THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Draft Guidelines for Mergers and Acquisitions involving Transportation Undertakings

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

September 2008

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the draft Guidelines for Mergers and Acquisitions involving Transportation Undertakings – June 2008 Draft (the Draft Guidelines) released for comment by Transport Canada on July 28, 2008. We offer suggestions to provide further clarity to the new process.

Ambiguity in the wording of the new merger notification and review provisions of the *Canada Transportation Act* (CTA) has resulted in uncertainty for the business community on the scope of transactions subject to notification, as well as the review process. The CBA Section's October 2007 letter on Bill C-11 (copy attached) outlines in detail our view that guidelines can go a long way to resolving uncertainty in the application of the new provisions. The CBA Section, therefore, welcomes the Draft Guidelines.

The CBA Section also welcomes the Minister's openness to enacting regulations to exempt certain classes of transactions from the CTA merger notification and review provisions, and to considering suggestions from the public on appropriate exemptions. As noted in our October 2007 letter, the CBA Section believes that the policy underlying the CTA merger notification and review provisions does not require review of the full range of transactions that may fall in the scope of section 53.1(1), and that appropriate exemptions should be available to minimize the regulatory burden and costs associated with the new provisions.

The CBA Section is concerned, however, that the comment period for the Draft Guidelines, as well as the formulation and suggestion of appropriate exemptions, is insufficient. The short comment period is exacerbated by the fact that the Draft Guidelines were posted at the

end of July when many potentially interested parties were on vacation, with only limited public indication of publication. For example, the CBA Section was not advised that the Draft Guidelines were posted for comment, notwithstanding our October 2007 letter to the Minister of Transport indicating a strong desire to participate in consultation. Our comments are necessarily more general than they would have been with more time to consider the issues and consult more broadly with members of the CBA Section. The CBA Section would welcome the opportunity to consult further with Transport Canada on the issues raised in this letter and the proposed exemptions.

While the Draft Guidelines provide useful guidance in a number of areas, a number of important threshold issues require further clarity, including the scope of transactions subject to review. The CBA Section also proposes a number of exemptions from the CTA notification and review requirements, although it is difficult to formulate appropriate exemptions without clarity on the scope of transactions that would otherwise be subject to the CTA provisions. In addition, the CBA Section suggests streamlining the public interest factors in the Draft Guidelines to better reflect the intent of the new CTA provisions and facilitate the preparation of a *Public Interest Impact Assessment*. Finally, the CBA Section suggests improvements to the filing and review process.

II. SCOPE OF TRANSACTIONS SUBJECT TO NOTIFICATION AND REVIEW

The CTA merger notification and review process applies to proposed transactions that are subject to the notifiable transaction provisions of the *Competition Act* and that "involve a transportation undertaking". This description of the scope of transactions raises a number of threshold issues.

As described in our October 2007 letter, considerable uncertainty arises from the absence of a definition of "transportation undertaking" for purposes of section 53.1(1) of the CTA (other than that the business must fall within the jurisdiction of Parliament). Additional uncertainty arises from the fact that the legislation provides no further guidance on when a transaction "involves" a transportation undertaking.

The CBA Section had hoped that guidelines would provide clarity on these points. However, no direction is provided in the Draft Guidelines, which now use the term "federal transportation undertaking". The Draft Guidelines acknowledge that there may be legitimate questions on whether the CTA provisions apply in a particular case, and indicate that these questions be directed to Transport Canada either in advance or as part of the notice filed with the Minister. While Transport Canada cannot eliminate the likelihood that legitimate questions of interpretation will inevitably arise even with clearer guidelines, it is unnecessarily burdensome on the business community to provide no further clarity by way of guidelines on how the broad and ambiguous CTA provisions will be interpreted.

Enacting exemptions from the CTA regime for appropriate classes of transactions will not be sufficient to clarify when a transaction "involves a transportation undertaking". In this regard, exemptions are only needed to exclude classes of transactions from notification which would otherwise be subject to the new provisions.

