among international air carriers.²¹ Maintaining the existing 25 percent foreign ownership restriction could exclude Canadian air carriers from future consolidation transactions that would result in global carriers.

Air transportation facilitates social and business transactions, thereby increasing economic advantage and opportunity. An air transport sector characterized by competitive choices, fares and costs will be critical for Canadian businesses to realize their ambitions in foreign markets. The Panel was presented with no evidence that foreign-controlled airlines would be any more or less inclined than Canadian firms in servicing Canadian routes; airline capacity typically matches the economic opportunities available in a community whether they are large or small.²²

Many industry participants have expressed concerns with respect to government policies that increase industry costs.²³ Ultimately, the benefits of lower industry costs could be passed on to the public in lower fares and better service in a competitive environment. Improving productivity in the industry is important for Canada's economic future. In line with Recommendation 6, fiscal arrangements affecting the competitiveness of the industry should be reviewed every five years.

There is a trend internationally toward greater liberalization of domestic aviation markets and a somewhat slower trend of international market liberalization. Both have yielded substantial economic benefits. The Panel is satisfied that increasing the level of foreign investment permitted in the air transportation sector would increase sustainable competition in the Canadian industry.²⁴ Appropriate safety and security measures that would apply to all airlines regardless of ownership are in place to protect the public. Other objectives, such as service to remote regions, are best met by an efficient and competitive private aviation sector. However, unilaterally eliminating foreign investment controls for Canada's international carriers would impact Canada's relationships with other countries with whom we have bilateral air transportation agreements. Complete liberalization of ownership restrictions would require a reciprocal or multilateral effort involving Canada and other countries.

The US is further advanced than Canada in securing "Open Skies" treaties. In practice, Canadian international air policy is still relatively restrictive. The Canadian industry now faces an increased risk of reduced intercontinental passenger traffic due to the stronger competitive position of the US industry stemming from its recent treaty with the EU. Successfully completing the "Open Skies" negotiations with the EU, which started in November 2007, has an economic importance for the nation.

The Panel recommends that:

- 7. The Minister of Transport should increase the limit on foreign ownership of air carriers to 49 percent of voting equity on a reciprocal basis through bilateral negotiation.**
- 8. The Minister of Transport should complete Open Skies negotiations with the European Union as quickly as possible.**
- 9. The Minister of Transport, on the basis of public consultations, should issue a policy statement by December 2009 on whether foreign investors should be permitted to establish separate Canadian-incorporated domestic air carriers using Canadian facilities and labour.**

Uranium Mining

The uranium industry is unique among the sectors with restrictions on foreign ownership that the Panel has been asked to review. Indeed, it is unique among the mineral and energy industries. Uranium has only two uses of consequence, namely, as an essential component of nuclear weapons and as a fuel for the generation of electricity.

Today the Canadian uranium mining industry is centred in Saskatchewan, and there is a mine development proposal situated near Baker Lake, Nunavut. Canada is the world's largest primary uranium producer, and ranks third in known and reported reserves after Australia and Kazakhstan. Canadian uranium deposits are the richest in the world in terms of percentage content.

Development of Canadian uranium resources for civilian purposes began in the 1970s, and has been subject to foreign ownership controls since 1970. The current regime, known as the Non-Resident Ownership Policy (NROP), was established in 1987 by the Minister of Natural Resources. It provides:

- a minimum level of resident ownership of 51 percent in uranium mining
- resident ownership of less than 51 percent to be permitted if Canadian control in fact can be established as defined in the *Investment Canada Act*
- exemptions to be granted if Canadian partners in a mining development cannot be found.

There are no ownership restrictions on foreign participation in exploration.

Canadian production is dominated by the two largest uranium mining companies in the world, Cameco and Areva SA.²⁵ Cameco is Canadian controlled and has mines in Canada, the US and Kazakhstan as well as first-stage, value-added processing in Canada.²⁶

The NROP also refers to the management of security and environmental issues through the Canadian Nuclear Safety Commission²⁷ and the Department of Foreign Affairs and International Trade. Concern over the potential proliferation of nuclear weapons from the beginning of the nuclear era has led to a high level of government involvement with the industry, including direct ownership. It has also led to high levels of regulatory and policy control at both the national and international levels. Canada has been a world leader in the development of an increasingly stringent and effective Nuclear Non-Proliferation Policy and accompanying export control regime. We now have more than 30 years of experience in ensuring that Canadian exports of nuclear material (including uranium), equipment and technology are used only for peaceful, non-explosive purposes.²⁸

In order for uranium to be used in the operation of a nuclear power plant, additional processing steps are required, involving conversion of uranium ore, enrichment and fuel fabrication.²⁹ Production is heavily concentrated in very few countries. In 2006, six countries produced 82 percent of the world's primary uranium production. Enriched uranium trades at much higher prices than primary uranium or uranium that has been processed to fuel at the first stage of conversion.

Security of supply considerations has led some countries to intervene in the market. Intervention ranges from policy support and fiscal incentives to the development of state-owned enterprises for uranium production and processing. Many of these countries also have realized the economic benefits of developing domestic fuel processing capabilities and advanced processing has become part of their national industrial policy. Three of the world's largest economies — the United States, France and Japan — are heavily dependent on imported energy resources. It is no coincidence that they have become heavily reliant on nuclear energy. Those countries and others have integrated national nuclear policies designed to provide stable low-cost electricity, foster development of production facilities, secure the raw energy inputs, add value through domestic fuel processing capability, and develop and protect domestic technology. It appears unlikely that these policies will be dismantled in the face of rapidly increasing energy demand.

International concerns with the spread of “sensitive technologies” led to a 2004 proposal by the US to ban the sale of enrichment and reprocessing equipment or technology to any state that does not already possess full-scale, functioning enrichment and reprocessing plants. While the proposal is rooted in nuclear proliferation concerns posed by other countries, the practical effect of this proposal is the restriction of the development of uranium enrichment technology in Canada. Discussion of this proposal has been on the agenda of G8 Summits since 2004. Canada has never accepted the necessity of having a permanent moratorium on the development of uranium enrichment technology in Canada. There has been some progress in multilateral discussions in 2007 and 2008; however, a resolution of Canada's concerns has yet to be achieved.³⁰

It would be a natural progression for Canada, as the world's leading uranium producer and converter, to develop the capacity to compete in this large and lucrative segment of the nuclear fuel market.

In summary, Canada's uranium resource base gives it a strategic advantage in global nuclear energy markets. In considering a more open ownership regime for the uranium sector, the Panel concludes that liberalizing the NROP should be on the condition that Canada receives some reciprocal benefits in return. This could take the form, for example, of requirements that the country provide reciprocal

access to its markets. Alternatively, Canada might want to secure access to certain technologies (e.g., enrichment) not otherwise available to it as a condition of granting improved access.

Unilateral liberalization of the policy would respond to the concerns of foreign investors and their governments. It is important to note that the vast majority of countries have ownership restrictions governing their uranium industries that are more restrictive than the NROP. Unconditional liberalization would do nothing to create a level playing field for Canadian companies that face investment and, in some cases, export restrictions or prohibitions in other countries, not only at the uranium mining stage but also at other stages of the nuclear fuel cycle.

Unilaterally lowering ownership restrictions without obtaining concessions from other countries that limit foreign competition or Canadian investment abroad would not be grounded in a hard-headed appraisal of Canada's national interest.

The Panel recommends that:

- 10. The Minister of Natural Resources should issue a policy directive to liberalize the non-resident ownership policy on uranium mining, subject to new national security legislation coming into force and Canada securing commensurate market access benefits allowing for Canadian participation in the development of uranium resources outside Canada or access to uranium processing technologies used for the production of nuclear fuel for nuclear power plants.**
-

Telecommunications and Broadcasting

Canada has developed a strong cadre of businesses in the telecommunications and broadcasting sectors, which have grown to their present position in a highly regulated domestic Canadian market. Today, these businesses operate in Canadian and global markets characterized by continuous product innovation and under increasingly liberalized national regulatory regimes. In this context, the Panel believes that the competitiveness of these industries can and should be strengthened through liberalizing foreign investment restrictions that apply to them.

Twenty years ago, Canada's telecommunications and broadcasting industries were distinct sectors. Telecommunications carriers were in the business of carriage, not content. Cable television companies distributed broadcasting and provided no telecommunications services. Wireless (cellular telephone) communications were in their infancy, as was the Internet.

The Internet and other information and communications technologies have changed the business landscape for these industries. In essence, with convergence, it is increasingly difficult to define distinct “telecommunications” and “broadcasting” industries or sectors, particularly when it comes to delivery or distribution networks. For example:

- fixed wire telecommunication carriers, wireless carriers, and cable television companies now compete directly with one another in the delivery of voice communications, Internet (data) services and video services
- telecommunication and broadcasting services increasingly overlap; when a subscriber accesses the Internet through a mobile phone, he or she may download an email, a text message or a video clip of a television show
- major telecommunications carriers are investing in technology to deliver advanced video services, and large cable television companies already offer voice services and are upgrading their Internet capacity; wireless carriers are delivering voice and data and investing in new video services.

To some extent, the current Canadian regulatory regimes for these two sectors reflect the past rather than the present. We continue to have one regulatory structure for telecommunications and another for broadcasting, even though industry boundaries between the two are disappearing.³¹ Some companies, because of the scope of their telecommunications and broadcasting activities (such as Bell Canada, Rogers, and TELUS), are subject to both regulatory regimes.

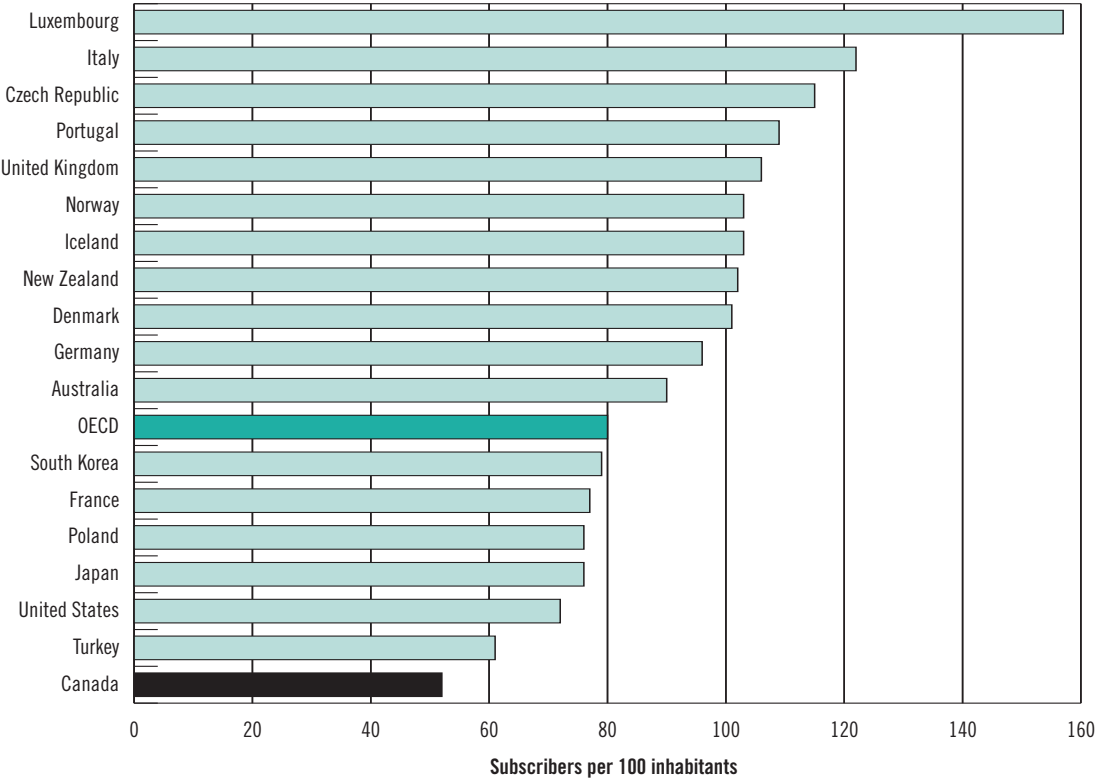
Both the *Telecommunications Act* and the *Broadcasting Act* contain restrictions on foreign investment that are largely similar in form. The *Telecommunications Act* states that one objective of Canadian telecommunications policy is “to promote the ownership and control of Canadian carriers by Canadians.”³² The *Broadcasting Act* states, “The Canadian broadcasting system shall be effectively owned and controlled by Canadians.”³³ The foreign investment rules to achieve these objectives are similar under both acts and related regulations. In summary, they restrict the number of voting shares that can be held by non-Canadians in a telecommunications or broadcasting business as well as the number of board members who can be non-Canadian, and require the Canadian Radio-television and Telecommunications Commission (CRTC) to ensure that non-Canadians cannot exercise “control in fact” over the business. With respect to either a telecommunications company or a broadcast licensee, the rules limit the holding of voting shares by non-Canadians to 20 percent at the operating company level and to 33.3 percent at the holding company level.³⁴

There is considerable evidence that liberalizing foreign investment restrictions brings demonstrable economic benefit through increasing competitive pressure on all participants in the market.³⁵ This is as important in new and emerging markets (including Internet-based communications platforms) as in well-established markets. Foreign investment restrictions reduce competitive intensity in a number of ways that are well known. In relation to telecommunications markets, they include placing potential new entrants (to the extent they can enter markets in the first place) at a cost disadvantage relative to incumbents, limiting the sources of finance available to existing incumbents, distorting optimal financing structures, preventing the transfer of the latest technology into the marketplace and, perhaps most fundamentally, removing pressure on existing firms to reduce or eliminate inefficiencies in their business practices and activities and to be world-class (rather than best-in-country-class) competitors.³⁶

These arguments in favour of foreign investment liberalization are applicable across many economic sectors. However, submissions to the Panel provided a number of different views on the merits of liberalizing foreign investment restrictions in relation to telecommunications and broadcasting.³⁷ The Panel took account of these views and the following considerations in its assessment of foreign investment restrictions in telecommunications and broadcasting.

First, Canada is already reorienting its policies for telecommunications and broadcasting to place greater reliance on market forces in a number of specific areas other than foreign investment. In 2006, the federal government issued a Policy Direction to the CRTC to regulate in telecommunications in a manner that interferes to the minimum extent necessary with competitive market forces.³⁸ More recently, the Minister of Industry launched the Advanced Wireless Services radio spectrum auction which includes a set-aside of some spectrum exclusively for new entrants in the wireless market in order to stimulate greater competition and innovation.³⁹ In this context, it appears incongruous to retain existing foreign investment restrictions that prevent Canadians from capturing the full benefits of these and other regulatory policy changes for telecommunications and broadcasting industries.

Figure 9 — Cellular Mobile Penetration Rates, 2005



Source: OECD Communications Outlook 2007.

Second, the number of entrants in the marketplace has a bearing on increasing competitive intensity and achieving better results for consumers. The Canadian telecommunications market is characterized by the presence of a limited number of integrated wire line and wireless carriers. If foreign investment liberalization results in only a shift in control of these existing Canadian firms to foreign owners with no increase in competitive pressure, then no significant change to current competitive circumstances will necessarily ensue. The Panel believes that measures to liberalize foreign investment should provide an opportunity to promote the growth and development of new entrants rather than merely provide an opportunity for a shifting of corporate control between existing market participants.

Finally, the Panel is well aware that Canada's telecommunications policy and regulatory frameworks were subject to an extensive review during 2005–2006 by the Minister of Industry's Telecommunications Policy Review Panel (TPRP) chaired by Dr. Gerri Sinclair.⁴⁰ The TPRP received almost 200 written submissions and drew on the results of extensive consultations with Canadian stakeholders and experts in Canada and from abroad. The TPRP's final report, issued in March 2006, concluded that liberalization of the restrictions on foreign investment in the

Canadian telecommunications sector “would increase the competitiveness of the telecommunications industry, improve the productivity of Canadian telecommunications markets, and be generally more consistent with Canada’s open trade and investment policies.”⁴¹

Taking these considerations into account, the Panel finds that the TPRP’s proposed phased liberalization of foreign investment rules for telecommunications and broadcasting has merit. In the first phase, for a period of five years, foreign investment would be permitted on a greenfield basis or by acquiring an incumbent Canadian telecom company with a market share of 10 percent or less. In a second phase, beginning at the end of the five-year period, there would be a broader liberalization of the foreign investment rules for both telecommunications and broadcasting. With respect to broadcasting distribution, in this second phase, liberalization would apply to the carriage side of broadcasting distribution, while broadcasting policies would focus any necessary Canadian ownership restrictions on “content.”⁴²

As pointed out by the TPRP, this approach should be competitively neutral for telecom carriers and holders of licences for broadcasting distribution undertakings.⁴³ However, of greater importance from the Panel’s perspective is the increase in competitive intensity in markets through its initial focus on encouraging new entrants and potentially strengthening smaller competitors. Moreover, it would allow Canadians to derive greater benefit from the many other regulatory changes that are under way in telecommunications and broadcasting markets. For example, it would work with, rather than against, the new spectrum auction policy to encourage new wireless entrants. Finally, and with specific regard to the cultural policy concerns associated with broadcasting, it would enable the federal government to focus its attention and resources on how to more effectively meet the challenge of strengthening a Canadian presence in an increasingly open system for the production and consumption of Canadian content.

The Panel recommends that:

- 11. Consistent with the *Telecommunications Policy Review Panel Final Report 2006*, the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, the Minister of Industry should seek an amendment to the *Telecommunications Act* to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalized in a manner that is competitively neutral for telecommunications and broadcasting companies.**

Financial Services

A solvent, efficient and competitive financial services sector is vital to Canada's economic well-being. Canadians can justifiably be proud of our financial services sector, which is internationally held in high regard. In recent years, Canadian financial institutions have established a substantial presence in non-Canadian markets.

In keeping with all developed countries, the provision of financial services in Canada is highly regulated.

At issue for the Panel is the regulation of ownership and the state of competition in the financial services sector. Ownership regulations in the financial services sector differ from regulations in place governing the other sectors under consideration. Canada has progressively reduced foreign ownership controls in the financial sector. Today, there are no foreign ownership restrictions. As such, entry of foreign-controlled institutions is subject only to prudential approvals by the Office of the Superintendent of Financial Institutions and the Minister of Finance.

A "widely held" requirement exists for banks with equity of over \$8 billion. This rule also applies to demutualized insurance companies with equity over \$5 billion at the time of demutualization. No person can hold more than 20 percent of the voting shares or 30 percent of the non-voting shares.

The Canadian "widely held" rule is in place to reduce the risk of "self-dealing" and ensure sound governance practices. Self-dealing involves lending transactions between a financial institution and persons who are in positions of influence (e.g., a dominant shareholder) over the institution. Ultimately, self-dealing increases the risk of insolvency and the failure of a lending institution. While other jurisdictions do not impose explicit limits on shareholdings (e.g., Australia, France, Germany, the United Kingdom and US), the world's largest institutions tend to be widely held.⁴⁴

The most commonly cited reason underlying calls for liberalizing ownership restrictions governing large financial institutions is that it would enhance competition. The Panel has heard a wide variety of views on the state of competition in the financial services sector. Larger businesses, particularly multinational enterprises often borrow abroad and generally have a larger choice of credit providers than smaller Canadian companies. Canadian financial institutions participate in international markets, where they face fierce competition from rivals, many of which are much larger. Scale is important for Canadian financial institutions and their Canadian customers doing business abroad.

Canada's largest financial institutions are often criticized for their small business lending practices. Other than late-stage venture capital, a market that needs to become more robust in Canada, the evidence before the Panel has not convinced us that competition is lacking in the supply of credit for small and medium-sized businesses. Beyond the six largest banks in Canada, there are many smaller Canadian and foreign banks, credit unions and other non-banks as well as several government-sponsored lending institutions in Canada. Competition has lowered the cost of banking services in Canada to the point where it is among the lowest-cost markets in the world.⁴⁵

Canada has the potential for comparative advantage in financial services, which could be further exploited internationally. At the same time, allowing greater international competition as well as more competition between bank and non-bank lending institutions would benefit both the financial services sector and the public interest in competitive and efficient markets.⁴⁶ These should be considerations in the 2012 review of the *Bank Act* by the Minister of Finance.

Limits to both scale *and* competition can be problematic. Concerning scale, bigger institutions could position Canada and Canadian-based firms and financial institutions to compete more effectively in international markets. As noted in the submission of the Canadian Bankers Association, the average assets of Canada's five largest banks in 1985 totalled 38 percent of the average assets of the top 10 global banks. Today, the ratio is about 19.5 percent.⁴⁷ Canada's major banks are relatively small by global standards: the Royal Bank of Canada, Canada's largest bank, ranks as the 30th largest bank in the world according to the Fortune 500.⁴⁸

Because Canada represents 3 percent of world capital markets, reaching the scale of the world's largest institutions will depend on how well Canadian banks fare in the contest to acquire foreign banks. At the same time, there may be benefits in terms of realizing efficiencies resulting from domestic mergers. In their submission to the Panel, the Canadian Bankers Association quotes former Bank of Canada Governor David Dodge:

...a flexible framework governing Canada's financial institutions that provides incentives for innovation and efficiency is needed. Bank [of Canada] research suggests that Canadian financial institutions may find efficiency gains through economies of scale — gains that could flow across the economy through lower-cost business and retail lending.⁴⁹

Much has changed since 1998 when a *de facto* prohibition on mergers between large financial institutions was announced by the Minister of Finance. Canadian financial institutions have become more international, have pursued divergent strategies and have succeeded or fallen back according to their respective strategies. Several of Canada's insurance companies have demutualized and grown to become some of the largest and most internationally competitive in the world. More foreign competitors and non-bank institutions compete with the big banks. Internet banking has grown and expanded the choices available for consumers. Financial institutions the world over have merged, creating larger, more powerful competitors. Yet the *de facto* ban on mergers between large Canadian financial institutions has been in place for a decade.

The Panel is of the view that appropriate prudential, competition and public interest standards and processes are in place in Canada to allow for an objective analysis of merger proposals involving financial institutions.

The Panel recommends that:

- 12. The “widely held” rule applicable to large financial institutions should be retained.**
 - 13. The Minister of Finance should remove the *de facto* prohibition on bank, insurance and cross-pillar mergers of large financial institutions subject to regulatory safeguards, enforced and administered by the Office of the Superintendent of Financial Institutions and the Competition Bureau.**
-

The Competition Act

Effective competition laws and policies are key elements in ensuring the competitiveness and efficiency of the Canadian economy. In its core mandate, the Panel was asked to review policies affecting competition law, focusing on the *Competition Act* to ensure that it fosters competition in Canada.

Canadian competition policies and institutions are largely in keeping with those of other major countries. The *Competition Act* is recognized internationally as both modern and flexible and, in the Panel's view, it does not constitute an impediment to Canada's overall competitiveness. However, the Panel concludes that long-term improvements to Canada's productivity could be achieved by amending certain outmoded or ineffective provisions of Canada's competition laws. The adjustments required, though, are more in the nature of fine-tuning than a major overhaul.

In assessing the effectiveness of Canadian competition law and policy, the Panel believes that it is desirable to conform Canadian legal requirements with those of the US, where practicably feasible, with a view to minimizing unnecessary procedural or substantive differences, given the high level of integration of business operations in the two countries.

The 1985 MacDonald Commission Report set out the importance of international competition to Canada's overall competitiveness and productivity:

Commissioners maintain that competition policy should not be particularly concerned about mergers and amalgamations in those sectors of the economy where foreign competition exists. Such policy should focus instead only on those sectors of the economy that are not exposed to competition from abroad. The importance of liberalized trade as a guarantee of competition cannot be stressed too often. Given the discipline of international market prices, Canada can obtain the benefits of scale and of rationalization without suffering increases in domestic monopoly power.⁵⁰

The Panel believes that this reasoning is even more relevant today with higher levels of global trade and investment.

Issues in Canadian Competition Law

Despite substantial reforms effected in the mid-1970s and 1980s as well as more recent amendments, the oral and written submissions received by the Panel have persuaded us that a number of provisions of the *Competition Act* are either ineffective or obsolete. These deficiencies are particularly evident in respect of the conspiracy and pricing provisions. As a consequence, the legislation deviates in some respects from internationally accepted best practices.⁵¹

A recurring theme in Canadian competition policy is the need to balance the necessity for Canadian firms to achieve scale and specialization in order to compete in global markets against concerns about reduced competitive intensity in the Canadian market stemming from industry consolidation and concentration. As a small open economy, higher levels of industry concentration in Canada than in other modern economies such as the US are inevitable. As the MacDonald Commission concluded, concentration and vigorous competition are not necessarily incompatible where barriers to entry into the marketplace are not insurmountable by potential entrants.

The Panel is of the view that the primary focus of Canadian competition law and its administration and enforcement should be on anti-competitive conduct and outcomes more than on concerns about industry concentration.⁵²

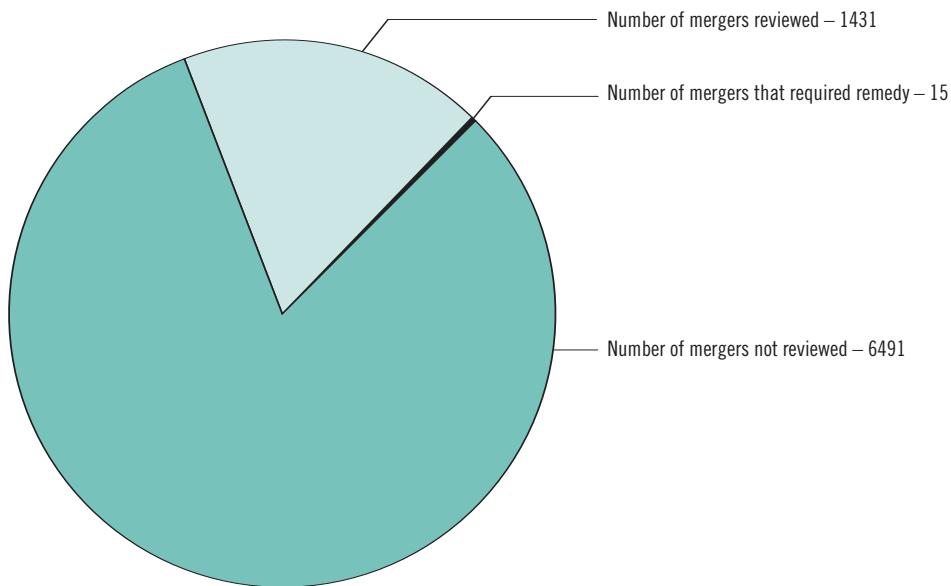
A number of the issues the Panel has considered were dealt with in legislative proposals introduced in Parliament in 2004 in Bill C-19. Essentially, the Bill proposed to decriminalize the pricing provisions of the *Competition Act* while strengthening the remedies available to the Competition Tribunal⁵³ for abuse of dominant position and deceptive marketing practices violations. Bill C-19 was not passed into law due to the 2005 federal election. The Panel commissioned research on recent proposals to amend the *Competition Act* and heard a great deal on this subject from competition policy experts and interested stakeholders.⁵⁴ Several of the proposals in Bill C-19 have merit and are relatively uncontroversial. However, the Bill did not address a number of the most important issues in Canadian competition policy that have economic importance.

Mergers

Merger review is a key activity conducted by the Competition Bureau that has a substantial impact on the competitiveness and scale of Canadian industry. Most transactions are reviewed on a timely basis as posing no competition concerns and very few transactions require merger remedies. From 2002 to December 2007, data indicate that there were 7937 mergers in Canada.⁵⁵ Of these, 1431 transactions were reviewed by the Competition Bureau and only 15 resulted in merger remedies, such as divestitures of assets or businesses.

Merger review is a feature of every modern economy. Increasingly, the most significant mergers are international in scope. It is important for Canada to have a voice along with the competition agencies of other countries that are engaged in the review of mergers affecting Canada's economic interests. Consequently, using an analytical approach and regulatory process that is convergent with our major trading partners should not only help the Competition Bureau conduct its work but also reassure international investors that Canadian competition laws in respect of mergers are modern and transparent.

Figure 10 — Mergers in Canada Reviewed by the Competition Bureau, 2002–2007



Source: Quarterly summaries of Canadian M&A activity from *Financial Post Crosbie: Mergers & Acquisitions in Canada*, and Competition Bureau statistics.

Overall, the Panel is satisfied that substantive merger provisions are generally modern, compatible with the laws of our major trading partners and appropriate for the Canadian economy. The Panel has heard much debate about the merger “efficiencies defence” but concludes that there is no compelling need to change it. Indeed, the Panel is of the view that the achievements of efficiencies through mergers is sufficiently important for the Canadian economy that the Competition Bureau should review mergers with this in mind from the outset, rather than limiting its assessment of efficiency considerations to cases where it has determined that the merger is likely to prevent or lessen competition substantially.⁵⁶

During the course of the Panel’s consultations, concerns were expressed about the time taken to review complex merger transactions and the use of formal investigative processes by the Competition Bureau, both of which can be time consuming and costly for the merging parties and other market participants.⁵⁷ Merger analysis needs to be conducted on a timely basis in the fast-paced world of modern business. At the same time, the Competition Bureau needs relevant information and a reasonable period of time to analyse transactions that raise complex issues. Seeking court orders to obtain more information or obtain an extension of the review period is unsatisfactory, for both the private and public sectors, because it diverts time and attention away from consideration of the substantive issues arising in connection with proposed merger transactions.

Given the identification of these issues and the importance of our merger review process being better harmonized with that of the US, the Panel is of the view that it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the US. This change would separate merger cases into two categories: those cases that are concluded (and effectively cleared) within 30 days of the initial filing, and “second stage” cases that raise complex competition issues. So-called “second stage” cases would be subjected to an additional review period that would terminate 30 days following full compliance with a “second request” for information.

To ensure that the merger notification provisions of the *Competition Act* are up-to-date and do not impose regulatory obligations on parties to proposed mergers that are disproportional to their potential to raise substantive competition issues, there should be a narrowing of the scope of these provisions by increasing the financial thresholds that trigger the notification obligation. In particular, the “size of parties” threshold in section 109 of the *Competition Act* has remained at \$400 million in Canadian assets or revenues since 1986. While the “size of transaction” threshold in section 110 was increased from \$35 million to \$50 million in 2002, a further increase is likely justified in light of the general appreciation of transaction values over the past five years. In addition to or in lieu of increasing financial thresholds, consideration should be given to creating more exemptions from merger notification for classes of merger transactions that do not raise competition concerns. Such changes can be effected relatively expeditiously by prescribing regulations under section 124 of the *Competition Act*.

One feature of the Canadian merger review that should be retained is the advance ruling certificate procedure that effectively provides a shortcut from the notification requirements in the *Competition Act* for merger transactions that do not raise significant competition issues. Indeed, the Panel believes that the interests of both the Competition Bureau and the business community would be served if the Bureau issued more guidance on the criteria the Commissioner of Competition applies in issuing advance ruling certificates.

Also in keeping with international norms, the Panel questions whether it is necessary for the Commissioner of Competition to have a three-year window to challenge a merger transaction after it is substantially completed.⁵⁸ A shorter period in which to challenge a transaction would provide more certainty for the Canadian business community and international investors. Moreover, the implications of a shorter time frame would engender very little change in practice, given that the Competition Bureau typically provides merging parties its views on whether the transaction raises substantive concerns in advance of the completion of the merger.⁵⁹

Modernizing the Criminal Provisions of the Act

The *Competition Act* contains criminal provisions addressing conspiracies, bid rigging, certain pricing practices as well as false or misleading advertising and marketing practices.⁶⁰ A number of these provisions have been the subject of ongoing debate concerning their effectiveness, as well as various legislative reform efforts.

The Panel is of the view that the criminal law, with its attendant sanctions including fines and imprisonment, 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. This is not the case with the price discrimination, promotional allowances and predatory pricing provisions. The Panel concludes that these practices should be addressed as civil matters reviewable by the Competition Tribunal.⁶¹ This was proposed in Bill C-19, and there is a consensus that the abuse of dominant position provisions provides an appropriate civil mechanism to address these practices. Moreover, taking this action would, again, harmonize our laws in this regard with those in the US.

The resale price maintenance provisions of the *Competition Act*, broadly speaking, address pricing issues that can arise between suppliers and resellers of a product, but do so as a criminal offence under the legislation. This is an area of Canadian competition law that is more restrictive than comparable US law.⁶² Other provisions of the *Competition Act*, such as those relating to refusal to deal and exclusive dealing, address competition issues between suppliers and resellers as civil matters. The Panel believes that resale price maintenance should also be treated as a civil matter.

There are strong arguments in favour of reforming the conspiracy provisions of the *Competition Act* that are out-of-step with similar laws of other developed countries and that have been the subject of international criticism. The conspiracy provisions are often described as the “cornerstone” of the *Competition Act* because they address cartel behaviour such as agreements between competitors to fix prices, allocate markets or customers, or limit production. These forms of illegal collaboration between competitors are particularly damaging to the competitive process because they reduce the normal economic incentives created by competitive markets to reduce costs and innovate, key factors that influence productivity.⁶³ This is particularly of concern, given that many cartels are international in scope, and substantive differences in the laws of the various countries that are affected by the same cartel can give rise to enforcement complications, particularly between Canada and the US.⁶⁴

At the same time, criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the “hardcore” cartel category, such as restrictions on advertising or strategic alliances, but that may harm competition nonetheless. A more sophisticated economic approach to address the latter has been advocated by the Bureau and other experts to deal with this category of agreements between competitors.

Penalties

There are a number of different ways of strengthening the civil provisions of the Act by empowering the Competition Tribunal to impose sanctions or penalties for breaches of the Act besides its existing order-making powers. These include providing administrative monetary penalties (AMPs) and awards of damages. A related measure to strengthen the civil provisions might be to allow greater access to the Competition Tribunal for private parties to initiate proceedings.

With further decriminalization of the pricing provisions of the Act and a consequent greater reliance on civil remedies, adequate penalties should be put in place to address violations of the law and prevent the repetition of anti-competitive conduct. The Panel can see the utility, as a deterrent, in providing for the imposition by the Competition Tribunal of AMPs of a modest amount under the *Competition Act's* abuse of dominant position provisions.

Amendments introduced in 2000 and 2002 provided for AMPs of up to \$15 million and other interim order powers to address the emergence of Air Canada as a dominant domestic air carrier. It is clearly inappropriate to have a monetary penalty for a violation of a civil provision that exceeds the maximum fine available for a criminal offence under the key conspiracy provision. Finally, most experts agree that, to the extent possible, having the *Competition Act* contain rules of general application is preferable to having industry-specific rules and exemptions that reduce the transparency and predictability of the legislation.

The existing regime of private access to the Competition Tribunal, which allows for the adjudication of competition issues involving suppliers and customers, has not been extensively used. However, there is a concern that extending private access to the abuse of dominance or merger provisions would serve to promote unmeritorious litigation between competitors that would not enhance the competitiveness of Canadian industry or markets. The Panel is of the view that empowering the Competition Tribunal to award damages should not be pursued for similar reasons.

Competition Advocacy

Competition advocacy refers to assessing the impact of laws and regulation on competition and market efficiency as well as promoting greater reliance on the role of competitive market forces in the economy. It can also include examining private sector behaviour outside traditional competition law enforcement. The Competition Bureau takes on some of these activities, including participation in regulatory proceedings, which is part of its legislative mandate, as well as market studies, which are conducted on an informal basis without recourse to judicially authorized investigative powers.

The Panel has heard a great deal about competition advocacy and agrees with the many stakeholders who stated that the absence of a formal ongoing process to undertake this function beyond the limited role that Parliament has given to the Competition Bureau constitutes a significant gap in Canadian competition policy.⁶⁵ At the same time, there are concerns about expanding the role of the Competition Bureau to include additional formal competition advocacy responsibilities in terms of possibly overwhelming its limited resources or causing the Competition Bureau to lose its focus on, or creating a conflict with, its core enforcement responsibilities. In this connection, the Panel is of the view that it is preferable to vest the responsibility for undertaking market studies as well as similar competition advocacy activities in another specialized and independent institution.

The Panel is of the view that the core mandate of the Competition Bureau is, and ought to continue to be, to enforce and promote compliance with the *Competition Act*.

The Panel recommends that:

14. The Minister of Industry should introduce amendments to the *Competition Act* as follows:

- a) align the merger notification process under the *Competition Act* more closely with the merger review process in the United States; the initial review period should be set at 30 days, and the Commissioner of Competition should be empowered, in its discretion, to initiate a “second stage” review that would extend the review period for an additional period ending 30 days following full compliance with a “second request” for information;
- b) reduce to one year the three-year period within which the Commissioner of Competition currently may challenge a completed merger;

- c) repeal the price discrimination, promotional allowances and predatory pricing provisions;
 - d) repeal the existing conspiracy provisions and replace them with a *per se*⁶⁶ criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects;
 - e) repeal the existing resale price maintenance provisions and replace them with a new civil provision to address this practice when it has an anti-competitive effect. This new provision should be subject to the private access rights before the Competition Tribunal;
 - f) grant the Competition Tribunal the power to order an administrative monetary penalty of up to \$5 million for violations of the abuse of dominant position provisions; and
 - g) repeal the “Air Canada” amendments that created special abuse of dominant position rules and penalties for a dominant air passenger service.
15. The Minister of Industry should examine whether to increase the financial thresholds that trigger an obligation to notify a merger transaction as well as whether to create additional classes of transactions that are exempt from the merger notification provisions of the *Competition Act*.
16. The responsibility for competition advocacy should be vested in the proposed Canadian Competitiveness Council. The power to undertake interventions before regulatory boards and tribunals under sections 125 and 126 of the *Competition Act* should remain with the Commissioner of Competition, unless and until such powers are granted to the proposed Council.
17. The Competition Bureau should reinforce its commitment to giving timely decisions, strengthen its economic analysis capabilities, give appropriate weight to the realities of the global marketplace and, where possible, provide “advance rulings” and other less formal advice to parties concerning prospective transactions and other arrangements on a timely basis to ensure compliance with the *Competition Act*.

8. Competitiveness Agenda: Public Policy Priorities for Action

As noted earlier, our work has been directed at establishing a clear plan of action for enhancing Canadian competitiveness. While there is a significant role to be played by the private sector, it is equally crucial for Canadian government policies to be calibrated to facilitate our global competitiveness. Governments must provide a solid framework, and set the conditions for the private sector to succeed.

National competitiveness will be achieved only if governments ensure that, across the areas that serve as the foundation of the economy, policies are appropriate to deal with Canada's circumstances in the global economy. In carrying out our examination of Canadian competitiveness, our mandate includes not only the core legislative and policy areas discussed in the previous chapter, but also the range of factors that constitute the conditions for success in the global economy.

We wish to emphasize that competitiveness is a journey, not a destination. Periodic reforms will not get us to where we need to be. Unless we keep moving forward as soon as we catch up, we will begin to fall behind. Canada's policy improvement process must be ongoing and continuous. We believe that the Competitiveness Council proposed later in this report will play a key role in assuring that improvement is continuous.

In this chapter, we discuss those public policy areas where we see reform as being most critical to Canada's future competitiveness. In the submissions we received and in the consultations we conducted, we were told that action in these areas is of equal or greater importance to Canada's competitiveness than action on our core mandate. We agree. By drawing attention to these issues and offering our recommendations, the Panel seeks to ensure that all levels of government dedicate the focus and attention that will be necessary to achieve Canada's economic objectives.

Taxation

In the global economy, both capital and people are increasingly mobile. Other things being equal, capital and people move to jurisdictions that offer lower taxes and higher returns. High business taxes reduce the return on investment, which in turn reduces domestic and foreign investment in Canada and discourages innovation and entrepreneurship.

Statutory income tax rates applicable to individuals and businesses remain relatively high in Canada. Historically, tax revenue as a percentage of gross domestic product in Canada has exceeded the OECD average.¹

The federal government has recognized the significance of reduced business taxes in improving Canada's international competitiveness. In its October 2007 Economic Statement, the federal government announced that it would reduce the federal corporate income tax rate to 15 percent by 2012.² The federal government's aim is to have the lowest statutory corporate tax rate in the G7. Likewise, several provinces have reduced their corporate tax rates and are eliminating capital taxes.

Income, Capital and Value-Added Consumption Taxes

Tax policy involves more than deciding how much revenue must be raised. An equally important policy issue is the design of a scheme of taxation and its impact on individual and corporate incentives and behaviour. For example, high corporate and personal income taxes discourage investment and work, whereas value-added taxes do not.

The superiority of value-added consumption taxes as a policy tool has been confirmed by research by the Institute for Competitiveness and Prosperity. Its study demonstrates that reducing corporate and personal income taxes would also benefit the average Canadian — more so than reductions in consumption taxes. Shifting taxation from business expenditure to consumption expenditure will increase the motivation for business investment, which in turn improves wages and job creation.³

Business investment in machinery and equipment, including advanced information and communications technology, has been shown to contribute to productivity and prosperity. In this regard, a study by economists from the Department of Finance suggests that a reduction of taxes on investment that results in a permanent and significant decline in the cost of capital will lead to a significant increase in investment.⁴

THE BENEFITS OF TAX HARMONIZATION

The most recent Ontario budget demonstrates the considerable tax savings that can be generated from tax harmonization between federal and provincial governments. As of April 2008, the Canada Revenue Agency began to collect and administer Ontario's Corporate Income Tax, Capital Tax, Corporate Minimum Tax and Special Additional Tax on life insurers.

As the 2008 Ontario Budget notes, "The single tax administration will reduce compliance costs for business and improve Ontario's competitiveness. Ontario businesses will save \$90 million annually in Ontario Corporate Income Tax from a harmonized corporate income tax base and up to an additional \$100 million annually in compliance costs from one tax return, one tax administration and one set of tax rules."⁵

While reduced consumption taxes also offer economic benefits, they do not specifically encourage investment and work. From the standpoint of Canada's competitiveness, an overwhelming majority of economists and submissions to the Panel which dealt with this matter argue that priority should be given to the reduction of income taxes over consumption taxes because they are more conducive to business investment, which in turn improves productivity, creates jobs and increases wages. The Panel accepts and agrees with these submissions.

In this regard, the federal goods and services tax (GST) is generally well conceived and superior to non-harmonized provincial sales taxes that tax capital investments. While several provinces have harmonized their retail sales tax regimes with the federal GST, Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island

have not.⁶ Beyond such retail sales taxes being a disincentive to capital investments, which enhance competition and productivity, in those provinces that have not harmonized their sales taxes, tax administration is also more complex and costly than it needs to be, making compliance for businesses and consumers more time-consuming and financially burdensome. Submissions made to the Panel highlighted instances in which the lack of harmonization and additional taxation on capital investment have affected investment decisions to the benefit of harmonized provinces.

Competitive Advantage

Unlike all other G7 countries, the federal government is in surplus and has been since 1997–98. This gives Canada a unique and historic opportunity to turn its fiscal advantage into a competitive advantage.

We believe that Canada must do more than try to "catch up" to other nations, particularly the US. With federal–provincial cooperation, Canada can and should move to secure a competitive edge. Given the rise in the Canadian dollar and US border impediments, Canada must use every means available to attract investment that might otherwise go to the US. Our fiscal strength is a source of competitive advantage in this regard. The Panel believes that it should be used.

The Panel recommends that:

18. The federal, provincial and territorial governments should continue to reduce corporate tax rates to create a competitive advantage for Canada, particularly relative to the United States.
 19. Provinces should expedite the phase-out of provincial capital taxes, and the provinces of Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island should move expeditiously to harmonize their provincial sales taxes with the goods and services tax.
 20. The federal, provincial and territorial governments should give priority to reductions in personal income taxes, particularly for lower- and middle-income Canadians, and should provide incentives for investment and work by shifting a higher proportion of governments' revenue base to value-added consumption taxes.
-

International Taxation

The Panel received submissions and heard presentations from a number of private sector tax advisers that Canada's tax system advantages foreign acquirers relative to Canadian acquirers in contests for Canadian assets, thereby undermining the competitiveness of Canadian-based companies and contributing to the acquisition of Canadian firms by foreign-owned companies.