With the benefit of having applied the new provisions for over a year, and considering that the provisions only apply to matters that fall within federal jurisdiction, it should be possible for Transport Canada to communicate general principles of interpretation on the subject matter over which Transport Canada would assert a right of review. For example, uncertainty surrounding the application of the new provisions could be reduced if the Draft Guidelines addressed the following general points:

- Does "transportation undertaking" include businesses that do not move goods or persons but provide services to those that do (e.g. longshoring) or is it limited to businesses that directly move goods or persons? If businesses that do not move goods or persons are included, what type or degree of connection to actual transportation must there be?

- Does "transportation undertaking" include businesses that "transport" via means such as pipeline or power transmission lines?

- What factors dictate when a transportation undertaking is sufficiently federal or national in nature to fall under the CTA provisions? This is particularly relevant if Transport Canada's view is that a "transportation undertaking" can include a business that does not actually move goods or persons. For example, is a licence to operate the business under federal law required for it to be a federal transportation undertaking (i.e. a necessary but not sufficient condition)?

- To what extent does "transportation undertaking" apply to a business that carries on transportation activities solely as an ancillary to a non-transportation related principal business, for example, carriage of a party's own goods or carriage of third party goods on an entirely ancillary or incidental basis? In this regard, we understand that Transport Canada advised a CBA Section member several months ago that there is no filing obligation under the CTA unless the "principal business" of one or more of the transacting parties is the provision of transportation services. While Transport Canada has not defined what constitutes the "principal business" of a transacting party, Transport Canada representatives did cite, as examples, department stores engaged in private carriage, i.e. companies that operate a transport division, with a significant fleet of trucks, used to transport merchandise, ancillary to their respective principal business as retailers. We understand that Transport Canada does not consider these companies a transportation undertaking. According to Transport Canada, even if the truck fleets were used, in part, for common carriage, i.e. to transport goods for third parties for compensation, this would still not be considered a "transportation undertaking" and transactions involving these companies would not be subject to the CTA provisions. If this is indeed Transport Canada's view, it should be in the Draft Guidelines (with the result that an exemption proposed below for "ancillary" transportation businesses may not be required);

- Is it Transport Canada's view that a transaction "involves" a transportation undertaking when the purchaser constitutes a transportation undertaking but the target is not involved in transportation?

Clarity on these points, even at a general level, would enable the business community to evaluate and implement strategic opportunities without being subject to unnecessary burdens. Similarly, Transport Canada would be spared repetitious inquiries.

The ambiguity about when a transaction would "involve a transportation undertaking" also makes it difficult to offer useful suggestions about appropriate exemptions from the CTA notification and review provisions. Exemptions that would be necessary or appropriate will depend to a significant extent on how broadly the language "involve a transportation undertaking" is interpreted.

Nevertheless, Transport Canada should exempt those transactions that either are unlikely to raise public interest concerns, or will be vetted by a regulator on public interest or similar grounds. For the former, it appears that a key reason for implementing the CTA's public

interest test was to allow the federal government to address loss of jobs and loss of head offices at the time of mergers of large transportation companies.[1] Accordingly, acquisitions unlikely to raise such concerns should be appropriate candidates for exemption. For the latter, the government strives to achieve efficiency in its regulatory process. Indeed, the April 1, 2007 Cabinet Direction on Streamlining Regulation requires government departments and agencies to "coordinate the implementation and management of regulation to minimize complexity and duplication".[2] Accordingly, the following classes of transactions (to the extent they would otherwise be subject to the provisions) should be exempt from the CTA review process:

(a) transportation of goods by road – transactions involving trucking lines and freight forwarders are not likely to give rise to national public interest concerns);

(b) pipelines, power transmission lines, etc. – these businesses are already subject to sectoral regulation and oversight and are unlikely to raise public interest concerns;

(c) transportation ancillary to a non-transportation business – where transportation revenues support a non-transportation business and constitute less than a specified percentage of overall revenue;

(d) transportation of own goods exclusively;

(e) transactions already subject to review and approval based on public interest or similar considerations, such as transactions subject to review under the *Investment Canada Act*, by the National Energy Board, or provincial energy boards; and

(f) any acquisition by a business carrying on a transportation undertaking of a business that is not a transportation undertaking.