Concerns were expressed to the Panel with respect to recent changes to Canadian tax legislation that will deprive Canadian companies making foreign acquisitions of some of the same advantages that foreign companies enjoy when making acquisitions in Canada. These measures will not enhance Canadian tax revenues but will disadvantage Canadian companies seeking to become global players. Our focus on Canadian competitiveness leads us to share the concerns we heard.

The Minister of Finance has announced an Advisory Panel on Canada's System of International Taxation to look at ways to make our international tax system more competitive and fair. The Panel is chaired by Peter Godsoe and is to report by December 1, 2008.⁷ Our recommendations below with respect to international taxation are made solely within the context of our mandate, which is focused on enhancing Canada's competitiveness.

The Panel recommends that:

- 21. The International Tax Panel should give particular attention to an assessment of tax provisions disadvantaging Canadian companies relative to non-Canadian companies in Canadian acquisitions, with the objective of recommending ways to allow Canadian-based companies to compete on an equal footing.**
 - 22. The International Tax Panel should assess the provisions of Canadian tax legislation limiting interest deductibility by Canadian companies in respect of foreign acquisitions to ensure that Canadian companies seeking to compete globally enjoy every advantage relative to their foreign competitors.**
-

Attracting and Developing Talent

Post-Secondary Education and Training

In recent years, the federal government set the goal of developing a knowledge advantage for Canada by creating the best educated, most skilled and most flexible workforce in the world. We believe that this is a critical goal: having a world-class education and training system should be a top priority for Canada.

In the knowledge-based economy, a skilled workforce is critical to attracting and retaining investment. For Canadians with strong education and training, the reward for meeting the economy's changing and rising labour market requirements is the opportunity to pursue good jobs and rewarding careers.

Fortunately, relative to most industrialized countries, Canada has high levels of human capital. Among OECD countries, Canada has the highest proportion of working-age adults with post-secondary education.⁸ Canada also attracts a relatively high proportion of foreign students enrolled in post-secondary education.⁹ This is an excellent foundation. However, to assure our future competitiveness, Canada needs to address emerging weaknesses. We need to produce more university graduates holding advanced degrees, particularly in math and science. We need to better match the abilities of Canadian workers with the changing skills needed in the economy. We also need to improve upon Canada's low levels of adult literacy and workplace training,¹⁰ improve Canada's level of business education relative to the US,¹¹ and attract and retain more international students.

Education and training is a broad and complex subject, and a full treatment of it is beyond the Panel's capacity. However, we see four specific means by which Canada can improve its educational performance in order to enhance its competitiveness.

First, governments must continue to commit to and invest in education and training. There is no reason to suggest that governments are not already aware of the profound importance of high-quality education to Canada's economic and social goals. We simply underscore the fact that continued improvement to our educational performance will require continued investments by governments. This is particularly important in light of increasing post-secondary education enrolment in many jurisdictions and the attendant operating and capital cost pressures borne by institutions serving more students.

UNIVERSITY CO-OPS

“Experiential learning is the cornerstone of the University of Waterloo. UW is home to Canada’s first and the world’s largest post-secondary co-operative education program. UW co-op gives students up to two years of work experience in their future professions, enables them to apply their classroom-acquired knowledge in real-life situations, and exposes them to opportunities rarely encountered in typical student jobs.”

David Johnston, President, University of Waterloo.

Second, our educational institutions must make choices in order to focus on achieving world-class expertise and pursuing excellence through greater specialization. To be competitive on the global scene, it is critical to aspire to be the best. Just as firms benefit from focus and economies of scale, so too can universities. Specialization and a continued drive to focus on excellence in chosen strategic areas is vitally important. Canada has some leading global institutions in specialized fields. We need more. The world's best students and professors can choose to go anywhere, and they typically choose the top universities in the world for their field of study. The attraction of top talent reinforces the excellence of these institutions.

Third, post-secondary education institutions must collaborate more closely with the business community. The model of the academy being withdrawn from the economy is outdated. Business–university collaboration is key to Canada's ability to be more competitive in the future. Business leaders can contribute to the governance, direction and financing of educational institutions. Close collaboration will help ensure that universities better prepare their graduates to capitalize on opportunities in the private sector by tailoring their programs to labour market needs. It is in Canada's best interest for programs taught on our campuses to be better aligned with our economic objectives.

Fourth, more use should be made, where appropriate, of post-secondary co-op programs, because they provide a vital link between the campus and the workplace. They help ensure that Canadians are equipped to meet future labour market needs and that students have a better understanding of business as they enter the labour market. Co-op programs also support Canada's commercialization performance by allowing students to complement their technical studies with real-world business experience.

The Panel recommends that:

- 23. Governments should continue to invest in education in order to enhance quality and improve educational outcomes while gradually liberalizing provincial tuition policies offset by more student assistance based on income and merit.**
- 24. Post-secondary education institutions should pursue global excellence through greater specialization, focusing on strategies to cultivate and attract top international talent, especially in the fields of math, science and business.**
- 25. Governments should use all the mechanisms at their disposal to encourage post-secondary education institutions to collaborate more closely with the business community, cultivating partnerships and exchanges in order to enhance institutional governance, curriculum development and community engagement.**
- 26. Federal and provincial governments should encourage the creation of additional post-secondary education co-op programs and internship opportunities in appropriate fields, to ensure that more Canadians are equipped to meet future labour market needs and that students gain experiences that help them make the transition into the workforce.**
- 27. Governments should provide incentives and undertake measures to both attract more international students to Canada's post-secondary institutions and send more Canadian students on international study exchanges.**
- 28. Governments should strive to increase Canada's global share of foreign students, and set a goal of doubling Canada's number of international students within a decade.**
- 29. Governments, post-secondary education institutions and national post-secondary education associations should undertake regular evaluations, measure progress and report publicly on improvements in business-academic collaboration, participation in co-op programs, and the attraction and retention of international talent.**

Immigrant Selection and Integration

Seventy-five percent of Canada's workforce growth now comes from immigration, and this is expected to reach 100 percent before the decade ends.¹² At present, one in five Canadian workers are foreign born.¹³ In many regions and sectors, Canada is experiencing acute skills shortages, which slows economic growth. As our population ages and labour force growth declines, attracting and retaining skilled workers will become even more important.

Recent studies indicate that our record on immigrant integration is deteriorating. While recent immigrants have high average levels of education, their incomes relative to their Canadian-born counterparts eroded over the past 25 years. In 1980, immigrant men who had some employment income earned 85 cents for each dollar received by Canadian-born men. By 2005, the ratio had dropped to 63 cents. The corresponding numbers for immigrant women were 85 cents and 56 cents, respectively.¹⁴

Efforts to improve Canada's competitiveness will require Canadian governments, professional and trade associations to expedite efforts to assess and recognize foreign credentials. In 2001 alone, more than 340 000 Canadians held unrecognized foreign credentials, mostly post-secondary degrees and diplomas.¹⁵ Part of the answer is for employers to show greater openness to immigrants with foreign education and experience.¹⁶ But systemic change is also required.

An impediment to progress has been Canada's backlog in processing immigrant applications. As of June 2007, the backlog of immigrant applications to Canada was 870 000 cases, of which 570 000 were in the skilled worker category.¹⁷ Depending on the country, some wait more than five years to finalize their applications. This backlog has meant long waits for prospective Canadians and lost opportunities for a Canadian economy that requires their skills.¹⁸

In order to meet urgent employer needs, Canada has introduced a Temporary Foreign Worker Program. Budget 2007 announced changes to streamline this program to enable employers to bring in workers more quickly to address their immediate labour shortages. The federal government also introduced the Canadian Experience Class to expedite the process for skilled temporary foreign workers and foreign students with Canadian credentials and work experience to remain in Canada as permanent residents. Budget 2008 announced further action to help address the growing demand at Canadian missions abroad for temporary resident visas for students and skilled workers, and committed to improve service and speed up processing for student visas.¹⁹

IMMIGRATION ADVANTAGE

In July 2007, Microsoft announced the opening of a new Microsoft Canada Development Centre in the Greater Vancouver area. The location “allows the company to recruit and retain highly skilled people affected by immigration issues in the US” and to “attract the next generation of leading software developers from all parts of the world.”²⁰

Canada’s immigration policy and attractiveness to highly educated and skilled immigrants can and should be used as a source of competitive advantage, particularly vis-à-vis the US.

Finally, the Panel heard that our immigration policies impact Canada’s attractiveness to investment and, particularly, as a site for corporate and divisional head offices. Our policies should facilitate management interchanges to give Canadians global experience and allow diffusion of international capabilities, and to preclude restrictive and time-consuming immigration procedures from becoming an impediment to the timely approval of multi-year secondment of foreigners to Canadian sites. In this connection, consideration must be given to providing working status to accompanying spouses and children.

The Panel recommends that:

- 30. Reforms to Canada’s immigration system should place emphasis on immigration as an economic tool to meet our labour market needs, becoming more selective and responsive in addressing labour shortages across the skills spectrum.**
- 31. Canada’s immigration system should develop service standards related to applications for student visas and temporary foreign workers, and should be more responsive to private employers and student needs by fast-tracking processing and providing greater certainty regarding the length of time required to process applications.**
- 32. In order to ensure that Canada is able to attract and retain top international talent, and respond more effectively to private employers, Canada’s immigration system should fast-track processing of applications for permanent residency under the new Canadian Experience Class for skilled temporary foreign workers and foreign students with Canadian credentials and work experience.**

Head Offices and Cities

Head Offices

The head office of an enterprise is its “brain.” It is the place where strategy and other critical decisions are made by its key management personnel. Very large multinational enterprises (MNEs) that operate in more than one line of business will sometimes establish a divisional head office to provide such functions to a particular business or geography within parameters determined by the corporate head office. When one company acquires another, the head office of the acquirer invariably becomes the head office of the combined enterprise.

While Canadian head offices tend to be small, employing on average fewer than 50 employees,²¹ they are a significant source of high-skilled, high-paying jobs. In 2005, average salaries at head offices in Canada were \$74 900, well above the overall average salary of \$37 800.²² In addition to their direct employment impacts, head offices make a significant indirect contribution by attracting high value business services—legal, accounting, consulting, information technologies, marketing and advertising—to the community. The communities in which head offices are located also benefit from philanthropic activities. These include corporate charitable contributions, support for specific community causes and initiatives to encourage volunteering by senior managers and employees, who often play leading roles in such organizations.

In light of the evident benefits of head office activity, the spate of Canadian merger and acquisition activity in recent years and the resulting loss or downgrading of head office functions at acquired firms have given rise to unease about the impact on Canada and its leading head office cities: Toronto, Calgary, Montreal and Vancouver. The statistics indicate that, while Calgary is gaining head offices and Montreal and Vancouver are losing them, in the aggregate Canada is not losing head offices.²³ This analysis and the lack of research quantifying the value of head offices have led some to conclude that public policy need not be concerned about the implications of the loss or downgrading of head office functions consequent on the sale of large Canadian companies. While the Panel does not dispute the statistics, we dispute that view. Our experience tells us that the head offices of large private companies and of public companies disproportionately provide the benefits that a head office provides to its host city and country. When a Canadian company is acquired by another Canadian company, Canada loses a head office but gains a stronger company. When the acquirer is foreign, Canada loses a head office and a company.

To ensure that Canada continues to benefit from head office presence, Canada needs to have public policies that nurture and develop Canadian-based MNEs (whose head offices will replace those of companies that are being acquired by foreigners). Canada also must ensure that its major cities have the attributes that will make them an attractive base for the divisional offices of non-Canadian MNEs. The United Nations Conference on Trade and Development²⁴ identifies eight key factors influencing the location of MNE head offices: excellent international accessibility, a skilled workforce especially with multilingual skills, high quality of life to attract international staff, low corporate and personal taxes, excellent information and communications technology infrastructure, well-developed business support services, low risk and proximity to customers. The study particularly emphasizes the importance of a highly skilled workforce.

The recommendations in this report, if heeded and implemented, will enhance Canada's competitiveness as a destination for capital and talent as well as the emergence of Canadian-based MNEs. As a consequence, they will enhance the quantity and quality of head offices located in Canada, and the associated benefits will accrue to Canadians.

Cities

In *The Rise of the Creative Class*, Richard Florida argues that successful cities attract the "creative class" by offering diverse job opportunities as well as social and cultural amenities. The creative class is a "fast-growing, highly educated and well-paid segment of the workforce on whose efforts corporate profits and economic growth increasingly depend."²⁵ The continued growth and success of our cities lie in their ability to attract and retain the best and the brightest.

Canada demonstrates Florida's thesis. More than 80 percent of Canadians live in urban areas, anchored by Toronto, Montreal, Vancouver, Ottawa–Gatineau, Edmonton and Calgary.²⁶ Canadians will continue to urbanize.

Our major urban areas are therefore the locus of talent. They attract the highly educated from within Canada, and they are also magnets for talent from abroad as the primary gateways for recent immigrants. Immigrants settle in large cities in pursuit of job prospects. In fact, 97 percent of recent immigrants settled in urban centres — fully 69 percent of these in Toronto, Montreal, and Vancouver²⁷ — bringing new cultural and linguistic diversity to Canada and a network of global connections. In short, our cities provide the critical mass of talent and productive capacity, underlie innovation, and attract investment and employment. It is no surprise, then, that our biggest and most competitive firms are located in our

six largest urban centres. Indeed, these six urban centres are the sites of 62 percent of all head offices in Canada.²⁸

We have concluded that these large, dynamic urban centres have a national importance that transcends their significance to a region or province, in the same way that the national railways were recognized in the 1800s as having a national significance. Our largest urban centres have a role to play in assuring Canada's future prosperity that transcends their municipal and provincial boundaries.

Canadian cities continue to rely primarily on property taxes and user fees to finance municipal services. In the US, all cities levy a selective sales tax of some kind. For example, alcohol and beverage taxes are levied in Atlanta, Chicago, and Detroit, while tobacco taxes are levied in Chicago.²⁹ Many other cities employ user fees, cost recovery, and public-private partnerships to address funding issues. Most cities in other OECD countries have broader and more secure tax bases than Canadian cities.³⁰

In addition to costs associated with a growing population, urban centres bear the burden of maintaining and building new infrastructure and integrating immigrants. As the Conference Board of Canada concludes, "The infrastructure of Canada's major cities is not keeping pace with the needs of the manufacturing and service businesses whose competitive advantage is tied to the existence of a modern, accessible and reliable network of roads, rail and air transport."³¹ It is estimated that the cost of repairing or replacing civic infrastructure (public transit, roads, highways, bridges, and waterworks) to meet current requirements ranges from \$50 billion to \$125 billion.³²

In recent years, governments have begun to address these funding issues. In 2007, the federal government announced *Building Canada*, a seven-year plan totalling \$33 billion; part of this is earmarked to municipalities, including the GST rebate and Gas Tax Fund.³³ There are also notable new investments by the provinces of Quebec, Ontario and others.

During the Panel's consultations and in the submissions we received, there was recognition of the advantage to Canada of the effective functioning of large urban centres. There was also recognition that the lines of accountability, program and service responsibility, and revenue sources in Canada are misaligned with respect to urban centres. While the federal and provincial governments possess the key levers to raise revenue, municipal leaders are responsible for administering urban centres with inadequate access to secure revenues. This results in poor governance and declining quality of life in our urban centres, with negative knock-on effects on Canada's competitiveness.

Governments should establish a more adequate, stable and diversified revenue base to underpin Canada's urban centres. Canada's municipalities, particularly those anchoring our largest urban areas, need to be seen as key partners in executing Canada's Competitiveness Agenda, and to be given the tools to attract the business, investment and talent needed for the continued growth of our economy.

The Panel recommends that:

- 33. Given the national importance of Canada's largest urban centres, the federal government should provide leadership to deal with critical urban issues, particularly those affecting infrastructure, immigration, and higher education and training.**
 - 34. In addressing urban issues, municipalities need a more stable, secure and growing revenue source. In particular, provincial governments should assess the feasibility of allowing any municipality to levy a 1 percent value-added tax within their jurisdiction, assessed on the harmonized goods and services tax base, which would be collected by the Canada Revenue Agency (or Revenue Quebec) on behalf of the municipality.**
 - 35. In dealing with these issues, municipal authorities that have not already done so should make greater use of financing mechanisms such as user fees, cost recovery programs, debt financing and public-private partnerships.**
-

Fostering Growth Businesses

Entrepreneurs are people who identify and capitalize on economic opportunities. They innovate, take risks, and develop new goods and services. They are responsible for the creation and expansion of businesses, and fuel overall economic expansion.

Small and medium-sized enterprises (SMEs) are an important part of the Canadian economy. In the dynamic global economy characterized by the forces of creative destruction, SMEs with the desire and capacity to grow are a key source of Canada's future prosperity.

SMEs represent over 99 percent of all firms in Canada, 48 percent of the total labour force in the private sector, and over 30 percent of all new jobs.³⁴ One study estimates that 22 percent of gross domestic product could be attributed to companies with fewer than 50 employees.³⁵ While SMEs are defined as firms with 500 employees or fewer, most Canadian SMEs have fewer than four employees.³⁶

Productivity growth is affected by the birth and death of small firms. Only a small number of new business start-ups will survive and grow, and an even smaller number have the potential to grow to become high-performance firms that will drive innovation and performance and become Canada's future large enterprises.

Survival is the main preoccupation of small business: only 54 percent of businesses with fewer than 99 employees survive for two years, and closer to 20 percent survive for 10 years.³⁷ At the same time, not all small firms have the intention to grow. A survey conducted by the Business Development Bank of Canada confirms that not all business owners plan to expand their businesses.³⁸

There is currently no overarching federal government policy covering SMEs or entrepreneurs, other than the 1994 declaration "Growing Small Businesses."³⁹ At the federal level alone, the government offers support to SMEs through at least 13 different departments. Many more programs and services are offered by provincial governments. As a result, some businesses have found it difficult to identify and access programs meeting their particular requirements, even when they exist.

While the keys to success are diverse, our consultations and submissions identified the critical importance of accessing financing. The principal deficiencies identified were venture capital available at the "angel" and late stage.

Budget 2008 announced \$75 million for the Business Development Bank of Canada to support the creation of a new privately run venture capital fund.⁴⁰ Several provinces have also made similar commitments, such as the British Columbia Equity Capital programs and the Ontario Venture Capital Fund. The Panel acknowledges the governments' recognition of this issue. However, in our view, investors putting their own capital at risk should make capital allocation decisions, as market forces will better determine successful outcomes. The role of government is to enhance returns to the level necessary to attract sufficient capital to this activity through, for example, the tax system.

The Panel recommends that:

- 36. Federal and provincial governments' small and medium-sized enterprise policies should focus on those firms that demonstrate the desire and capacity to grow to become large enterprises. Small and medium-sized enterprise policies and programs should be subjected to regular review in order to assess and measure whether this objective is being met.**
- 37. The Minister of Finance and the Minister of Industry should develop and release a public report on options, including tax incentives, to facilitate the provision of more private venture capital, particularly at the "angel" and late stage, by June 2009.**

Strengthening the Role of Directors in Mergers and Acquisitions

The details of the regulatory and legal frameworks governing the exercise by public company directors of their fiduciary duties are of narrow professional interest. However, the market for corporate control affects not only public shareholders but also the career opportunities and community benefits associated with large Canadian publicly traded enterprises and their head offices. This is why the “hollowing out” debate is of broad significance to Canadians.

The Panel received a number of submissions to the effect that an important factor contributing to the perceived imbalance between the acquisition of Canadian companies by foreigners and the acquisition of foreign companies by Canadians is the limited tools available to directors of Canadian public companies when exercising their fiduciary duties in regard to an acquisition proposal, relative to directors of US public companies.

In examining this issue, the Panel sought advice from lawyers and investment bankers with deep experience on both sides of the border. The position of directors of a federally incorporated Canadian company was compared with that of the directors of a US company incorporated in the State of Delaware, on the basis that these are the benchmark jurisdictions of incorporation for public companies in each country. We asked how differences in the legal and regulatory framework in which the directors function would impact their margin for manoeuvre. This involved looking at the applicable corporate law, securities law and enforcement mechanisms, and roles played by the courts and securities regulators.

Except in rare cases, directors’ duties imposed by corporate law do not give rise to material differences in the responsibilities or actions of the directors of Canadian relative to Delaware companies in deciding whether to engage in a process to sell a company in response to an unsolicited acquisition proposal. The relevant statutes provide that directors of Canadian companies owe their fiduciary duties to the “corporation” while Delaware directors owe their duties to the shareholders. However, where the choice between selling the company and remaining independent to pursue the company’s business plan materially impacts only the value of the shareholders’ investment, this difference in terminology is of no practical effect. Once a company is “in play” directors on both sides of the border have an obligation to maximize the value of the company. However, where the decision materially impacts the value of the investments of other stakeholders such as creditors, as a fiduciary matter, while directors of a Delaware company may focus only on the interests of shareholders in maximizing the value of the company through a sale, directors of Canadian companies are required to consider those other interests as well.⁴¹

Stock exchange rules in the two countries have very little impact on director response to an acquisition proposal. In fact, Toronto Stock Exchange policy (which the Panel has been advised is under review) with respect to the issuance of shares to facilitate acquisitions without shareholder approval is an important advantage for Canadian companies pursuing acquisitions.

The key difference in regulation on the leeway available to directors arises from the greater role played by Canadian securities regulators with respect to takeover defences. In the US, the securities regulator (the US Securities and Exchange Commission) has a very limited role respecting conduct of takeover defence. In Canada, the policies of Canadian provincial regulators and the active role they play in enforcing them place a “thumb on the scale.” This arises from the way Canadian securities regulators deal with defensive tactics and, in particular, shareholder rights plans (“poison pills”).

Unlike the US Securities and Exchange Commission, which leaves to the US courts the regulation of substantive decision making by directors, Canadian securities regulators are prepared to actively supervise the exercise by directors of their fiduciary duties in relation to change of control proposals. Established policy is reflected in National Policy 62-202 (Defensive Tactics). The policy essentially relegates the directors of a company in receipt of a credible acquisition proposal to the role of auctioneer. In keeping with this orientation, Canadian securities regulators have a well-established policy of requiring, in almost all cases, the termination of poison pills within 40 to 70 days from the commencement of a bid. Acquirers have come to rely on this time frame. This relatively short period, predictable outcome and policy stance provide almost no leverage to a board seeking to negotiate with a potential acquirer.

The posture of Canadian securities regulators was developed approximately 20 years ago in a market environment where there were no hedge funds and institutional shareholders were by and large passive investors. Corporate governance practices and the focus on directors’ and management conduct were also very different from those of today. The regulator filled a void left by deferential Canadian courts. Since then, our courts have demonstrated a willingness and capacity to deal with directors’ duties in a timely manner, and standards of corporate governance have improved in response to investor activism and the “Enron affair.” Today’s institutional shareholder routinely pursues and protects its interests in a more active and aggressive manner than when these policies and practices were developed.

In fact, the outcome of public acquisition proposals, whether hostile or not, is determined today by an efficient market in which shareholders of the target company can, and often do, sell immediately into a liquid market, which enables them to monetize the proposal at a discount even before the board of the target company has pronounced on it. Every share that moves into the hands of these arbitrageurs is a vote for the proposal and increases the likelihood that the target company will be sold. However, the tools available to the directors can affect the price and, in rare cases, lead to an unbridgeable price gap that causes the acquisition proposal to fail. The Panel concludes that the market for corporate control has matured to the point where it no longer requires the regulator's compensating "thumb on the scale" to achieve a competitive result.

The Panel concludes that the new global context in which mergers and acquisitions (M&As) occur requires that Canada update its regulatory framework to place the directors of Canadian companies on the same footing as their counterparts at Delaware companies. The changes required are straightforward.

Ontario is generally recognized as the leading jurisdiction in securities regulation of M&A. This is due to the fact that Toronto is home to more public company head offices than any other city, and that head office location is the basis for provincial securities commission jurisdiction in M&A matters.

The Panel recommends that:

- 38. Securities commissions should repeal National Policy 62-202 (Defensive Tactics).**
 - 39. Securities commissions should cease to regulate conduct by boards in relation to shareholder rights plans ("poison pills").**
 - 40. Substantive oversight of directors' duties in mergers and acquisitions matters should be provided by the courts.**
 - 41. The Ontario Securities Commission should provide leadership to the Canadian Securities Administrators in making the above changes, and initiate action if collective action is not taken before the end of 2008.**
-

The Canadian Economic Union

One of Canada's defining characteristics is its regional diversity, as reflected in the Canadian federal system, with individual provinces and municipalities setting their own policies based on local priorities.

The division of powers in the Canadian constitution was developed in the context of an agrarian economy in which the speed and distance that goods could be moved was limited by the capacity of the "iron horse." This framework has not evolved to keep pace with Canada's changing economic context. The result is a misalignment of revenue sources with program responsibilities. More importantly in terms of Canada's competitiveness, powers and responsibilities are misaligned with the national challenges of a global knowledge-based economy.

The resulting internal barriers to the free movement of goods, services and people drive up costs and weaken Canada's competitiveness for talent and capital because of the resulting complexity and market fragmentation. Canada is a small market and, as a study by SECOR rightly concludes, "Country fragmentation makes a small economy smaller, and translates into a loss of business opportunities and additional costs for domestic players."⁴²

The submissions received by the Panel and research conducted for the Panel make it clear that this failure to evolve our governance at a sufficient pace may be laid at the feet of all levels of government and the courts. While it is difficult to place a credible dollar cost to this issue, the Panel concludes that the negative impact justifies dramatic and immediate action.

Canadian governments need to work better together if we are to achieve our competitiveness objectives. Our courts need to take account of contemporary realities in defining the powers of the various levels of government under the existing constitutional arrangements. The various levels of government must cooperate in the national interest. Because the national interest is in play, the Panel calls on the federal government to show leadership by taking the initiative and employing all legal and financial tools available to it. We are encouraged by the federal government's signal in the most recent Throne Speech that it is prepared to do so.

To illustrate the problem, we discuss below three specific situations selected from the many that were brought to our attention in submissions and consultations.

Agreement on Internal Trade

In 1994, federal and provincial governments signed the Agreement on Internal Trade (AIT). It was intended to reduce or eliminate barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic Canadian market.⁴³ In the 14 years since the AIT was put in place, progress has been far too slow.

INTERPROVINCIAL BARRIERS

Anyone can be an accountant in Canada, but not anyone can provide independent audits. Since provinces individually regulate public accounting services, whichever professional body is recognized in a province gets to decide who can provide independent audits. Panels convened under the AIT in 2001 and 2005 found that Ontario and Quebec regulations were inconsistent with the AIT and impeded internal trade and labour mobility. Nevertheless, progress has been slow, since the AIT dispute resolution process has no mechanism to ensure rulings are implemented.⁴⁴

The AIT suffers from many weaknesses. In particular, its scope is limited to specified sectors. It has an ineffective dispute settlement mechanism that is slow and unresponsive to the private sector. It relies wholly on moral suasion and good faith. While governments appear committed to strengthening the AIT, there has been more input than output.

The bilateral approach negotiated by British Columbia and Alberta in the Trade, Investment and Labour Mobility Agreement is promising but restricted to two jurisdictions, and its effects are not yet known. Bilateral discussions between Ontario and Quebec may also yield results, but a national effort is clearly preferable to bilateral progress.

Other federations find ways to address this. Australia, a federation not unlike Canada, enacted the *Mutual Recognition (Commonwealth) Act* 1992. The essence of this statute is that goods produced in one jurisdiction, which may be lawfully sold in that jurisdiction, may also lawfully be sold in other jurisdictions. They have also taken this step for the mutual recognition of occupational credentials. The European Union has in place a common market policy based on the free movement of goods, services, people and capital, and has achieved much progress.⁴⁵

On April 1, 2008, a national coalition of ten business, industry and professional associations urged the federal and provincial governments to cooperate in finding ways to strengthen the economic union. The coalition called on Ottawa to take the lead in improving trade across Canada by legislating a set of open trade

principles and establishing a standing internal trade tribunal to ensure that all parties adhere to those principles:

“Across the country, governments have awakened to the fact that internal trade barriers hurt consumers, discourage investment and damage Canada’s international reputation as a place to do business. The time has come for a bold new approach that strengthens the economic union and enhances Canada’s prosperity and competitiveness.”⁴⁶

We agree.

In particular, we encourage the Forum of Labour Market Ministers to achieve their stated goal of enabling any worker qualified for an occupation in one part of Canada to have access to employment opportunities within that occupation in any other province or territory by the April 1, 2009 deadline established under the AIT.⁴⁷ Other internal barriers to interprovincial movement of goods and services would benefit from a corresponding objective and a similar deadline.

The Panel recommends that:

- 42. The federal government should provide leadership in the elimination of all internal barriers between the provinces and territories that inhibit the free flow of goods, services and people by June 2011.**
 - 43. Federal and provincial governments should establish by June 2009 a work plan to achieve this goal and provide interim reports on progress every six months.**
-

National Securities Regulation

Canada is the only OECD country that has not adopted an integrated national approach to securities regulation. Despite past and present efforts to harmonize, we currently have 13 securities regulators, with 13 sets of laws and 13 sets of fees.⁴⁸ The inefficiencies are obvious.

Canada clearly would benefit from a streamlined regulatory approach. The International Monetary Fund asserted earlier this year that more streamlined securities regulation would: allow Canada to respond more quickly to local and global developments, reduce costs for market participants, eliminate the inefficiencies created by the limited authority of individual provinces, and help simplify coordination with other enforcement agencies.⁴⁹

The Panel is encouraged by the continued focus that is being dedicated to the issue of securities regulation in Canada. In February 2008, the federal government named an Expert Panel, chaired by Tom Hockin, to provide advice and recommendations by year end on securities regulation in Canada. We are particularly encouraged that that Panel has been asked to examine how Canadian regulations can minimize impediments to cross-border capital flows.⁵⁰

The Panel recommends that:

- 44. The federal government should show leadership regarding national securities regulation and resolve this matter expeditiously.**
-

Environmental Assessment

Canadians place great value on ensuring a healthy and sustainable environment for current and future generations. Responsible environmental stewardship will continue to be important to both our quality of life and the competitiveness of our economy.

At the federal level, environmental assessment is undertaken by departments, agencies, boards, commissions and Crown corporations. The Canadian Environmental Assessment Agency, which reports to the Minister of the Environment, provides coordination, advice and policy guidance. In 2005, the federal government issued a Cabinet Directive to all departments that indicated that it will conduct environmental assessments under the *Canadian Environmental Assessment Act* in such a way that “places a priority on the delivery of high-quality environmental assessments in a predictable, certain and timely manner.”⁵¹

The Panel has heard that improving certainty and timeliness and reducing duplication between the federal and provincial processes for environmental assessment is key. Often a major project proposal will be subject to both provincial and federal environmental review. The difficulties lie in the differing timelines and potential duplication of efforts, which directly affect important investment decisions. The more complex assessments, including large-scale natural resource projects, have been lengthy, often extending up to several years at the federal level.

The British Columbia government has a good model of applying timelines to key parts of the process. Once a completed application is accepted, the British Columbia government commits to complete the review, prepare the assessment report and refer the application to ministers for a decision on the issuance of an environmental assessment certificate within a set 180-day time frame. Ministers are then obliged to make a decision within 45 days.⁵²

The federal Major Projects Management Office is intended to bring a greater degree of oversight, transparency and predictability to the review of major natural resource projects, including developing and reporting on project agreements and time frames for regulatory review.⁵³ It is too early to evaluate its impact.

While the Canadian Environmental Assessment Agency has assumed new responsibilities for managing major resource projects, addressing many of the underlying issues related to diffuse accountability under the current *Canadian Environmental Assessment Act* will require legislative change. The Act will be reviewed by Parliament in 2010, and issues of accountability, cooperation and timeliness should be examined. We believe that the federal government should commit to establishing meaningful deadlines for completing its environmental assessments and respect the timelines of the relevant provincial jurisdiction.

The Panel recommends that:

- 45. The federal government should more fully harmonize federal environmental assessment procedures with provincial processes.**
 - 46. Beginning January 2009, the federal government should abide by timelines that are not longer than the environmental assessment timelines set by the relevant provincial jurisdiction for a proposed project subject to assessment and incorporate such timelines as part of the broader national review required for 2010.**
-

Canada–US Economic Ties

NAFTA has been a success for Canada. It is vital to safeguard and augment its benefits. Canada and the US trade over \$1 million worth of goods and services with each other every minute of every day of the year. In the wake of NAFTA, Canada restructured parts of its economy to better integrate with the US. We must make every effort to capitalize on this investment of time, capital and effort, recognizing that this is far and away Canada’s most important near-term economic opportunity.

The common observation that over 70 percent of our trade is with the US belies the fact that the Canadian economy is more closely integrated than ever with that of our southern neighbour. Stephen Blank notes, “Ottawa and Washington talk about the world’s largest bilateral trading relationship. But we really don’t trade with each other, not in the classic sense of one independent company sending finished goods to another. Instead we make stuff together.”⁵⁴

This is epitomized by how new business models work. For example, an automobile may contain components that have crossed the border 18 times before the finished product reaches the car lot on either side of it. Two-way truck traffic volumes facilitating this trade means approximately 13 million cross-border journeys a year.⁵⁵ The majority of this trade is intra-firm; the remainder is within global value chains rather than traditional exports or imports.

Since September 11, 2001, the Canada–US border has “thickened,” threatening the viability of the fully integrated NAFTA business model. The problem is that

“for Americans the border is a security issue; for Canadians it is a vital business artery that has become clogged.”⁵⁶ The Conference Board of Canada observes that document processing and other procedural delays at border crossings mean that “just-in-time” manufacturing (of supply chain inputs) is in danger of being replaced by much more costly and inefficient warehouses on either side of the border “just-in-case.”⁵⁷ Because the US market is so much larger than the Canadian market, these concerns weigh against the establishment in Canada of business activity to serve the North American market.

SLOW STANDARDS HARMONIZATION

“... the continued presence of a heavily regulated border and of similar but differentiated regulatory regimes still undermines the ability of firms and individuals alike to reap the full benefits of deepening integration.”*

A single market for automobiles in North America has been in the making since 1965. As of 2008, however, this process is still not complete.

* Source: Michael Hart, “Steer or Drift? Taking Charge of Canada–US Regulatory Convergence,” C. D. Howe Institute Commentary no. 229, March 2006.

The chief mechanism to deal with Canada–US border issues, the Security and Prosperity Partnership (SPP), has yielded too little progress in improving cross-border flows. Indeed, Canada risks being side-swiped by the preoccupation the US has with its southern border.⁵⁸ The most recent SPP Summit confirms that little progress can be expected within a relevant time frame. In this context, the Panel believes that it is imperative to intensify our bilateral effort with the US, focusing on facilitating the flow of goods, services and people across the Canada–US border. If we are forced to choose between trilateral and bilateral efforts, the latter should be chosen. Enhanced public recognition of the benefits of the Canada–US trading relationship south of the border should also be part of this effort.

Recognizing the vital contribution of Canada–US trade to Canadian prosperity, a two-faceted approach is necessary. The first and most immediate priority is to deal with logistics and physical infrastructure logjams at the border, starting with Windsor–Detroit (the conduit for 30 percent of total Canada–US trade⁵⁹), and then other crossings. The Canadian and US Chambers of Commerce have produced a joint study on reducing border costs that outlines a number of recommendations that would facilitate cross-border shipping and complement our broader recommendations.⁶⁰ The federal government must also lead on enhancing our transport infrastructure, beginning at the border.

The Panel recommends that:

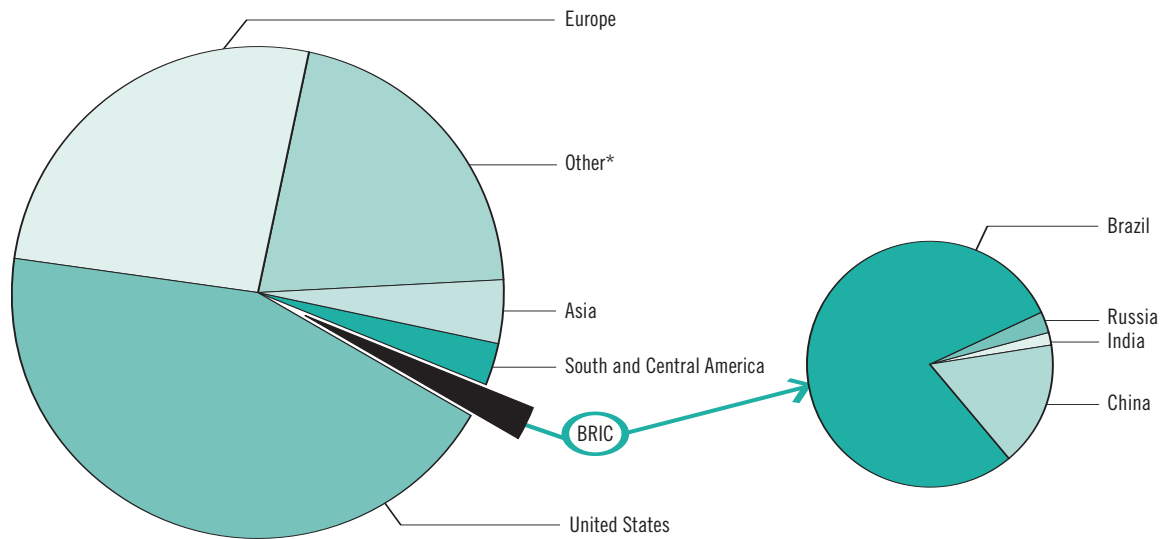
- 47. Addressing the thickening of the Canada–US border should be the number one trade priority for Canada, and requires heightened direct bilateral engagement at the highest political levels.**
 - 48. Canada should act to create a more seamless US border crossing process, focusing on priorities jointly identified by the Canadian Chamber of Commerce and US Chamber of Commerce in their February 2008 report, while responding to legitimate US security needs, and funding and expediting vital border infrastructure.**
-

International Trade and Investment

Much of Canadian wealth and well-being is directly attributable to our success as a trading nation. Canada is the second most trade-intensive country in the G7, with total trade amounting to 70 percent of gross domestic product.⁶¹ Complementing the increase in importance of trade in the Canadian economy, Canadian investment flows have also increased throughout the postwar period. Although Canada has always been an important destination for foreign direct investment, Canadian direct investment abroad has also increased as the Canadian economy has matured.⁶²

While the US is Canada's biggest trading partner, new trading patterns and potential partners have emerged — in the European Union, South America, Asia and the growing BRIC countries. These are too numerous to tackle simultaneously, so priorities among them must be established.

Figure 11 — Geographic Distribution of Canadian Direct Investment Abroad, 2007



*Caribbean, Africa, Oceania and Mexico

Source: Statistics Canada, CANSIM Table 376-0051.

Too Little Engagement with Global Markets

While Canadian investment flows are more diversified than trade flows, too few Canadian companies have excelled at exploiting new economic opportunities beyond the US or in regions outside those where we have long-standing relationships. To be competitive, Canadian business must engage internationally, invest shrewdly, and marshal the skills and resources to add value and seize global opportunities. The government also has a role to play. As the Canadian Manufacturers and Exporters note, Canadian firms “require a world-class business environment in order to be world-class competitors. In turn, they depend on governments to take a strategic approach to policy making. ...”⁶³

The Panel notes that Canada has recently launched a Global Commerce Strategy (GCS). The GCS is a three-part strategy to increase Canadian participation in global investment and innovation networks beginning in North America, renew the Canadian international trade negotiations agenda, and better connect Canadian companies to global opportunities through realigned services to business.⁶⁴

However we have heard through our consultations that, unlike the initiatives of other countries competing for markets on behalf of their companies, the GCS is lacking in profile and poorly understood, including by Canadian businesses.

Clear Plans and Priorities

Canada must ramp up its participation in new trading relationships and more aggressively pursue opportunities in the world economy, or risk being left behind. With poor prospects for a successful Doha Round of multilateral trade negotiations at the World Trade Organization (WTO), the onus is now on governments to focus on bilateral and regional arrangements through free trade agreements (FTAs) and foreign investment protection agreements (FIPAs).

The purpose of FTAs is to improve market access for trade in goods and services, either regionally or bilaterally. FTAs deliver commercial benefits by reducing tariffs, as well as discriminatory non-tariff barriers in areas such as standards or restrictions on services trade. These agreements have proliferated throughout the world. Since 2001, the US concluded 15 FTAs, and the EU has been similarly active. However, Canada has a poor record of concluding such deals and, despite an active negotiating agenda, has signed only three recent FTAs (with European Free Trade Association countries, Peru and Colombia).

One reason for this weak performance has been the difficulty in dealing with specific sectors in the Canadian economy. For example, the Panel understands that interests associated with the shipbuilding, textile and apparel, and agricultural sectors have at times actively opposed the conclusion of trade agreements that more broadly serve the goals of Canadian productivity and competitiveness domestically. This has served to deprive Canada of the benefits that accrue to the economy through greater competition. Insofar as the government liberalizes its investment restrictions generally and in specific sectors, it is more able to negotiate trade and investment agreements in Canada's economic interests.

Canada also has a poor track record at completing FIPAs or bilateral investment treaties (BITs). These agreements provide protection against expropriation without compensation and other mistreatment of investors.⁶⁵ Canada has been able to effectively conclude only one new agreement (with Peru) since 2001. The United Nations Conference on Trade and Development estimates that 600 BITs have been negotiated globally since 2001. Countries such as Switzerland, Germany and China have negotiated over 100 each.

Canada must negotiate and conclude more FTAs and FIPAs with our trading partners, beginning with those markets determined to have the greatest trade and investment flows or potential. More agreements mean enhanced market access and investment protection for Canadian firms as well as greater competitive intensity in Canada. Failure in this regard means that Canadian firms are put at competitive disadvantage relative to firms based in countries with more agreements. An example cited to the Panel concerned a manufacturer that located North American production facilities in Mexico in part because Mexico has a free trade agreement with the EU and Canada does not. Rigorous impact assessments concerning prospective trade agreements would help generate domestic support for these deals.

In the context of our foreign relations more broadly, Canada should articulate its international trade and investment objectives and then make foreign policy choices with these goals in mind. Negotiating partners must be chosen strategically— with a view to maximum commercial impact in a world of global value chains and changing trade patterns. Foreign policy goals should be formulated with the understanding that they are intimately related to commercial policy goals.

More Collaboration with Business on Trade and Investment Priorities

We have heard that government consultations on trade and investment negotiations and services to business, including inward and outward investment flows, are not sufficiently coordinated by different government departments and sometimes are undertaken after key decisions have been taken. The Canadian Chamber of Commerce summarizes, “What we would like to see is a more focussed international strategy behind these negotiations that is developed in concert with, and reflects the priorities of, Canadian business.”⁶⁶ In Canada’s case, enhancing consultations processes across government to facilitate *pro-competitive* business input on trade-related matters would assist in mobilizing support for crucially important trade and investment liberalization. A good starting point would be the prioritization of our FTA and FIPA initiatives. A stronger role for the Minister of International Trade in advancing the trade and investment agenda on behalf of the government would contribute to this.

The Panel recommends that:

49. The federal government should set an ambitious timeline for concluding priority trade and investment agreements, led by the Minister of International Trade who should pursue a flexible, results-based approach, beginning by simplifying Canada’s model foreign investment protection agreements and streamlining our free trade agreements negotiating processes.
50. Beginning in 2009, on behalf of the federal government, the Minister of International Trade should report at least annually on Canada’s trade and investment liberalization initiatives generally and in specific sectors.
51. Beginning immediately, the Minister of International Trade should build on the Global Commerce Strategy by developing and publicizing annual plans and priorities for enhanced trade and investment, and by identifying priority trading partners, economic impacts of prospective agreements and services to businesses. Comprehensive input from business should guide and inform Canada’s approach across government.

Regulation

In many of the submissions to the Panel and through our consultations, we heard that federal, provincial and municipal regulatory processes constrain Canadian competitiveness.

Regulation is one means governments use to achieve public policy objectives, such as health, safety, environmental protection, and a fair and efficient marketplace for industry and consumers. However, regulations often unnecessarily or inadvertently constrain Canadian competitiveness because public policy initiatives are rarely designed to minimize their impact on competition.