The CBA Section also reiterates its position regarding the suggested application of the CTA notification and review provisions to transactions for which the parties do not file a pre-merger notification under the *Competition Act*. The Draft Guidelines state that parties to a proposed transaction are required to provide notice of a proposed transaction involving a

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1 The Air Canada-Canadian Airlines merger in 1999, and the proposed CNR-BNSF merger announced in 1999, but never completed, appear to have been key reasons for the addition of merger review provisions to the CTA.

2 See http://www.regulation.gc.ca/directive/directive01-eng.asp at Item No. 4

transportation undertaking to the Minister at the same time parties either file a request for an advance ruling certificate or make a short or long form filing with the Commissioner of Competition. On a plain reading of the statute, the CTA merger review provisions require notice to the Minister at the same time of a filing of a short or long form notice under Part IX of the *Competition Act*, but do not require any notification to the Minister in connection with an application for an advance ruling certificate or any less formal contact. Transport Canada has an obligation to apply the law as it written, and should not expand the scope of merger review by means of guidelines. Given that the issue was raised with the Parliamentary Committee that reviewed the legislation, Parliament must have intended that only notifications need be copied to the Minister.

III. PUBLIC INTEREST FACTORS

With respect to the public interest factors described in the Draft Guidelines that may be relevant to the Minister's public interest assessment, the CBA Section comments as follows:

1. The CBA Section questions the relevance of some factors identified to the public interest *as it relates to national transportation*. In particular, the "Social" factors identified as potentially relevant are overly broad. For example, it is not clear how impact on low income workers and families will be taken into account apart from impact on employment or access to transportation mentioned elsewhere in Draft Guidelines. It is also not clear why corporate governance considerations or cultural impacts would be relevant to an assessment of whether a transaction is in the public interest as it relates to national transportation. These factors should be deleted or their relevance clarified.

2. The Draft Guidelines should state that the public interest assessment will balance or weigh the potentially relevant factors. It should be clear that while "public interest" is a broad concept, the Minister of Transport should not review a merger under the CTA if the only public interest issues relate to competition, since those will be dealt with under the *Competition Act* merger review provisions.

3. The Economic factors listed under "Impact on Users of the Transportation System" should be moved to a new "competition law considerations" section. Additional potential impacts of a transaction on users of a transportation system that are not a function of the adequacy of competition should be highlighted separately. We also suggest moving the text under "Impact on Other Transportation Undertakings" to the "competition law considerations" section.

4. "Anticipated reactions of competitors to a transaction" is listed as a factor that might affect the determination of whether a proposed transaction raises public interest concerns in relation to national transportation. While competitors should be consulted in appropriate cases, the Minister should recognize that submissions of competitors will often be motivated by self-interest rather than public interest considerations. Consultation with competitors regarding competition law matters is most appropriately dealt with by the Competition Bureau. Accordingly "anticipated reaction of competitors" should not be a public interest factor for the purposes of the Guidelines.

5. The Draft Guidelines appropriately comment on certain factors that "could be" relevant to a public interest assessment. However, in some cases, the Draft Guidelines inappropriately give the impression that parties to a merger subject to the CTA notification requirement must demonstrate a positive impact on the public interest in Canada. Nothing in the CTA merger review provisions gives rise to any obligation to demonstrate a positive net benefit in the same way as the *Investment Canada Act*. We highlight, for example the following statement:

> Transactions which have the potential to improve competition, efficiency, networks or market structure and/or add capacity or investment will be less likely to raise a public interest concern compared to those which do not or which have an adverse impact on these factors.