An unintended consequence of regulation can be the anti-competitive effect of preventing the entry of new products into the Canadian market. As the C. D. Howe Institute notes in its submission to the Panel, “regulatory policy can improve Canada’s attractiveness as a destination or home for business establishments.”⁶⁷

In this regard, the Panel believes that, building on our NAFTA positioning, competitiveness in Canada would benefit if the default position in the regulation-making process was to harmonize our product and professional standards with those of the US so that Canada and the US would represent a single market for those products or services.

Concerns about the impact that regulations have on competitiveness are not new. In fact the 2004 External Advisory Committee on Smart Regulation, chaired by Gaetan Lussier, got it right. The Committee heard, “the current regulatory system often acts as a constraint to innovation, competitiveness, investment and trade.” Lussier concluded, “... I observed an increasingly profound disconnect between the regulatory system and 21st century reality. ...Without rapid and significant change, Canada’s ability to innovate and provide citizens with high levels of protection would be impaired.”⁶⁸

The Panel has been advised of the following steps taken by the federal government to address regulatory issues:

- In March 2005 under the Security and Prosperity Partnership of North America, Canada, the United States and Mexico agreed to work together to strengthen regulatory cooperation, streamline regulation and regulatory process, and encourage the compatibility of regulations.⁶⁹

- The government has set the goal of simplifying compliance with regulations by reducing the number of information and administrative requirements imposed on business by 20 percent by November 2008.⁷⁰
- A new Cabinet Directive requiring that all new regulations undergo greater scrutiny came into effect on April 1, 2007.⁷¹
- In 2007, the government established a Major Projects Management Office to provide overarching management of the federal regulatory system for major natural resource projects and to identify areas where the federal regulatory process can be improved, working with regulatory departments and agencies.⁷²

We understand that there are more than 20 000 regulators in the federal government working in more than 20 different departments and agencies.⁷³ Regulatory departments and agencies are required to implement the Cabinet Directive while a central group, numbering about 30, is charged with providing policy leadership on federal regulatory policy as well as the review of new regulations. While a simple metric, these numbers make a powerful statement. Moreover, political responsibility seems to be dispersed among ministers and departments, and overall leadership appears problematic. Finally, none of these initiatives appears to be aimed squarely at confronting federal–provincial overlap or duplication, or a re-engineering of regulatory regimes, which is a principal source of complaint.

The 2004 Smart Regulation Report set out useful principles: effectiveness, cost efficiency, timeliness, transparency, accountability and performance. We accept these, placing competitiveness at the top of the list.

It is premature to judge the efficacy of the more recent initiatives to reduce the regulatory burden. The Panel believes that effective regulatory reform is vital and that the success of any reforms will require strong leadership, a comprehensive process focused on execution, meaningful milestones and deadlines, and rigorous evaluations.

The Panel recommends that:

52. A senior federal economic minister should be mandated to lead and oversee progress on regulatory reforms, implementing a new regulatory screen by June 2009 that would subject all new regulations to a rigorous assessment of their impact on competitiveness.
 53. Each major federal regulatory department and agency should reform its processes to increase transparency, reduce overlap and duplication, and set clear standards to yield time certain decisions, reporting annually, commencing in 2010, on outcomes and performance.
 54. The foregoing recommendations for regulatory reform are equally applicable to provinces and territories.
 55. Canada should harmonize its product and professional standards with those of the US, except in cases where, and then only to the extent that, it can be demonstrated that the impairment of the regulatory objective outweighs the competitiveness benefit that would arise from harmonizing.
-

Innovation and Intellectual Property

Innovation

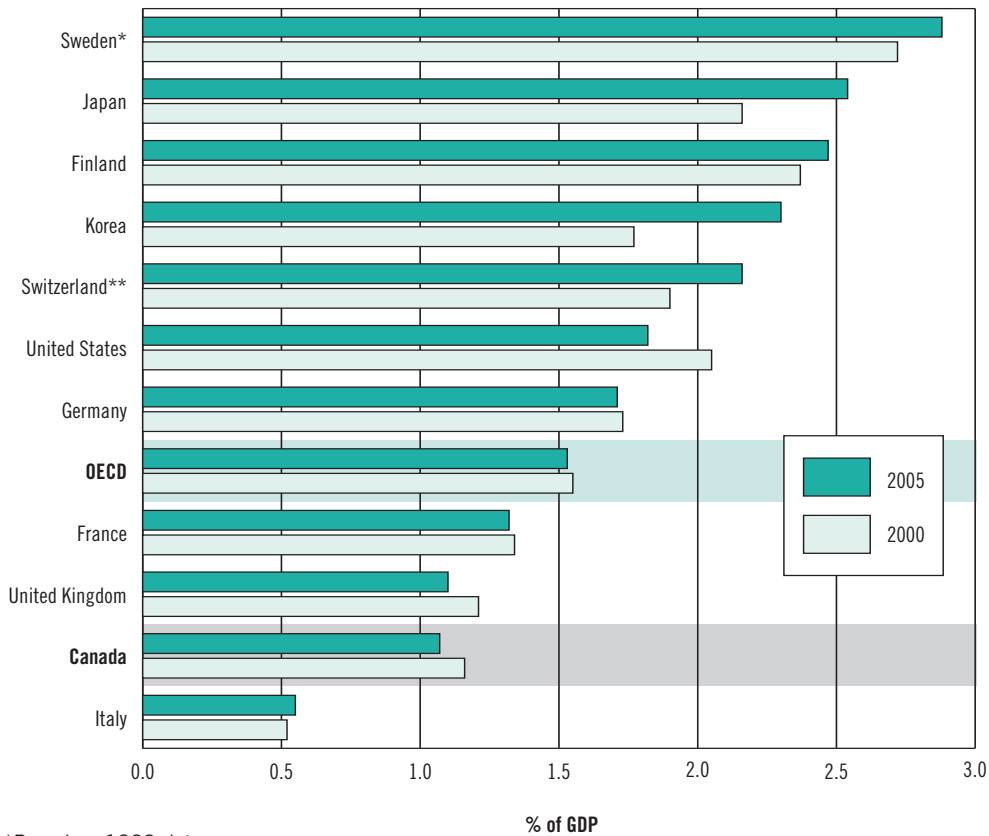
Innovation drives productivity and competitiveness in the 21st century. It underpins the fastest growing industries and high-wage jobs, provides the tools needed to compete in every business today, and drives growth in all major countries and in every sector. Innovation and technological leadership often mean the difference between success and failure in the global marketplace.

Innovation involves the successful interplay of four factors: public and private research and development (R&D), science and technology (S&T) policy, intellectual property rights, and the effective commercialization of technologically intensive goods and services.⁷⁴

In addition, as we have seen, new business dynamics have combined to make the “innovation imperative” even more crucial for companies seeking to compete in the domestic and international economy. The Panel heard about all these factors in the course of its research and consultations.

Canada is near the top of the OECD in public research funding for R&D infrastructure.⁷⁵ But with respect to private investment in R&D, Canada ranks only 15th out of 30 OECD countries in terms of business expenditure on research and development (BERD), although the heavy weighting of resource industries in Canada’s economy affects our ranking⁷⁶ (Figure 12). To increase competitiveness, Canadian business

Figure 12 — Business Expenditure on Research & Development (BERD) as a Percentage of Gross Domestic Product, 2000 and 2005



*Based on 1999 data.

**Based on 2004 data.

Source: OECD, *Main Science and Technology Indicators 2007/1* (Paris: May 2007).

needs to increase its expenditure on R&D in order to enhance its knowledge, know-how and technology to the level necessary to be globally competitive.⁷⁷

In this regard, we acknowledge improvements to the scientific research and experimental development (SR&ED) tax credit in the most recent Budget. Notwithstanding the \$4 billion in tax assistance in 2007 through SR&ED,⁷⁸ we believe that it is important to closely monitor the SR&ED program in line with the important policy goals of enhancing business investment in R&D and innovation in Canada.

More broadly, we believe that ambitious policies to promote competitive intensity, greater reliance on market forces, more openness to international trade and investment, and greater business investment including investment in R&D will enhance Canadian competitiveness and spur greater innovation.

Intellectual Property

Intellectual property (IP) rights are accorded to inventors and creators of new and/or original work. They are protected through domestic and international laws governing copyright (which typically also governs computer software), patents, trademarks, trade secret rights and industrial design rights. Internationally, intellectual property frameworks are governed by a number of agreements under the umbrella of the World Intellectual Property Organization (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works (copyright)

WATERLOO MAGIC

“Most North American universities retain ownership of intellectual property developed within their laboratories and classrooms. Not so at the University of Waterloo (UW). ... Our professors and students own their creations and our creator-ownership policy encourages them to commercialize their research results. ... Why? Because what goes around, comes around. The university has benefited immensely from the philanthropy of its graduates, who choose to support those who supported them. In the process, UW is becoming the best-supported university of its size per capita in the country. ...”

David Johnston, President, University of Waterloo.

and the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc.). In the trade domain, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement at the WTO seeks to protect these rights through the multilateral trading system, as do intellectual property chapters in many of our bilateral and regional trade agreements including NAFTA.

The Panel recognizes that intellectual property frameworks play a central role in rewarding and encouraging innovation by granting creators the rights that enable them to monetize the products of their innovation. This is particularly so for knowledge-based industries in the contemporary global economy. At the same time, the rights afforded by these frameworks should not be so

all-encompassing as to impede further innovation by others and create barriers for new entrants. It is important for the federal government to get this balance right.

The ever-increasing importance of the Internet to all aspects of economic activity has brought new urgency to updating IP frameworks in Canada. We acknowledge the difficulties inherent in doing so, but believe that Canada has an opportunity to develop strong IP capacity and demonstrate to the world how competition and productivity can be furthered by a modern IP regime.

In this regard, any new copyright or patent legislation must take account of changes facilitated by the Internet as a platform for creating, selling or telecasting digital content, such as software, music, videos, and even literature. In this vein, the legislation should facilitate use of the Internet as a medium for research and education, cornerstones of Canada's ability to innovate and compete in a knowledge economy. There is no reason for Canada's patent and copyright frameworks not to be "state of the art" for the Internet age.

In addition, Canada must further strengthen its counterfeit laws. Commercial counterfeiting robs legitimate IP rights holders of their livelihoods and chills creative industries. OECD estimates for trade in counterfeit and pirated goods are up to \$200 billion a year, and even this is likely an underestimate.⁷⁹

Finally, complementing our views on enhanced business–university partnerships, we believe strongly in the benefits to Canada that can accrue from more effective commercialization of intellectual property. This has been acted upon effectively at the University of Waterloo, but this is not the only model for the effective transfer of technology from educational institutions to the marketplace.⁸⁰

The Panel recommends that:

- 56. The federal government should monitor the scientific research and experimental development tax credit program annually in order to ensure that business investment in research and development and innovation in Canada is effectively encouraged.**
- 57. As a matter of priority, the federal government should ensure that new copyright legislation will both sufficiently reward creators while stimulating competition and innovation in the Internet age. Any prospective changes to Canada's patent law regime should also reflect this balance. The federal government should assess and modernize the Canadian patent and copyright system to support the international efforts of Canadian participants in the global economy in a timely and effective manner.**
- 58. Before December 2009, the federal government should strengthen counterfeit and piracy laws to ensure that intellectual property rights are effectively protected.**
- 59. Canada's post-secondary education institutions should expedite the transfer of intellectual property rights and the commercialization of university-generated intellectual property. One possible method to achieve this would be to move to an "innovator ownership" model to speed commercialization.**

9. Driving Change: A Canadian Competitiveness Council

By itself, competition law enforcement without supporting policies and institutions to promote competition is insufficient to realize the economic benefits of competitive markets or innovative and efficient businesses. The concept of competition, and the value it has for our society is not fully realized or widely appreciated by Canadians.

Improvements to our competitive performance will not be accomplished in a month or a year or solely by statutory reform. Sustained effort and focus are

required in order to realize improvements. In research commissioned by the Panel and in views expressed in submissions and consultations, Canada has been identified as a country that does not place sufficient importance on competition in the conduct of its affairs.¹ The Panel agrees with this conclusion.

This theme is brought into greater relief by the Panel's belief that collaboration and progress in Canada between levels of government and the private and public sectors on competitiveness issues is sorely lacking.

International Comparisons

The Panel consulted with Australian experts, including Fred Hilmer, who chaired a review of Australian competition policy in the early 1990s. The Australian review arose from that country's unique circumstances and challenges in the 1990s. Canada's situation in 2008 is obviously not the same as Australia's in the early 1990s. Yet there are useful lessons that can be drawn from Australia

as well as other OECD countries that make competition a pillar of economic policy. We have been impressed by Australia's success in addressing complex competitiveness issues in the context of a federal state. A key factor was establishing a National Competition Council to spur productivity improvements.

AUSTRALIAN NATIONAL COMPETITION COUNCIL

In the early 1990s, in response to the decline in Australia's economic performance, the Government of Australia undertook a broad review of the country's economic and competition policies. Important findings from this review were that the country's competitiveness was not given sufficient priority in policy-making, and that the levels of government were not working well enough together to improve economic performance and opportunity for Australians.

In response, the Australian National Competition Council was established in 1995, reflecting an agreement among the federal, state and municipal governments that focused, coordinated action was needed if Australia was to address its economic challenges. While its mandate continues to evolve, its mission is to improve the well-being of all Australians through growth, innovation and rising productivity, and by promoting competition that is in the public interest.²

Australia is unique in establishing an institution devoted solely to competition advocacy and has successfully broadened competition policy beyond traditional competition law enforcement. Other nations have used other institutional approaches to strengthen competition advocacy. In some countries, competition advocacy institutions foster market integration in a federal state, eliminate special rules and exemptions that blunt the impact of competition and promote greater adherence to competition values in regulatory decision making.

As examples:

- The Australian Competition and Consumer Commission, the US Federal Trade Commission and the Irish Competition Authority, among others, have powers to conduct studies of industry sectors and the interaction between government regulation and economic performance.
- Australia has two other institutions that participate in competitiveness matters, the previously mentioned National Competition Council and the Productivity Commission, which conducts in-depth studies of competitiveness issues.
- The Office of Fair Trading in the United Kingdom has responsibility to review all new regulations proposed by other government ministries and agencies to evaluate their impact on competition.
- In 2007, Sweden established The Globalization Council to promote a deeper knowledge of globalization issues, develop economic policy and broaden public dialogue to ensure that Sweden can compete successfully in a world marked by continued rapid globalization. This institution focuses largely on independent research but is also mandated to develop public policy recommendations for the Swedish government by 2010.
- The European Commission is responsible for enforcing rules on discriminatory state subsidies and liberalizing former state-regulated or controlled sectors such as transport, energy, postal services and telecommunications. It also undertakes market studies and approves new regulations following a competitive assessment process.

While these examples highlight the importance that other industrialized countries place on a dedicated focus on competition, the Panel does not recommend that Canada should directly mimic any single country's model. Other countries have benefited from the presence of a dedicated competition advocate or have given their competition law enforcement agencies, the equivalent of our Competition Bureau, additional competition advocacy powers.³

Giving Voice to Competition

Earlier in this report, we propose a change in the regulation-making process to ensure that the impact of proposed regulations on competition and Canadian competitiveness is given due weight in the regulatory process. However, an important contributor to the competitiveness issues which the Panel was established to address is the long-standing inaction with respect to these issues on the part of public policy-makers and regulators at all levels of government. The private sector bears at least equal responsibility with government in this regard.

The change in public and private sector mindset that will be required to elevate competitiveness to the priority needed to assure Canada's continuing prosperity will not be achieved easily or quickly. It will require a profound recalibration of Canadians' attitudes and understanding of the elements of national economic success. Accordingly, the Panel has concluded that the absence of a national institution independent of both government and the private sector with a focused mission to advocate for specific measures to improve the levels of competition and competitive performance in specific sectors of private and public endeavour in Canada based on rigorous expert analysis is the most significant gap in Canadian competition policy.⁴ Such a body, staffed with the right people, has the potential for positive and lasting impact on the well-being of Canadians. Over time, the Panel believes that this will rival the impact of all the other measures discussed in this report.

Institutional Structure

International experience shows that there is no one "right" model for competition advocacy. Some countries place advocacy functions within the central government, others grant advocacy powers to the competition law enforcement agency, and a few have created an independent advocacy institution. Several countries distribute advocacy responsibilities across government institutions.

The Panel believes that a made-in-Canada approach, with the adoption of a specialized competition advocacy institution, is likely to provide the best prospects for sustained improvements in Canada's productivity. The increasing economic and legal complexity of competition law enforcement in Canada is a challenge for the Competition Bureau. Indeed, competition law enforcement is not restricted to the domestic arena; it has an increasingly complex international dimension where enforcers coordinate investigations. Providing the agency with additional advocacy responsibilities risks diluting the Competition Bureau's core enforcement effort.

We therefore recommend the separation of enforcement from the advocacy and review function. The administration and enforcement of competition law should remain exclusively with the Competition Bureau. These two sides of competition policy demand different skills and orientation. As Daniel Crane says:

*The enforcement function may require primarily “tough-minded” prosecutorial personnel with expertise in legal processes whereas the advocacy function may require primarily policy-oriented personnel with expertise in political and regulatory processes.*⁵

Moreover, concerns were expressed in submissions to the Panel that housing both enforcement and advocacy functions in the same agency might impair the agency’s credibility in both its enforcement and advocacy activities.

Similarly, the Panel does not believe that assigning competition advocacy functions to the federal government or to departments or agencies responsible for specific industry sectors is likely to be successful. Competition is likely to become just one of many factors considered in the calculus of government decision making. Moreover, ministers with sectoral responsibilities may be perceived to be motivated by sectoral interests unrelated to competition. Independence is critical. A council that is free to speak out without being constrained by the bureaucratic or political ramifications of its work will be the most effective way to advance an agenda for a more competitive Canada.

Finally, because all levels of government must engage in a national effort to make Canada more competitive, provincial and municipal representation should help to assure that competitiveness issues are addressed regardless of where they reside. As stated earlier, we believe that there needs to be greater recognition of the importance of urban centres to our economic prosperity.

Therefore, the Panel recommends that a Canadian Competitiveness Council should be structured along the following lines:

- The Council should be independent of government, but with a clear, annual reporting relationship to Parliament.
- It should be initially mandated for five years and have secure and sufficient funding so that the Council could carry out its mandate in an effective and responsible manner.
- The Council should be governed by a nine-member Board of Directors appointed by the Minister of Industry for a five-year term and made up of persons who are knowledgeable and experienced in matters of economics, business and government affairs pertaining to competition, industry, regulation and consumers.

- The Board of Directors should include a majority of representatives from outside government:
 - six non-government (i.e., business, labour, academic)
 - three representatives who bring the respective perspectives of the federal government, the provinces and cities.
- The Chair should be a person experienced in matters of business, appointed by the Minister of Industry.
- The Chief Executive Officer of the Council should be appointed by the Board and should sit as an *ex officio* Board member.
- The form in which the Council is established should allow it both to be established quickly and to be independent.

Mandate

The Council should serve as the primary Canadian advocate for competition. It should take a global perspective on competition issues in both the public and private sectors using evidence-based economic analysis. It should also have a small core staff who would conduct analysis and commission independent research.

The Council's mandate should not be restricted to examining government activities. A broad mandate is preferable to a narrow one. The Council should set its own agenda and not display a bias for or against government or the private sector.

Examples of the activities that the Panel envisages the Council might choose to undertake include:

- reviewing existing laws and regulations, regulatory agencies and processes that affect competitiveness, and issuing reports with actionable recommendations.
- reviewing private sector activity affecting competition, markets and productivity outside the realm of competition law enforcement, and issuing public reports with actionable recommendations addressing competition and productivity issues.
- reviewing progress toward the elimination of internal barriers to the free flow of goods, services, people and capital.
- conducting research on any other issues that the Council deems to have a material impact on Canada's competitiveness, and publicizing the results and recommendations.

The Council could choose to participate in and report on policy reviews at the invitation of a federal minister. The Council would be well positioned to review and report on sectoral regimes, in line with the five-year reviews the Panel recommends in this report. Provincial ministers and civic mayors should also be entitled to bring issues to the attention of the Council. In the Panel's view, the ability to partner with other non-government policy research organizations would also underscore the Council's independence and potential contribution to advancing Canada's competitiveness agenda.

At the same time, independence and effectiveness could be undermined by government requests to study issues that are unrelated or immaterial to competition. The ability of the Council to control its agenda and set its priorities will be essential to the Council's independence.

In addition to conducting research and issuing reports, a public voice is needed to foster national debate and dialogue on competitiveness issues. The Council should be free to comment on these issues in the media, interact with federal-provincial and municipal leaders and public officials as well as to participate in conferences and debates before the general public. In the same vein, reporting on activities and expenditures to assure public accountability would be achieved by requiring the Council to report annually to Parliament through the Minister of Industry.

Of course, political commitment is a necessary requirement for the Council to get off the ground and become successful. Resources and access to information and decision makers will be critical. Finally, it is also critical, in the Panel's view, for the Council to be given sufficient powers in its mandate to be seen and to act in an independent fashion. This is important not only in the day-to-day course of its work, but also for ensuring that the Council can attract and retain a Board of Directors, Chief Executive Officer and core staff of the necessary calibre to succeed.

The Panel recommends that:

- 60. The federal government should establish as expeditiously as possible an independent Canadian Competitiveness Council under the Minister of Industry. The Council should be staffed by a Chief Executive Officer and a small core staff, overseen by a Board of Directors.**
 - 61. The Council's mandate should be to examine and report on, advocate for measures to improve, and to ensure sustained progress on, Canadian competitiveness. The Council should not enforce laws and regulations but should have a public voice, including the power to publish and advocate for its findings.**
 - 62. The Council should set its own agenda, reviewing matters or conducting research on its own initiative as well as in response to the request of a federal or a provincial minister or a municipal mayor. Governments should not have the power to compel the Council to undertake or discontinue a review or study.**
 - 63. The Council should be required to report to Parliament on its activities on an annual basis through the Minister of Industry.**
 - 64. The Council's Board of Directors should consist of not more than nine persons, including the Chair, and should include a majority of non-governmental members, as well as members with experience representing the federal, provincial and municipal governments.**
 - 65. The Council should be mandated and fully funded in a manner that would allow the Council to operate in an effective and responsible manner for a five-year period. Prior to the end of the five-year period, the Minister of Industry should undertake a review to determine whether the Council's mandate should be renewed and, if so, on what terms.**
-

10. Conclusion

In this report, we present a picture of the changing global economy and our view of Canada's place within it, as well as the dynamics that will shape our future. We try to make a compelling case for action, not just by governments, but by all Canadians.