A transaction with a neutral impact on these factors should not raise issues or concerns with respect to the public interest. Other statements in the Draft Guidelines which suggest the need to demonstrate a benefit (as opposed to raising a public interest issue related to transportation) are:

> The capacity of the transaction to improve the quality of life and the environment by reducing congestion and pollution will be a positive public interest factor.
>
> Potential of transactions to improve safety in the work place and in our communities will be an important consideration.
>
> Wherever possible, transactions should improve wherever possible access to transportation for people with disabilities.

6. The Economic factors under the heading "Impact on the Undertakings Involved" and text of that section should indicate that the pre vs. post closing financial position of one or both parties to a transaction is the relevant public interest consideration.

7. Under the Security factor, further clarity is needed on how "reliability of the new owners" would be assessed. If the federal government adopts a new national security review regime, as has been proposed, security would continue to be a relevant factor. However, Transport Canada should discontinue an independent review of national security issues and indicate that these need not be addressed as part of the *Public Interest Impact Assessment*.

IV. NOTICE, PROCESS AND TIMING MATTERS

The CBA Section has the following comments on the contents of the notice to be filed, as well as process and timing issues:

1. The Draft Guidelines call for filing with the Minister "the information that is required to be provided to the Commissioner of Competition under the *Competition Act* or that is filed with the Commissioner of Competition" (emphasis added). However, much of the information filed with the Commissioner goes beyond that which is relevant to the Minister of Transport. It includes commercially sensitive confidential information the disclosure of which should be minimized. To the extent the information is relevant to competition, it is adequately dealt with by the Competition Bureau. The Minister should be looking for additional factors that potentially raise public interest issues related

to the functioning of the national transportation system. Again, the CTA requires only that a copy of the notice be sent to the Minister, and makes no mention of "other information" filed with the Commissioner. Parties may choose to file this information but should not be required to do so.

2. The Draft Guidelines introduce ambiguity about when the 42 day time period runs, by stating that the Minster's consideration of a transaction will commence only upon receipt of a complete notice that includes all the information required under the Draft Guidelines. Given the subjective nature of some notice requirements described in the Draft Guidelines and the fact that the contents of the notice are not set out in legislation or regulation, it would be inappropriate for a notice to be found incomplete on this basis with a resulting delay in the running of the 42 day period. The CBA Section recommends instead that a more concrete list of required information be set out in the Draft Guidelines to increase the likelihood that Transport Canada will receive the information required for a thorough assessment with the initial filing. Follow-up questions, if any, can easily be accommodated within the 42 days.

3. The requirement to identify in the *Public Interest Impact Assessment* major stakeholders who "may be interested" in the transaction involves speculation about the potential interest of third parties, and should be deleted.

4. The Draft Guidelines state that “it is possible that for simpler transactions clearly raising no public interest issues that a determination will be made more quickly” than the 42 day initial period The Minister should give a stronger commitment than this, as only a limited number of transactions would potentially require extensive consideration. The Competition Bureau can clear almost all non-controversial mergers within two weeks. We suggest that Transport Canada commit to meet a similar two-week standard for non-controversial mergers under the CTA.

5. The Draft Guidelines state that a notice of a transaction involving an air transportation undertaking should also be submitted to the Canadian Transportation Agency so that the agency can assess whether the transaction would result in an air transportation undertaking that is "Canadian" as defined in section 55(1) of the CTA. This comment should be qualified by "if applicable", since not every air transportation undertaking is required to be "Canadian" under the CTA.

6. The CBA Section also reiterates comments made in the October 2007 letter relating to confidentiality matters and publication, and urges that the proposed treatment of these important issues be set out in the Draft Guidelines.

V. CONCLUSION

The CBA Section appreciates the opportunity to submit these comments. We would welcome further consultations with Transport Canada on the issues raised in this submission, and the potential exemptions that may be considered.