By putting forward a national Competitiveness Agenda, we hope to seize the attention of Canadians from all walks of life and all regions. It is an agenda for everyone: from employees on the shop floor to managers in the corporate office, and from students in college and university classrooms to researchers in the most advanced lab.

The objective can be simply stated: to raise Canadians' standard of living by improving our economic performance. As we have noted throughout this report, we believe that the key will be to encourage more competition at home and more exposure to competition from abroad. Competition drives the productivity that ultimately sustains our incomes, jobs and quality of life. This is our central principle.

Our proposals to renew legal foundations and refine key public policies will increase competitive intensity in Canada. We also propose a powerful new Canadian advocate for competition.

Our Competitiveness Agenda does not ask Canadians to give up anything, nor to settle for less. On the contrary, we are asking Canadians to raise their sights, and to recognize the challenges and opportunities of economic globalization. We are asking Canadians to take a global perspective. We do not believe that Canadians have any other choice.

Governments must adopt this same perspective and evaluate policy, not in a domestic context, but in a global one. When examining legislation, setting policy and establishing regulations, governments need to consider how this positions Canada against our competitors and in the context of Canada's links to the US economy.

It also means establishing a process where we continually review and refine our policies to reflect a fast-evolving world and changing circumstances. Competitiveness begins at home, but it is measured internationally.

Business leaders too need to think big and grasp global opportunities. We have a small market, one that has compelled our businesses to look south of the border for growth opportunities. We have done just that, and should more fully integrate with the North American economy.

But our small domestic market should also compel us to look to the larger world as a source of opportunity. We call upon business leaders to become more global, to grow their enterprises and to seek opportunity. There are risks, but the successes of the many Canadian global champions serve as the example.

While we have many global success stories, Canada has also witnessed the loss of some of our most iconic firms. Our Panel was formed at a time when the debate over the hollowing out of Canada was at its peak. Indeed, we ourselves share the feelings of disappointment and loss when a notable Canadian firm is acquired by a foreign company.

In our consultation paper, we asked Canadians whether domestic control and ownership was important to Canada's economic prospects and our ability to create opportunity for Canadians.

For our part, we believe that competitive, Canadian-based firms **are** important.

We are steadfast in our belief that Canadian ownership of our firms is valuable. But we do not believe that the best way to ensure Canadian control is by legislating it or imposing other protections.

We believe that the best way to ensure we create and sustain new Canadian champions is by ensuring that our policies, laws and regulations are the right ones to facilitate growth. Given the right conditions, the dynamism, talent and ambition of Canadians will rise to the fore. We will have more Canadian firms competing globally. And winning globally.

Thus, our journey leads us to conclude that the main issue is **not** whether we are being hollowed out. The real issues are the economic environment in Canada and the mindset of Canadians in all walks of life. The questions are how we raise our productivity through greater openness to talent, capital and innovation, through vigorous competition, and through a more ambitious mindset.

This report is our best effort to set the agenda for sustained competitiveness. It is a national project, and we call on all Canadians to commit to making our country more competitive. It is a long-term project requiring a fundamental change in the mindset of Canadians.

It will not be quick or easy. But if we take on this challenge with the commitment and collective spirit that have enabled Canadians to overcome formidable obstacles and bring great national projects to fruition, the Panel has no doubt that we will continue building a Canada that we will be proud to bequeath to our children and grandchildren.

Endnotes

Chapter 1. Our Mandate and Approach

- ¹ The Panel's mandate may be found at: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00004e.html
- ² The full document is available at: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00009e.html. Submissions to the Panel are also on this site.

Chapter 2. Creating Wealth: Competitiveness and Productivity

- ¹ See, for example, Michael Porter, *The Competitive Advantage of Nations* (New York: The Free Press, 1990).
- ² William W. Lewis, *The Power of Productivity* (Chicago: The University of Chicago Press, 2004).
- ³ *Ibid.*

Chapter 3. Globalization and the Pace of Change

- ¹ These now account for 6.5 percent of the cost of inputs, down from 10.3 percent in 1963. Source: Aaron Sydor, "The Rise of Global Value Chains," *Canada's State of Trade: Trade and Investment Update – 2007* (Ottawa: Department of Foreign Affairs and International Trade, 2007), p. 69, available at: http://www.international.gc.ca/eet/trade/sot_2007/sot-2007-en.asp#vi
- ² "Competition Intensity as Driver of Innovation and Productivity: A Synthesis of the Literature," CCLS Research Report 2008-03, June, prepared for the Competition Bureau (Ottawa: Centre for the Study of Living Standards); Penny Hope-Ross, "From the Vine to the Glass: Canada's Grape and Wine Industry," Ottawa: Statistics Canada, Cat. no. 11-621-MIE — No. 049, October 2006; available at: <http://dsp-psd.pwgsc.gc.ca/Collection/Statcan/11-621-M/11-621-MIE2006049.pdf>
- ³ Today, more than 20 percent of the population in developed countries is aged 60 years or over, and this proportion will grow. In less developed regions, seniors account today for just 8 percent of the population. Source: United Nations, *World Population Ageing 2007*, summary available at: <http://www.un.org/esa/population/publications/WPA2007/wpp2007.htm>
- ⁴ FDI increased from US\$13.4 billion in 1970 to US\$1.3 trillion in 2006. Source: Andrew Sharpe and Meghna Banerjee, "Assessing Canada's Ability to Compete for Foreign Direct Investment," Centre for the Study of Living Standards, research paper prepared for the Competition Policy Review Panel, March 2008.
- ⁵ United Nations Conference on Trade and Development, *World Investment Report 2007*.
- ⁶ The total size of sovereign wealth funds has increased dramatically over the past 15 years. In 1990, sovereign funds held roughly \$500 billion. However, the IMF estimates their current total is \$2 to 3 trillion and will potentially reach \$10 trillion by 2012. Source: Simon Johnson, "The Rise of Sovereign Wealth Funds," *Finance and Development* 44 (3), September 2007, available at: <http://www.imf.org/external/pubs/ft/fandd/2007/09/straight.htm>
- ⁷ Scotiabank Commodity Price Index, March 2008.

- ⁸ PriceWaterhouseCoopers, *Mining Deals 2007 Annual Review*, available at: <http://www.pwc.com/Extweb/pwcpublishings.nsf/docid/0BEFE75E2B45FCF98525740F0053COAA>
- ⁹ See Sydor, “The Rise of Global Value Chains,” *op. cit.*
- ¹⁰ The growth in intra-firm trade is a complementary phenomenon: multinational enterprises established in different international markets trade products that also comprise inputs produced in global value chains. As intra-firm trade between Ford Canada and Ford US has increased, so have the inputs of autopart firms from Canada, the US and around the globe into the traded products.
- ¹¹ Naomi R. Lamoreaux, Daniel M. G. Raff, and Peter Temin, “Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History,” *American Historical Review* 108 (2): 404–433 (April 2003).
- ¹² “How Two European Giants Keep Up with the Global Race,” *The Economist*, 13 February 2007.
- ¹³ Claude Turcotte, “Investissement Québec rappelle « l’urgence » d’accroître la productivité,” *Le Devoir*, March 13, 2008.
- ¹⁴ The BRIC countries (Brazil, Russia, India and China) account for 40 percent of the world population with a market exceeding two billion people and 28 percent of the world economy, and growing.
- ¹⁵ China now comprises 6.9 percent of the total world demand for oil, 18.6 percent for aluminum and 28.5 percent for steel. See Department of Foreign Affairs and International Trade Canada, “China’s Appetite for Natural Resources Continues to Grow,” April 5, 2006, available at: <http://w01.international.gc.ca/CanadExport/view.aspx?isRedirect=True&id=383848&language=E>
- ¹⁶ Information and communications technologies encompass a wide variety of products and services, including computers, software, communications equipment and networks, fibre optics, interactive video, satellite infrastructure and services, radio frequency identification technology, and a growing number of complementary devices for work, education, health and entertainment.
- ¹⁷ International Telecommunication Union and the United Nations Conference on Trade and Development, *World Information Society Report 2007, Beyond WSIS*, June 2007, available at: http://www.itu.int/osg/spu/publications/worldinformationsociety/2007/WISR07_full-free.pdf
- ¹⁸ Global System for Mobile Communication Association (GSMA) Press Release, April 16, 2008.

Chapter 4. What We Heard and What We Learned

- ¹ From 2001 to 2006, 455 Canadian companies, worth a total of US\$137 billion were acquired. Source: Andrea Mandel-Campbell, *Foreign Investment Review Regimes: How Canada Stacks Up* (Ottawa: Conference Board of Canada, April 2008), available at: <http://www.conferenceboard.ca/documents.asp?next=2531>
- ² SECOR, “Positioning Canadian Firms in the Global Market for Corporate Control,” February 2008.
- ³ Research findings indicate almost no change since 2001 in the 27 percent share of assets in Canada’s non-financial industries under foreign control. See Statistics Canada, “Foreign Control in the Canadian Economy,” *The Daily*, Statistics Canada, June 14, 2007.
- ⁴ *Globe & Mail Report on Business*, “Leaps of Faith,” April 25, 2008; *CBC News*, “In Depth: Research In Motion,” 24 October 2007; *Barron’s*, “The World’s Best CEO’s,” March 25, 2008; and *Canadian Business*, “Men in Motion,” December 2004.

- ⁵ The number of Canada's global leading firms rose from only 15 in 1985 to 40 in March 2008. See Institute for Competitiveness and Prosperity, *Report on Canada 2008: Setting our Sights on Canada's 2020 Prosperity Agenda*, p. 54, available at: http://www.competeprosper.ca/index.php/work/reports_canada/
- ⁶ William Polushin, "Case Studies of Firm Improvements in Productivity and Competitiveness," research paper commissioned by Competition Policy Review Panel, Ottawa, 2008.
- ⁷ This is discussed in Walid Hejazi, "Foreign Direct Investment and the Canadian Economy," research paper prepared for the Competition Policy Review Panel, April 2008.
- ⁸ The US accounted for 79 percent of our exports in 2007. See Export Development Corporation, "Canada Country Overview," March 2008.
- ⁹ It is estimated by Goldman Sachs that the gross domestic product of these four countries alone will be as much as half the G7 countries combined by 2025.
- ¹⁰ Large firms are more export intensive than smaller firms. Small firms (fewer than 50 employees) account for 72 percent of exporting firms but only 26 percent of export value. See Sydor, "The Rise of Global Value Chains," *op. cit.*, p. 26.
- ¹¹ Philippe Mercure, "Doublent les Chinois par la qualité," *La Presse*, March 22, 2008.
- ¹² Bank of Canada, Noon Rate, historical data, available at: <http://www.bankofcanada.ca/en/rates/exchange-look.html>
- ¹³ The Conference Board recently gave Canada a "D" on innovation, ranking Canada 14th out of 17 countries. See Conference Board of Canada, *How Canada Performs: A Report Card on Canada*, June 2007, p. 2, available at: <http://www.conferenceboard.ca/documents.asp?rnext=2047>
- ¹⁴ Canada ranked 10th of 27 OECD countries on a broad composite measure of innovative performance. See OECD, "Benchmarking Innovation Policy and Innovation Framework Conditions," January 2004, available at: <http://www.oecd.org/dataoecd/37/34/33705586.pdf>
- ¹⁵ Over the period 1981–2006, Canada placed 17th among the 20 OECD countries for which productivity data are available, and 6th among the G7 major industrial countries.
- ¹⁶ Labour productivity is defined as gross domestic product per hour worked, based on purchasing power parity. The series are extrapolated based on 1999 benchmarking estimates of the Canada–US labour productivity gap, using labour productivity indexes from Statistics Canada and US Bureau of Labor Statistics.
- ¹⁷ Statistics Canada, *Earning and Incomes of Canadians over the Past Quarter Century, 2006 Census*, May 2008, Statistics Canada Cat. no. 97-563-X, available at: <http://www12.statcan.ca/english/census06/analysis/income/pdf/97-563-XIE2006001.pdf>
- ¹⁸ Over the period 2002–2006, Canada's standard of living (measured by real gross national income per capita) increased much faster (14.3 percent) than that in the US (8.1 percent). Source: Statistics Canada, *ibid.*

Chapter 5. How Well Is Canada Positioned to Compete to Win?

- ¹ A study of ten industrialized countries over a ten-year period found Canada to be second only to Mexico in terms of the lowest after-tax costs of start-up and operations of a new business; see KPMG, *Competitive Alternatives: KPMG's Guide to International Business Location, 2008 Study*, March 27, 2008, available at: http://www.mmkconsulting.com/compalts/reports/2008_compalt_report_vol1_en.pdf
A global business environment assessment of the best place to conduct business ranked Canada fourth out of 82 countries based on macroeconomic stability, infrastructure, labour market flexibility, quality of the workforce and policy conduciveness for businesses; see *The Economist* Intelligence Unit, "Business Environment Rankings," October 25, 2007, available at: <http://www.eiuresources.com/mediadir/default.asp?PR=2007102501>
Canada was ranked 14th out of 17 countries in terms of innovation; see Conference Board, *How Canada Performs, op. cit.* Canada was ranked 10th out of 55 nations in terms of having an environment that can create and sustain the competitiveness of enterprises; see IMD, *World Competitiveness Yearbook, 2007*. Canada was ranked 21st in a survey of executives regarding where they planned to engage in direct investment in the coming year; see AT Kearney, *FDI Confidence Index, 2005*, available at: http://www.atkearney.ro/pdf/fdici_2005.pdf?PHPSESSID=938a70942d121ceb62138ca167d1aff3
- ² In February 2008, the Scotiabank Commodity Price Index reached a record high. The Agricultural Index rose over 25 percent and wheat was valued at the highest price per bushel ever recorded. Potash surged 131 percent in value since 2004. Uranium spot prices are eight times higher than in 2000 and double their previous peak in 1979–80. See Scotiabank Commodity Price Index, March 2008.
- ³ See Major Projects Management Office at: www.mpmo-bggp.gc.ca/context-contexte-eng.php
- ⁴ Michael Hart, "Steer or Drift? Taking Charge of Canada–US Regulatory Convergence," *C. D. Howe Institute Commentary*, No. 229 (Toronto, March 2006), p. 3.
- ⁵ Industry Canada, *2007 Canada's Automotive Industry*, p. 5, available at: [http://www.ic.gc.ca/epic/site/auto-auto.nsf/vwapj/2007_AutoStatisticsFlyer-ENG.pdf/\\$FILE/2007_AutoStatisticsFlyer-ENG.pdf](http://www.ic.gc.ca/epic/site/auto-auto.nsf/vwapj/2007_AutoStatisticsFlyer-ENG.pdf/$FILE/2007_AutoStatisticsFlyer-ENG.pdf)
- ⁶ See Hart, "Steer or Drift?" *op. cit.*, p. 2.
- ⁷ SECOR, "Positioning Canadian Firms," *op. cit.*, p. 78.
- ⁸ See KPMG, *Competitive Alternatives: KPMG's Guide to International Business Location, 2008 Study, op. cit.*
- ⁹ Reuven Brenner and Gabrielle Brenner, "How to Attract, Groom and Retain Talent in Canada," research paper prepared for the Competition Policy Review Panel, March 2008.

Chapter 7. Competitiveness Agenda: The Legal Foundations

- ¹ The notification threshold for investors from World Trade Organization (WTO) member countries is inflation adjusted annually, and is currently set at \$295 million. For non-WTO investors, the threshold is \$5 million for a direct acquisition and \$50 million for an indirect acquisition; the \$5-million threshold will apply, however, for an indirect acquisition if the asset value of the Canadian business being acquired exceeds 50 percent of the asset value of the global transaction.
- ² In 1999, responsibility for the administration of the ICA in relation to cultural businesses (music recordings, film and video, books, periodicals, magazines and newspapers) was transferred to the Minister of Canadian Heritage. The Minister of Canadian Heritage also has the authority to review cultural investments below the \$5-million threshold as well as the establishment of new cultural businesses by foreign investors.
- ³ Of note, these disallowance rates do not reflect proposals withdrawn before a decision was rendered.
- ⁴ OECD, *International Investment Perspectives 2007: Freedom of Investment in a Changing World*.
- ⁵ United Nations Conference on Trade and Development, *World Investment Report 2007*, Annex Table B.3, available at: http://www.unctad.org/en/docs/wir2007_en.pdf
- ⁶ See Mandel-Campbell, *How Canada Stacks Up*, *op. cit.* This study compares both stated policies and actual practices related to foreign direct investment screening in France, Germany, Italy, the United Kingdom, the US and Canada across nine strategic sectors, and finds that Canada ranks third most open, being no more restrictive than Germany, France and Italy.
- ⁷ *Ibid.*
- ⁸ Speech by the Honourable Jim Prentice, Minister of Industry, to the Vancouver Board of Trade, October 9, 2007.
- ⁹ In the US, foreign investment is subject to the *Foreign Investment and National Security Act of 2007*. The Committee on Foreign Investment in the United States is made up of representatives from the Departments of Treasury, Defense, State, Homeland Security, Commerce, and Energy. The Attorney General, among others, is responsible for the administration and enforcement of this legislation.
- ¹⁰ Industry Canada, “Guidelines— Investment by state-owned enterprises — Net benefit assessment,” available at: <http://strategis.ic.gc.ca/epic/internet/inica-lic.nsf/en/lk00064e.html#state-owned>
- ¹¹ J. Timothy Kennish, “Evaluation of the Operation and Effectiveness of the *Investment Canada Act* and Recommendations for Changes to this Legislation,” research paper prepared for the Competition Policy Review Panel, March 2008.
- ¹² Enterprise value is a measure used to evaluate the potential acquisition value of a business. It is equal to the sum of the price to be paid for the equity of an acquired business and the assumption of liabilities on its balance sheet minus its current cash assets.
- ¹³ Foreign investment involving financial institutions regulated under the *Bank Act* and the *Insurance Companies Act* is exempt from review under the ICA. The Minister of Finance has responsibility for the review and disposition of foreign investment involving federally regulated financial institutions.

- ¹⁴ Canada is signatory to a number of international trade and investment agreements under which it must ensure that foreign investors are treated equally and no less favourably than domestic investors. Under the WTO agreement and the NAFTA, Canada has taken reservations to preserve its ability to use the ICA to ensure that investments by non-Canadians provide net benefit to Canada.
- ¹⁵ See OECD, *International Investment Perspectives*, *op. cit.*, pp. 19 and 20.
- ¹⁶ Section 14.1 (6) of the ICA defines a “cultural business” as a Canadian business that carries on any of the following activities, namely,
- a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,
 - b) the production, distribution, sale or exhibition of film or video recordings,
 - c) the production, distribution, sale or exhibition of audio or video music recordings,
 - d) the publication, distribution or sale of music in print or machine-readable form, or
 - e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.
- ¹⁷ For a full description of Canada’s foreign investment policies for cultural businesses under the Department of Canadian Heritage, see http://www.canadianheritage.gc.ca/progs/ac-ca/progs/eiic-csir/index_e.cfm
- ¹⁸ Submission of Torstar Corporation to the Competition Policy Review Panel, January 11, 2008.
- ¹⁹ Examples of company-specific statutes relating to the privatization of former Crown corporations include *CN Commercialization Act*, *Petro-Canada Public Participation Act*, *Air Canada Public Participation Act*, *Eldorado Nuclear Limited Reorganization and Divestiture Authorization Act*, and the *Teleglobe Canada Reorganization and Divestiture Act*.
- ²⁰ *National Post*, “Where’s Canada? Canada, with its small size, cannot be left out of open skies agreements between the US and Europe,” April 9, 2008, p. FP17: interview with Pierre Jeannot, former CEO of Air Canada and the International Air Transport Association.
- ²¹ *Financial Post*, “No way to run airlines,” April 5, 2008: interview with Giovanni Bisignani, Chief Executive, International Air Transport Association.
- ²² D. G. McFetridge, “The Role of Sectoral Ownership Restrictions,” research paper prepared for the Competition Policy Review Panel, March 15, 2008.
- ²³ Submissions of Air Transport Association of Canada; Air Line Pilots Association of Canada; Joint Submission of the Aéroports de Montréal, Greater Toronto Airports Authority, and Vancouver Airport Authority; and Transat.
- ²⁴ This argument was made in the submission of the Commissioner of Competition, as well as in research conducted on behalf of the Panel by McFetridge, “The Role of Sectoral Ownership Restrictions,” *op. cit.*, and by David Gillen, “Foreign Ownership Restrictions in the Canadian Aviation Industry,” research paper prepared for the Competition Policy Review Panel, March 2008.
- ²⁵ Areva SA participates in the Canadian industry on an exemption basis as well as in joint ventures with Cameco. Other foreign investors in Canada include Japanese, South Korean and other French interests.
- ²⁶ Governance of Cameco is subject to the *Eldorado Nuclear Limited Reorganization and Divestiture Authorization Act*.

- ²⁷ In 2000, legislation came into force, the *Nuclear Safety and Control Act*, replacing the former *Atomic Energy Control Act*, establishing the Canadian Nuclear Safety Commission.
- ²⁸ Dennis Browne, “Uranium: Controls on Foreign Ownership and National Security,” research paper prepared for the Competition Policy Review Panel, March 2008, p. 15.
- ²⁹ Canadian-designed CANDU reactors do not require enriched uranium fuel, and the Canadian nuclear industry has developed the capacity to supply all fuel requirements for these reactors. However, 95 percent of the world’s reactors, as well as the new Advanced CANDU Reactor, require enriched uranium fuel.
- ³⁰ These multilateral discussions take place in the context of the Nuclear Suppliers Group, which represents 45 countries involved in the development of export control guidelines for nuclear material, equipment and technology.
- ³¹ Telecommunications carriers are regulated under the *Telecommunications Act* and largely through the Canadian Radio-television and Telecommunications Commission (CRTC). Companies that distribute or broadcast programming to Canadians through cable, satellite or other specified means (but not the Internet) are regulated under the *Broadcasting Act*. They obtain from the CRTC a licence to undertake activities that are known as Broadcasting Distribution Undertakings or BDUs. BDUs include cable services, direct-to-home (DTH) satellite services and multi-point distribution systems.
- ³² *Telecommunications Act* (1993, c. 38) subsection 7(d).
- ³³ *Broadcasting Act* (1991, c. 11) subsection 3(a).
- ³⁴ Hank Intven and Stephen Rawson, *CRTC approves Sale of BCE*, March 27, 2008, available at: http://www.mccarthy.ca/article_detail.aspx?id=3946. Intven and Rawson also note that voting rights cannot be cumulated between two companies to total more than 46.7 percent.
- ³⁵ See, for example, Steven Globerman, *“Implications of Foreign Ownership Restrictions for the Canadian Economy: A Sectoral Analysis”* (Ottawa: Industry Canada, 1999), pp. 3–4.
- ³⁶ McFetridge, “The Role of Sectoral Ownership Restrictions,” *op. cit.*
- ³⁷ For example, Rogers Communications Inc. stated in its submission that current foreign investment rules remain appropriate and have not had negative impacts on Canada’s competitiveness and productivity; see submission of Rogers Communications Inc. to the Competition Policy Review Panel, January 11, 2008, p. 5. TELUS supported the elimination of current foreign investment rules on both telecommunications and broadcasting in part because they limit the formation of joint venture initiatives with foreign firms and impede technology transfers and other unique partnerships, mechanisms through which domestic firms become more innovative and competitive internationally; see submission of TELUS to the Competition Policy Review Panel, January 18, 2008, p. 8.
- ³⁸ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355; *Canada Gazette*, Vol. 140, No. 26, December 27, 2006.
- ³⁹ *Government Opts for More Competition in the Wireless Sector*, Industry Canada News Release, November 28, 2007. In June 2007, the Minister of Industry announced a new Spectrum Policy Framework for Canada, concluding that “Market forces should be relied upon to the maximum extent feasible.” See *Canada Gazette* Notice DGTP-001-07 — New Spectrum Policy Framework for Canada, June 2007.

- ⁴⁰ The Telecommunications Policy Review Panel was appointed by the Ministry of Industry in April 2005 and issued its Final Report in March 2006. Panel members were Gerri Sinclair (chair), Hank Intven and André Tremblay. The *Telecommunications Policy Review Panel Final Report 2006* is available at: <http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/Home>
- ⁴¹ TPRP, *Final Report*, *op. cit.*, p.14.
- ⁴² *Ibid.*, Afterword, p. 11–26.
- ⁴³ Broadcasting distribution undertakings or BDUs generally encompass cable television, satellite television services, and multi-point distribution systems.
- ⁴⁴ Memo provided to the Competition Policy Review Panel by the Department of Finance, March 17, 2008.
- ⁴⁵ The submission of the Canadian Bankers Association to the Competition Policy Review Panel at p. 4 cites World Economic Forum Global Competitiveness Reports 1997–2007 among other reports. See also Jason Allen and Walter Engert, “Efficiency and Competition in Canadian Banking,” *Bank of Canada Review*, Summer 2007, pp. 33–45, available at: <http://www.bankofcanada.ca/en/review/summer07/allen-engert.pdf>. The authors conclude that the Canadian banking industry is competitive.
- ⁴⁶ John F. Chant, “Foreign Direct Investment in Canadian Banking: Is There a Case for Special Treatment?” paper presented at the Carleton University Centre for Trade Policy and Law Conference on *Canada’s Foreign Investment Policies — A Time for Review?* Ottawa, December 6, 2007.
- ⁴⁷ Submission of the Canadian Bankers Association to the Competition Policy Review Panel, p. 20.
- ⁴⁸ *Fortune* 500 Companies Global Edition 2007, World’s Largest Companies, available at: <http://money.cnn.com/magazines/fortune/global500/2007/>
- ⁴⁹ Canadian Bankers Association, *loc. cit.*
- ⁵⁰ Royal Commission on the Economic Union and Development Prospects for Canada, *Summary of Conclusions and Recommendations*, Ottawa, p. 19.
- ⁵¹ For example, see Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada’s Competition Regime*, April 2002, and OECD, *Canada — Report on Competition Law and Institutions*, 2004.
- ⁵² This view has been expressed since the Economic Council’s *Interim Report on Competition Policy* (Ottawa: Queen’s Printer, 1969). See also, for example, Michal S. Gal, “Market Conditions under a Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies,” New York University Centre for Law and Business, Working Paper no. 01-004, available at: http://papers.ssrn.com/paper.ta?abstract_id=267070
- ⁵³ The Competition Tribunal is a quasi-judicial tribunal made up of judges appointed from the Federal Court and lay members. It adjudicates civil matters under the *Competition Act*. Prosecutions of criminal *Competition Act* matters are undertaken by the Director of Public Prosecutions before the courts.
- ⁵⁴ Commissioner of Competition, Competition Bureau, “A Synthesis and Review of Recent Reform Proposals Regarding Canada’s *Competition Act*,” research paper prepared for the Competition Policy Review Panel, March 31, 2008.
- ⁵⁵ *Financial Post Crosbie: Mergers & Acquisitions in Canada* is the database of record for M&A transactions in Canada. Quarterly reports are available at: <http://www.crosbieco.com/ma/index.html>

- ⁵⁶ The utility of this approach has been illustrated in the recent clearance by the US Department of Justice of the XM Satellite and Sirius merger, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Radio Satellite Holdings Inc.'s Merger with Sirius Satellite Radio Inc.*, available at: http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm
- ⁵⁷ On March 3, 2008, the Minister of Justice appointed Brian Gover as an expert to review the Competition Bureau's use of court orders to obtain documents, testimony and written returns of information and to report to the Commissioner of Competition and the Deputy Minister of Justice with recommendations within three months. See Competition Bureau, Information Notice, "Expert Appointed to Advise on Section 11 Process," available at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02587e.html>
- ⁵⁸ The US law and practice pertaining to merging parties legally closing a merger transaction following the expiration of the relevant waiting period is not markedly different from its Canadian counterparts. But, while the jurisdiction to challenge a transaction is not barred beyond a specific time period in the US, in practice, the federal US competition authorities endeavour to inform merging parties with respect to competition concerns prior to the end of the waiting period and almost never concern themselves further about a merger, once its review process is completed without challenging the transaction. EU law under Council Regulation (EC) No 139/2004, Article 6(1)(c) is more definitive in terms of requiring the European Commission to decide on the legality of a merger at the end of their review process.
- ⁵⁹ In more than 20 years of formal merger review, Competition Bureau has never challenged a merger transaction within the existing three-year time period following an initial determination that the transaction did not raise competition concerns.
- ⁶⁰ The Panel did not consider the false and misleading advertising and marketing practices provision of the *Competition Act*.
- ⁶¹ In addition to the Panel's consultations, where many stakeholders recommended decriminalization of these provisions, there have been a number of other reports recommending decriminalization of some or all of the pricing provisions, including: *Consultative Panel Report on Amendments to the Competition Act* in 1996; Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices under the Competition Act, Theory, Law and Practice* (1999) and again in the 2002 Standing Committee on Industry, Science and Technology Report, *A Plan to Modernize Canada's Competition Regime*.
- ⁶² The Supreme Court of the United States recently rejected the *per se* illegality of resale price maintenance in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).
- ⁶³ A number of experts have noted the large number of guilty pleas and significant fines the government has secured over the past decade under the existing conspiracy provisions as an argument for retaining the existing law. Statistics compiled by the Competition Bureau have shown that in 23 contested proceedings under this section conducted since 1980, the Crown has failed to secure a conviction in all but three cases. Moreover, in the period between 1993 and 2001, 88 percent of the fines imposed under the conspiracy provision received were as a result of guilty pleas in international cartel cases where the Canadian resolution was preceded by or contemporary with resolutions in other jurisdictions.

- ⁶⁴ These complications arise largely from the requirement under Canadian law to establish that an agreement prevents or lessens competition *unduly* before it can be considered a criminal offence. It is the combination of market power and behaviour likely to injure competition that makes a lessening of competition undue. The determinants of market power include such factors as market shares, the number of competitors and the concentration of competition, barriers to entry, geographical distribution of buyers and sellers, product differentiation, and countervailing power on the part of customers, among other factors. This tends to increase the quantity and quality of evidence required to establish an offence to the criminal standard of proof, thereby resulting in longer, more complex investigations and prosecutions in Canada compared with other industrialized countries.
- ⁶⁵ See, for example, the submissions to the Competition Policy Review Panel of the American Bar Association, Bell Canada, Canadian Bar Association, Canadian Chamber of Commerce, Canadian Manufacturers and Exporters, Competition Bureau, Insurance Bureau of Canada and Lang Michner LLP.
- ⁶⁶ The legal term *per se*, in the context of a conspiracy, means that the act of a defined anti-competitive agreement is presumed to be illegal without the necessity of proving its effect on a market.

Chapter 8. Competitiveness Agenda: Public Policy Priorities for Action

- ¹ OECD data cited in Andrew Sharpe, “Assessing Canada’s Ability to Compete for Foreign Direct Investment,” research paper prepared for the Competition Policy Review Panel, March 31, 2008.
- ² Finance Canada, “Strong Leadership. A Better Canada,” Economic Statement, October 30, 2007, p. 10, available at: http://www.fin.gc.ca/ec2007/pdf/EconomicStatement2007_E.pdf
- ³ Institute for Competitiveness and Prosperity, *Report on Canada 2008*, *op. cit.*, p. 43.
- ⁴ Aled ab lowerth and Jeff Danforth, “Is Investment Not Sensitive to Its User Cost: The Macro Evidence Revisited,” Department of Finance, Working Paper 2004-05.
- ⁵ 2008 Ontario Budget, *Growing a Stronger Ontario*, p. 141, available at: http://ontariobudget.ca/english/pdf/papers_all.pdf
- ⁶ Finance Canada, *Advantage Canada: Building a Strong Economy for Canadians*, November 23, 2006, p. 76, available at: <http://www.fin.gc.ca/ec2006/pdf/plane.pdf>
Quebec and three Atlantic provinces have harmonized their retail sales tax regimes with the federal GST. All other provinces continue to impose a separate sales tax at the retail level only, with the exception of Alberta, which does not have a provincial sales tax. The three territories of Canada (Yukon, Northwest Territories and Nunavut) do not have territorial sales taxes. The Government of Quebec administers both the federal GST and the provincial Quebec Sales Tax.
- ⁷ Department of Finance, “Finance Minister Finalizes Advisory Panel on Canada’s System of International Taxation,” News Release, December 11, 2007. The Advisory Panel on Canada’s System of International Taxation’s consultation paper was released on April 25, 2008, and is available at: <http://www.apcsit-gcrfci.ca/05/cnpdcn-eng.html>
- ⁸ OECD, *Education at a Glance*, 2007, Table A1.3a, available at: <http://www.oecd.org/dataoecd/4/55/39313286.pdf>
- ⁹ *Ibid.*, Chart C3.3. Canada had the eighth-highest share of international tertiary enrolled students among OECD and partner economies.

- ¹⁰ See *Ibid.* and Canadian Council on Learning, “Raising the Score: Promoting Adult Literacy in Canada,” September 29, 2005, available at: <http://www.ccl-cca.ca/CCL/Reports/LessonsInLearning/LiL-29Sep2005.htm>
OECD Table C5.1a indicates that, in 2003, only 25 percent of Canadians undertook non-formal, job-related continuous education and training, compared with 40 percent of Swedes, 39 percent of Danes, 37 percent of Americans and 36 percent of Finns.
- ¹¹ Institute for Competitiveness and Prosperity, *Report on Canada 2008*, *op. cit.*, pp. 48–49.
- ¹² Foreign Credentials Referral Office, “Frequently Asked Questions,” available at: http://www.credentials.gc.ca/faq/index.asp#Employers_5
- ¹³ See Statistics Canada, *Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census*, Catalogue no. 97-557-XIE, especially the section on “Immigration: Driver of population growth,” p. 7, available at: <http://www12.statcan.ca/english/census06/analysis/immcit/pdf/97-557-XIE2006001.pdf>
- ¹⁴ Statistics Canada, “2006 Census: Earnings, Income and Shelter Costs,” *The Daily*, May 1, 2008, available at: <http://www.statcan.ca/Daily/English/080501/d080501a.htm>
- ¹⁵ Michael Bloom and Michael Grant, *Brain Gain: The Economic Benefits of Recognizing Learning and Learning Credentials in Canada* (Ottawa: Conference Board of Canada, 2001), available at: www.conferenceboard.ca/press/documents/323-01mb.pdf
- ¹⁶ See Naomi Alboim and Elizabeth MacIsaac, “Making the Connections: Ottawa’s Role in Immigrant Employment,” *IRPP Choices* 13 (3), May 2007, available at: www.irpp.org/choices/archive/vol13no3.pdf. See also initiatives by the Toronto Region Immigrant Employment Council (TRIEC) to profile Canadian organizations that excel at integrating immigrants into their workforces.
- ¹⁷ Citizenship and Immigration Canada, “True or False?” available at: <http://www.cic.gc.ca/English/department/media/facts/times.asp>
- ¹⁸ Citizenship and Immigration Canada, “Statistical Information: Applications Processed at Canadian Visa Offices,” available at: <http://www.cic.gc.ca/english/information/times/international/01-all.asp> and <http://www.cic.gc.ca/english/information/times/international/02a-skilled-fed.asp>
- ¹⁹ Finance Canada, *Budget Plan 2008*, *op. cit.*, pp. 116–117.
- ²⁰ Microsoft News Release, “Microsoft Expanding Canadian Operations in Greater Vancouver Area,” July 5, 2007, available at: <http://www.microsoft.com/presspass/press/2007/jul07/07-05MSExpandVancouverPR.msp>
- ²¹ Based on data from Statistics Canada’s Business Register.
- ²² Institute for Competitiveness and Prosperity, “Assessing the Economic Impact of Head Offices in City Region,” research paper prepared for the Competition Policy Review Panel, March 2008.
- ²³ Desmond Beckstead and W. Mark Brown, *Head Office Employment in Canada, 1999 to 2005*, Statistics Canada Cat. no. 11-624-MIE, July 2006, p. 4, available at: <http://www.statcan.ca/english/research/11-624-MIE/11-624-MIE2006014.pdf>
- ²⁴ United Nations Conference on Trade and Development, Press Release, July 21, 2003, available at: <http://www.unctad.org/Templates/webflyer.asp?docid=3768&intItemID=2261&lang=1>
- ²⁵ Richard L. Florida, *The Rise of the Creative Class* (New York: Basic Books, 2002).
- ²⁶ Casey G. Vander Ploeg, *Big Cities and the Census: The Growing Importance of Big Cities on the Demographic Landscape* (Canada West Foundation, January 2008), p. 4, available at: http://www.cwf.ca/V2/files/Big_Cities_and_the_Census.pdf

- ²⁷ Statistics Canada, *Immigration in Canada, op. cit.*, p. 5.
- ²⁸ Beckstead and Brown, *Head Office Employment in Canada, op. cit.*
- ²⁹ Enid Slack, “Are Ontario Cities at a Competitive Disadvantage Compared to US Cities?” report prepared for the Institute for Competitiveness and Prosperity, June 2003, p. 12, available at: www.competeprosper.ca/images/uploads/EnidSlackReport_190603.pdf
- ³⁰ Harry H. Kitchen and Enid Slack, “New Finance Options for Municipal Governments,” *Canadian Tax Journal* 51 (2003): 2216–2275.
- ³¹ Conference Board of Canada, *Mission Possible: Successful Canadian Cities* (Ottawa: January 2007), p. 8.
- ³² TD Bank Financial Group, *Mind the Gap: Finding the Money to Upgrade Canada's Aging Public Infrastructure*, May 2004, p. 4, available at: <http://www.td.com/economics/special/infra04.pdf>
- ³³ Infrastructure Canada, *Building Canada: Modern Infrastructure for a Strong Canada*, 2007, available at: www.buildingcanada-chantierscanada.gc.ca/plandocs/booklet-livret/booklet-livret-eng.html
- ³⁴ Industry Canada, *Key Small Business Statistics*, January 2008, p. 3, available at: [http://www.ic.gc.ca/epic/site/sbrp-rppe.nsf/vwapj/KSBS_Jan2008_Eng.pdf/\\$FILE/KSBS_Jan2008_Eng.pdf](http://www.ic.gc.ca/epic/site/sbrp-rppe.nsf/vwapj/KSBS_Jan2008_Eng.pdf/$FILE/KSBS_Jan2008_Eng.pdf)
- ³⁵ Business Development Bank of Canada, *Entrepreneurial Insight* Newsletter, February 2008, p. 5, available at: http://www.bdc.ca/NR/rdonlyres/ejyefexsbg2bflqjfevqtw6m7v7w54ifockckivdu4ynd2x6hhoov6xntwz5t4kwpjytkxxl3uo5ltkly7a6tdha/Resources%2fmedia_room%2fSME+Insight_Feb29_2008_final-E+ 3.pdf
- ³⁶ Industry Canada, *Key Small Business Statistics, op. cit.*, p. 7.
- ³⁷ *Ibid.*, pp. 12–13.
- ³⁸ Business Development Bank of Canada, *Entrepreneurial Insight, op. cit.*, p. 7.
- ³⁹ Industry Canada, *Growing Small Businesses*, February 1994.
- ⁴⁰ Finance Canada, *Budget Plan 2008, op. cit.*, p. 124.
- ⁴¹ As the report went to press, the fiduciary duties of directors of a *Canada Business Corporations Act* corporation in relation to the sale of a corporation by way of plan of arrangement were under consideration by the Supreme Court of Canada, which had agreed to hear, but had not yet disposed of, an appeal from the May 21, 2008, decision of the Quebec Court of Appeal in litigation arising from the proposed leveraged buyout of BCE Inc.
- ⁴² SECOR, “Positioning Canadian Firms,” *op. cit.*
- ⁴³ See Agreement on Internal Trade website at: <http://www.ait-aci.ca>
- ⁴⁴ Certified General Accountants, personal communications, March 25, 2008; and Association of Chartered Certified Accountants, submission to the Competition Policy Review Panel, January 2008.
- ⁴⁵ See European Commission, *The EU Single Market: Fewer Barriers, More Opportunities* website at: http://ec.europa.eu/internal_market/top_layer/index_1_en.htm
- ⁴⁶ See *Improving Internal Trade: A Bold Approach*, proposal of a coalition of leading Canadian business groups, available at: http://www.cga-canada.org/en-ca/DiscussionPapers/ca_rep_internal_trade_position-paper2008.pdf

- ⁴⁷ Council of the Federation, “Premiers Move to Strengthen Trade,” press release, January 28, 2008, available at: http://www.councilofthefederation.ca/pdfs/COMMUNIQUE_Jan28_eng.pdf
- ⁴⁸ Barbara Stymiest, CEO of TSX Group, Speech to B.C. and Yukon Chamber of Mines, January 23, 2002, as cited by Department of Finance, “Selection of Statements on Securities Regulation in Canada,” available at: http://www.fin.gc.ca/news02/data/02-094_2e.html
- ⁴⁹ International Monetary Fund, *Canada: Financial System Stability Assessment — Update*, February 2008, p. 33, available at: [http://wbln0018.worldbank.org/FPS/fsapcountrydb.nsf/\(attachmentwebFSSA\)/Canada_Update_FSSA.pdf/\\$FILE/Canada_Update_FSSA.pdf](http://wbln0018.worldbank.org/FPS/fsapcountrydb.nsf/(attachmentwebFSSA)/Canada_Update_FSSA.pdf/$FILE/Canada_Update_FSSA.pdf)
- ⁵⁰ Finance Canada, “Government of Canada Appoints Expert Panel to Review Securities Regulation,” press release, February 21, 2008, available at: <http://www.fin.gc.ca/news08/08-018e.html>
- ⁵¹ Canadian Environmental Assessment Agency, “Cabinet Directive on Implementing the *Canadian Environmental Assessment Act*,” November 22, 2005, available at: http://www.ceaa.gc.ca/013/010/directives_e.htm
- ⁵² Government of British Columbia, *Environmental Assessment Act*, Prescribed Time Limits Regulation, effective December 30, 2002.
- ⁵³ See Major Projects Management Office website at: <http://www.mpmo-bggp.gc.ca/index-eng.php>
- ⁵⁴ As quoted in Hart, “Steer of Drift?” *op. cit.*, p. 5.
- ⁵⁵ Statistics Canada, “International Travel Account,” *The Daily*, February 28, 2008; and unpublished Transport Canada statistics.
- ⁵⁶ *The Economist*, “A Fence in the North, Too,” February 28, 2008, available at: http://www.economist.com/world/la/displaystory.cfm?story_id=10766402
- ⁵⁷ Danielle Goldfarb, “Is Just-In-Case Replacing Just-In-Time? How Cross-Border Trading Behaviour Has Changed Since 9/11,” *Conference Board of Canada Briefing*, June 2007, available at: <http://www.conferenceboard.ca/documents.asp?next=2050>
- ⁵⁸ The SPP was launched by Canada, the US and Mexico in March 2005. The SPP facilitates dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of all North Americans. It addresses issues such as border facilitation, the environment, food and product safety, and improving North American competitiveness. In Canada, the Minister of Industry leads SPP initiatives, and also oversees work on priorities identified under the “Prosperity” pillar of the SPP. The Minister works closely with the Minister of Public Safety (responsible for leading the agenda of the “Security” pillar), the Minister of Foreign Affairs, as well as ministers of other departments who lead on specific initiatives. See Security and Prosperity Partnership of North America website at: <http://www.spp-ppsp.gc.ca/overview/about-en.aspx>
- ⁵⁹ Transport Canada, *National Policy Framework for Strategic Gateways and Trade Corridors*, 2007, p. 7, available at: <http://www.tc.gc.ca/GatewayConnects/docs/NationalPolicyFramework.pdf>
- ⁶⁰ Canadian Chamber of Commerce and US Chamber of Commerce, *Finding the Balance: Reducing Border Costs While Strengthening Security*, February 2008, available at: www.chamber.ca/cmslib/general/0802FindingTheBalance20083393251.pdf
- ⁶¹ Department of Foreign Affairs and International Trade, *Canada’s State of Trade, Trade and Investment Update*, 2007, available at: <http://www.international.gc.ca/eet/pdf/07-1989-DFAIT-en.pdf>

- ⁶² Indeed CDIA flows were greater than FDI flows by 1995. Diversification is considerable.
- ⁶³ Submission of the Canadian Manufacturers and Exporters to the Competition Policy Review Panel, pp. 4–5.
- ⁶⁴ See Foreign Affairs and International Affairs Canada, “A Global Commerce Strategy for Securing Canada’s Growth and Prosperity,” at: <http://www.international.gc.ca/commerce/strategy-strategie/details.aspx>
- ⁶⁵ FIPAs and BITs are international treaties, usually negotiated bilaterally, based on standard FTA provisions such as national treatment and most favoured nation status. Canada’s FIPA “model” is based on NAFTA’s Chapter 11, as is that of the US.
- ⁶⁶ Submission of the Canadian Chamber of Commerce to the Competition Policy Review Panel, p. 11.
- ⁶⁷ Submission of the C. D. Howe Institute to the Competition Policy Review Panel, January 11, 2008.
- ⁶⁸ External Advisory Committee on Smart Regulation, *Smart Regulation: A Regulatory Strategy for Canada: Executive Summary*, Report to the Government of Canada, September 2004.
- ⁶⁹ See the Security and Prosperity Partnership of North America website at: <http://www.spp.gov>
- ⁷⁰ See Industry Canada, “2008 Progress Report on the Paperwork Burden Reduction Initiative,” available at: <http://www.reducingpaperburden.gc.ca/epic/site/pbri-iafp.nsf/en/sx00120e.html>
- ⁷¹ Under the new *Cabinet Directive on Streamlining Regulation* departments and agencies are to evaluate regulatory programs against the following criteria: inputs (e.g., resources, mandate and enabling authorities), activities, effectiveness, ultimate outcomes of the regulatory program, and the extent to which the program contributed to the achievement of reported results; value for money (e.g., relevance, efficiency and cost-effectiveness); and governance, decision making and accountability processes, service standards, and service delivery mechanisms. Regulatory frameworks are to be examined with a focus on the effectiveness of the current regulation in meeting the policy objective, the current instrument selection, level of intervention and degree of prescriptiveness; clarity and accessibility of the regulation to users; and the overall impact on competitiveness, including trade, investment and innovation. See “Regulatory Analysis” at: http://www.regulation.gc.ca/directive/directive01-eng.asp#_Toc162687226
- ⁷² The Major Projects Management Office became operational on February 26, 2008. It should be noted that the Office initiative does not apply to projects north of the 60th parallel. See Major Projects Management Office website at: <http://www.mpmo-bggp.gc.ca/index-eng.php>
- ⁷³ See Community of Federal Regulators, *Business Plan 2007–2010*, April 10, 2007, available at: http://ricommunity.gc.ca/cfr-crf/plan/2007-2010/CFR_Business_Plan_2007-2010_e.pdf
- ⁷⁴ An Expert Panel on Commercialization reported to the federal government on April 24, 2006. The report compiled a series of recommendations with a view to enhancing the transformation of knowledge and technology into new goods, processes or services to satisfy market demands. See *People and Excellence: The Heart of Successful Commercialization*, report to the Government of the Expert Panel on Commercialization, Joseph L. Rotman (chair), at: <http://www.ic.gc.ca/epic/site/epc-gdc.nsf/en/tq00068e.html>
- ⁷⁵ Canada also stands top in the G7 in federal spending on higher education expenditures on research and development (HERD).

- ⁷⁶ Canada also ranked 15 out of 30 on BERD as a percentage of value-added by industry. On this measure, Canada's score has declined from 1.76 percent in 2001 to 1.39 percent in 2005. The OECD average is between 2.15 percent and 2.21 percent in this period. The US figure is between 2.66 percent and 2.83 percent in this period.
- ⁷⁷ See Andrea Bassanini and Stefano Scarpetta, "The Driving Forces of Economic Growth: Panel Data Evidence for the OECD Countries," *OECD Economic Studies* (Paris, OECD, 2001), No. 33, 2001/II, available at: <http://www.oecd.org/dataoecd/26/2/18450995.pdf>; and Dominique Guellec and Bruno van Pottelsberghe de la Potterie, "The Impact of Public R&D Expenditure on Business R&D," *Economics of Innovation and New Technology* 12 (3): 225–243, January 2003.
- ⁷⁸ SR&ED provided over \$4 billion in tax assistance in 2007; see Finance Canada, *Budget Plan 2008*, *op. cit.*, chapter 3.
- ⁷⁹ "This estimate does not tell the whole story. The figure does not include counterfeit and pirated products consumed domestically, nor does it include the significant volume of pirated digital products that are being distributed via the Internet. If these items were added, the total magnitude could well be several hundred billion dollars higher." OECD, "The Economic Impact of Counterfeiting and Piracy: Results of Phase I," 2007, available at: http://www.oecd.org/document/40/0,3343,en_2649_34173_39542888_1_1_1_1,00.html
- ⁸⁰ See, for example, the links between Cégeps and SMEs encouraged through "centre collégiaux de transfert technologique des cégeps du Québec" (CCTT). See the CCTT mandate at: <http://www.mels.gouv.qc.ca/ens-sup/ens-coll/cctt/cctt-mandat.asp> See also Denis Lord, "La recherche et le développement au service des PME," *Le Devoir*, January 26, 2008.

Chapter 9. Driving Change: A Canadian Competitiveness Council

- ¹ Daniel A. Crane, "Report on Best Competition Advocacy Practices," research paper prepared for the Competition Policy Review Panel, March 7, 2008.
- ² National Competition Council website at: <http://www.ncc.gov.au/>.
- ³ The Competition Bureau's formal advocacy powers are limited. Section 125 of the *Competition Act* empowers the Commissioner of Competition to appear before federal boards, commissions and tribunals to make submissions in respect of competition. The Commissioner requires the permission of provincial boards, commissions and tribunals to engage in the same type of advocacy activity under section 126 of the Act. Our view is that the Commissioner of Competition should continue to exercise the powers under sections 125 and 126, unless and until such powers are fully exercised by the proposed Council. As mentioned elsewhere, the Competition Bureau has conducted market studies on an informal basis where it relies upon the cooperation of market participants and public sources for information.
- ⁴ Crane, *op. cit.*, p. 20, writes: "There is considerable value in having an external public advocate focusing solely on competition policy. History has shown that competition values are often sacrificed to other well-intentioned policies if competition lacks a single-minded and independent champion."
- ⁵ *Ibid.*, p. 22.

List of Panel Recommendations

Competitiveness Agenda: The Legal Foundations

The Investment Canada Act

1. The Minister of Industry should introduce amendments to the *Investment Canada Act* as follows:
 - a) raise the review threshold to \$1 billion, replace gross assets as the standard of measurement with enterprise value of the acquired business, and continue to index this threshold for inflation in accordance with the current NAFTA formula;
 - b) raise the threshold for the review of foreign investment in the transportation sector (including pipelines), non-federally regulated financial services and uranium mining from \$5 million to the \$1-billion threshold recommended above;
 - c) change the applicable review standard and reverse the onus within the ICA, which currently requires applicants to demonstrate “net benefit to Canada,” to require the relevant minister to be satisfied that consummation of the proposed transaction would be contrary to Canada’s national interest, before disallowing the transaction;
 - d) remove the obligation under the ICA to notify Industry Canada with regard to an acquisition that falls below the threshold for review or for the establishment of any new business;
 - e) state that neither recommendation 1.a, 1.b nor 1.d would apply to the administration or enforcement of the ICA as they relate to cultural businesses; and
 - f) revise the ICA’s purpose clause (section 2) to remove Industry Canada’s responsibilities to promote foreign investment in Canada.

2. The Minister of Industry and the Minister of Canadian Heritage should increase the use of guidelines and other advisory materials to provide information to the public concerning the review process, the basis for making decisions under the ICA, and interpretations by Industry Canada and the Department of Canadian Heritage regarding the application of the ICA. Additionally, amendments to the ICA should require the Ministers to:
 - a) report publicly on the disallowance of any individual transaction under the ICA, giving reasons for such action being taken; and
 - b) table an annual report to Parliament on the operation of the ICA.
3. The Minister of Canadian Heritage should establish and make public a *de minimis* exemption clarifying that the acquisition of a business with cultural business activities that are ancillary to its core business would not be considered a separate cultural business nor be subject to mandatory review by the Department of Canadian Heritage. For the purpose of applying this exemption, the cultural business activities would be considered *de minimis* if the revenues from cultural business activities are less than the lesser of \$10 million or 10 percent of gross revenues of the overall business.
4. Consistent with recommendations for other sectors, the Minister of Canadian Heritage, with advice from stakeholders and other interested parties, should conduct a review every five years of cultural industry policies, including foreign investment restrictions. The first such review should be launched in 2008. As a matter of priority, the first review should consider:
 - a) increasing and revising the threshold for the review of acquisitions of cultural businesses; and
 - b) the desirability of the Minister of Canadian Heritage continuing to have the right to require the review and approval under the ICA of any new cultural business establishments by foreign investors.
5. In administering the ICA, the ministers of Industry and Canadian Heritage should act expeditiously and give appropriate weight to the realities of the global marketplace and, in appropriate cases, the ministers should provide binding opinions and other less formal advice to parties concerning prospective transactions on a timely basis to ensure compliance with the ICA.

Sectoral Regimes

6. Individual ministers responsible for the sectors addressed in this report should be required to conduct a periodic review of the sectoral regulatory regime with a view to minimizing impediments to competition as well as updating and adapting the regulatory regime to reflect the changing circumstances, needs and goals of Canada. This review should be modelled on the *Bank Act* process and should occur on a five-year cycle. Ownership restrictions should be reviewed on the basis of:
 - a) a statement of policy goals that reflect the current Canadian reality;
 - b) an understanding that limitations on competition and investment may be required to address a market failure, a paramount social policy or a security objective;
 - c) an understanding of the costs and benefits of any such restriction on competitive intensity; and
 - d) an evaluation of whether existing restrictions — or alternative approaches — are the optimal means of achieving the stated policy goals.

Air Transport

7. The Minister of Transport should increase the limit on foreign ownership of air carriers to 49 percent of voting equity on a reciprocal basis through bilateral negotiation.
8. The Minister of Transport should complete Open Skies negotiations with the European Union as quickly as possible.
9. The Minister of Transport, on the basis of public consultations, should issue a policy statement by December 2009 on whether foreign investors should be permitted to establish separate Canadian-incorporated domestic air carriers using Canadian facilities and labour.

Uranium Mining

10. The Minister of Natural Resources should issue a policy directive to liberalize the non-resident ownership policy on uranium mining, subject to new national security legislation coming into force and Canada securing commensurate market access benefits allowing for Canadian participation in the development of uranium resources outside Canada or access to uranium processing technologies used for the production of nuclear fuel for nuclear power plants.

Telecommunications and Broadcasting

11. Consistent with the *Telecommunications Policy Review Panel Final Report 2006*, the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, the Minister of Industry should seek an amendment to the *Telecommunications Act* to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalized in a manner that is competitively neutral for telecommunications and broadcasting companies.

Financial Services

12. The “widely held” rule applicable to large financial institutions should be retained.
13. The Minister of Finance should remove the de facto prohibition on bank, insurance and cross-pillar mergers of large financial institutions subject to regulatory safeguards, enforced and administered by the Office of the Superintendent of Financial Institutions and the Competition Bureau.

The Competition Act

14. The Minister of Industry should introduce amendments to the *Competition Act* as follows:
 - a) align the merger notification process under the *Competition Act* more closely with the merger review process in the United States; the initial review period should be set at 30 days, and the Commissioner of Competition should be empowered, in its discretion, to initiate a “second stage” review that would extend the review period for an additional period ending 30 days following full compliance with a “second request” for information;
 - b) reduce to one year the three-year period within which the Commissioner of Competition currently may challenge a completed merger;
 - c) repeal the price discrimination, promotional allowances and predatory pricing provisions;

- d) repeal the existing conspiracy provisions and replace them with a *per se* criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects;
 - e) repeal the existing resale price maintenance provisions and replace them with a new civil provision to address this practice when it has an anti-competitive effect. This new provision should be subject to the private access rights before the Competition Tribunal;
 - f) grant the Competition Tribunal the power to order an administrative monetary penalty of up to \$5 million for violations of the abuse of dominant position provisions; and
 - g) repeal the “Air Canada” amendments that created special abuse of dominant position rules and penalties for a dominant air passenger service.
15. The Minister of Industry should examine whether to increase the financial thresholds that trigger an obligation to notify a merger transaction as well as whether to create additional classes of transactions that are exempt from the merger notification provisions of the *Competition Act*.
16. The responsibility for competition advocacy should be vested in the proposed Canadian Competitiveness Council. The power to undertake interventions before regulatory boards and tribunals under sections 125 and 126 of the *Competition Act* should remain with the Commissioner of Competition, unless and until such powers are granted to the proposed Council.
17. The Competition Bureau should reinforce its commitment to giving timely decisions, strengthen its economic analysis capabilities, give appropriate weight to the realities of the global marketplace and, where possible, provide “advance rulings” and other less formal advice to parties concerning prospective transactions and other arrangements on a timely basis to ensure compliance with the *Competition Act*.

Competitiveness Agenda: Public Policy Priorities for Action

Taxation

18. The federal, provincial and territorial governments should continue to reduce corporate tax rates to create a competitive advantage for Canada, particularly relative to the United States.
19. Provinces should expedite the phase-out of provincial capital taxes, and the provinces of Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island should move expeditiously to harmonize their provincial sales taxes with the goods and services tax.
20. The federal, provincial and territorial governments should give priority to reductions in personal income taxes, particularly for lower- and middle-income Canadians, and should provide incentives for investment and work by shifting a higher proportion of governments' revenue base to value-added consumption taxes.
21. The International Tax Panel should give particular attention to an assessment of tax provisions disadvantaging Canadian companies relative to non-Canadian companies in Canadian acquisitions, with the objective of recommending ways to allow Canadian-based companies to compete on an equal footing.
22. The International Tax Panel should assess the provisions of Canadian tax legislation limiting interest deductibility by Canadian companies in respect of foreign acquisitions to ensure that Canadian companies seeking to compete globally enjoy every advantage relative to their foreign competitors.

Attracting and Developing Talent

23. Governments should continue to invest in education in order to enhance quality and improve educational outcomes while gradually liberalizing provincial tuition policies offset by more student assistance based on income and merit.
24. Post-secondary education institutions should pursue global excellence through greater specialization, focusing on strategies to cultivate and attract top international talent, especially in the fields of math, science and business.

25. Governments should use all the mechanisms at their disposal to encourage post-secondary education institutions to collaborate more closely with the business community, cultivating partnerships and exchanges in order to enhance institutional governance, curriculum development and community engagement.
26. Federal and provincial governments should encourage the creation of additional post-secondary education co-op programs and internship opportunities in appropriate fields, to ensure that more Canadians are equipped to meet future labour market needs and that students gain experiences that help them make the transition into the workforce.
27. Governments should provide incentives and undertake measures to both attract more international students to Canada's post-secondary institutions and send more Canadian students on international study exchanges.
28. Governments should strive to increase Canada's global share of foreign students, and set a goal of doubling Canada's number of international students within a decade.
29. Governments, post-secondary education institutions and national post-secondary education associations should undertake regular evaluations, measure progress and report publicly on improvements in business–academic collaboration, participation in co-op programs, and the attraction and retention of international talent.
30. Reforms to Canada's immigration system should place emphasis on immigration as an economic tool to meet our labour market needs, becoming more selective and responsive in addressing labour shortages across the skills spectrum.
31. Canada's immigration system should develop service standards related to applications for student visas and temporary foreign workers, and should be more responsive to private employers and student needs by fast-tracking processing and providing greater certainty regarding the length of time required to process applications.
32. In order to ensure that Canada is able to attract and retain top international talent, and respond more effectively to private employers, Canada's immigration system should fast-track processing of applications for permanent residency under the new Canadian Experience Class for skilled temporary foreign workers and foreign students with Canadian credentials and work experience.

Head Offices and Cities

33. Given the national importance of Canada's largest urban centres, the federal government should provide leadership to deal with critical urban issues, particularly those affecting infrastructure, immigration, and higher education and training.
34. In addressing urban issues, municipalities need a more stable, secure and growing revenue source. In particular, provincial governments should assess the feasibility of allowing any municipality to levy a 1 percent value-added tax within their jurisdiction, assessed on the harmonized goods and services tax base, which would be collected by the Canada Revenue Agency (or Revenue Quebec) on behalf of the municipality.
35. In dealing with these issues, municipal authorities that have not already done so should make greater use of financing mechanisms such as user fees, cost recovery programs, debt financing and public-private partnerships.

Fostering Growth Businesses

36. Federal and provincial governments' small and medium-sized enterprise policies should focus on those firms that demonstrate the desire and capacity to grow to become large enterprises. Small and medium-sized enterprise policies and programs should be subjected to regular review in order to assess and measure whether this objective is being met.
37. The Minister of Finance and the Minister of Industry should develop and release a public report on options, including tax incentives, to facilitate the provision of more private venture capital, particularly at the "angel" and late stage, by June 2009.

Strengthening the Role of Directors in Mergers and Acquisitions

38. Securities commissions should repeal National Policy 62-202 (Defensive Tactics).
39. Securities commissions should cease to regulate conduct by boards in relation to shareholder rights plans ("poison pills").
40. Substantive oversight of directors' duties in mergers and acquisitions matters should be provided by the courts.
41. The Ontario Securities Commission should provide leadership to the Canadian Securities Administrators in making the above changes, and initiate action if collective action is not taken before the end of 2008.

The Canadian Economic Union

42. The federal government should provide leadership in the elimination of all internal barriers between the provinces and territories that inhibit the free flow of goods, services and people by June 2011.
43. Federal and provincial governments should establish by June 2009 a work plan to achieve this goal and provide interim reports on progress every six months.
44. The federal government should show leadership regarding national securities regulation and resolve this matter expeditiously.
45. The federal government should more fully harmonize federal environmental assessment procedures with provincial processes.
46. Beginning January 2009, the federal government should abide by timelines that are not longer than the environmental assessment timelines set by the relevant provincial jurisdiction for a proposed project subject to assessment and incorporate such timelines as part of the broader national review required for 2010.

Canada–US Economic Ties

47. Addressing the thickening of the Canada–US border should be the number one trade priority for Canada, and requires heightened direct bilateral engagement at the highest political levels.
48. Canada should act to create a more seamless US border crossing process, focusing on priorities jointly identified by the Canadian Chamber of Commerce and US Chamber of Commerce in their February 2008 report, while responding to legitimate US security needs, and funding and expediting vital border infrastructure.

International Trade and Investment

49. The federal government should set an ambitious timeline for concluding priority trade and investment agreements, led by the Minister of International Trade who should pursue a flexible, results-based approach, beginning by simplifying Canada's model foreign investment protection agreements and streamlining our free trade agreements negotiating processes.
50. Beginning in 2009, on behalf of the federal government, the Minister of International Trade should report at least annually on Canada's trade and investment liberalization initiatives generally and in specific sectors.
51. Beginning immediately, the Minister of International Trade should build on the Global Commerce Strategy by developing and publicizing annual plans and priorities for enhanced trade and investment, and by identifying priority trading partners, economic impacts of prospective agreements and services to businesses. Comprehensive input from business should guide and inform Canada's approach across government.

Regulation

52. A senior federal economic minister should be mandated to lead and oversee progress on regulatory reforms, implementing a new regulatory screen by June 2009 that would subject all new regulations to a rigorous assessment of their impact on competitiveness.
53. Each major federal regulatory department and agency should reform its processes to increase transparency, reduce overlap and duplication, and set clear standards to yield time certain decisions, reporting annually, commencing in 2010, on outcomes and performance.
54. The foregoing recommendations for regulatory reform are equally applicable to provinces and territories.
55. Canada should harmonize its product and professional standards with those of the US, except in cases where, and then only to the extent that, it can be demonstrated that the impairment of the regulatory objective outweighs the competitiveness benefit that would arise from harmonizing.

Innovation and Intellectual Property

56. The federal government should monitor the scientific research and experimental development tax credit program annually in order to ensure that business investment in research and development and innovation in Canada is effectively encouraged.
57. As a matter of priority, the federal government should ensure that new copyright legislation will both sufficiently reward creators while stimulating competition and innovation in the Internet age. Any prospective changes to Canada's patent law regime should also reflect this balance. The federal government should assess and modernize the Canadian patent and copyright system to support the international efforts of Canadian participants in the global economy in a timely and effective manner.
58. Before December 2009, the federal government should strengthen counterfeit and piracy laws to ensure that intellectual property rights are effectively protected.
59. Canada's post-secondary education institutions should expedite the transfer of intellectual property rights and the commercialization of university-generated intellectual property. One possible method to achieve this would be to move to an "innovator ownership" model to speed commercialization.

Driving Change: A Canadian Competitiveness Council

60. The federal government should establish as expeditiously as possible an independent Canadian Competitiveness Council under the Minister of Industry. The Council should be staffed by a Chief Executive Officer and a small core staff, overseen by a Board of Directors.
61. The Council's mandate should be to examine and report on, advocate for measures to improve, and to ensure sustained progress on, Canadian competitiveness. The Council should not enforce laws and regulations but should have a public voice, including the power to publish and advocate for its findings.

62. The Council should set its own agenda, reviewing matters or conducting research on its own initiative as well as in response to the request of a federal or a provincial minister or a municipal mayor. Governments should not have the power to compel the Council to undertake or discontinue a review or study.
63. The Council should be required to report to Parliament on its activities on an annual basis through the Minister of Industry.
64. The Council's Board of Directors should consist of not more than nine persons, including the Chair, and should include a majority of non-governmental members, as well as members with experience representing the federal, provincial and municipal governments.
65. The Council should be mandated and fully funded in a manner that would allow the Council to operate in an effective and responsible manner for a five-year period. Prior to the end of the five-year period, the Minister of Industry should undertake a review to determine whether the Council's mandate should be renewed and, if so, on what terms.