ANNEX: LETTER TO THE MINISTER OF TRANSPORT AND THE COMMISSIONER OF COMPETITION

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 2, 2007

The Honourable Lawrence Cannon, P.C., M.P.
Minister of Transport, Infrastructure and Communities
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Ottawa, ON K1A 0N5

- and –

Ms Sheridan Scott
Commissioner of Competition
Competition Bureau
Industry Canada
Place du Portage, Phase I
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Dear Minister Cannon and Ms Scott:

RE: Regulations and Guidelines for Merger Notification and Review under *Canada Transportation Act* (Bill C-11)

I am writing as Chair of the National Competition Law Section of the Canadian Bar Association (the CBA Section) with respect regulations and guidelines under Bill C-11, amending the *Canada Transportation Act* (CTA) and other Acts (now S.C. 2007, c. 19). The amendments to the CTA established a new merger notification and review process for proposed transactions that are subject to the notifiable transactions provisions of the *Competition Act* and which "involve a transportation undertaking". These new provisions effectively extend existing merger notification and review provisions for mergers involving air transportation undertakings to mergers involving any type of transportation undertaking.

An important aspect of the new merger notification and review process is the issuance of regulations in relation to the information required in merger notifications to the Minster, and guidelines on the factors that will be taken into account in assessing the public interest as it relates to national transportation. The Bill expressly contemplates consultation with the Competition Bureau on these guidelines. The Bill also contemplates the possibility of regulations setting out exemptions from the CTA merger notification and review process.

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The purpose of this letter is to stress the importance of establishing appropriate regulations and guidelines expeditiously, and to suggest some possible approaches to those documents. The practical problem for Canadian businesses is that numerous transactions are currently underway – and no doubt more to come – which may fall within the new regime, whether or not that was intended. This uncertainty is costly for the economy. There are ambiguities in the legislative provisions, including threshold issues such as what constitutes a "transportation undertaking," when a merger "involves" such an undertaking, and whether the new merger notification and review provisions apply to mergers that exceed the thresholds for notification under the *Competition Act* but are exempt from notification under that legislation, for example because of an advance ruling certificate or waiver of the obligation to file a notification in respect of a merger.

Given the subject matter of the provisions in question, there is an immediate need for guidance from both the Minister and the Commissioner.

The Canadian business community, as well as other interested stakeholders, would greatly benefit from guidance from the Minister and the Commissioner on their approach to these new merger provisions. For example, the Commissioner's November 2006 submission to the House of Commons Standing Committee on Transport, Infrastructure and Communities provided helpful guidance on her intent to apply the same competitive effects standard in a CTA merger review as she applies in a merger review under the *Competition Act*.

A number of the CBA's concerns about the uncertainty in the new merger provisions were set out in our September 2006 submission on Bill C-11 (a copy of which is enclosed with this letter), which in turn is consistent with our submissions on previous Bills.

Guidance from the Minister

The following are some illustrative examples of points on which we believe guidance from the Minister would be helpful:

1. The term "transportation undertaking" is not defined for the purposes of section 53.1(1) of the CTA. Is it intended to include every business that transports people or goods across a provincial or a national border on a continuous and regular basis, even if to a minimal extent, either in absolute terms or in the context of a much larger business? Is it intended to apply only to undertakings carrying third party persons or goods? Is it intended to apply only to transportation undertakings that have a national dimension (given the reference to "national transportation" in section 53.1(4) as the standard for determining whether a merger review is required and, if so, what constitutes a "national" dimension)? Is it intended to extend to businesses that provide ancillary services to airline, ship or rail operations, for example, such as stevedoring? Is it intended to apply to suppliers of parts or equipment to transportation businesses?

    - We suspect that the policy motivating the imposition of the new CTA merger notification and review provisions is not as wide as the statutory language might be interpreted. We submit that limitation of the scope of these provisions through guidelines and exemptions would be helpful.

2. When a transaction "involves" a transportation undertaking is also not defined. Is it the Minister's view that this concept applies only to acquisitions of transportation undertakings, or does it apply also to an acquisition by a transportation undertaking? Do the new CTA merger notification and review provisions apply to an acquisition of or by an affiliate of an entity that has a transportation undertaking, or only if the entity that carries on a transportation undertaking is itself a party to the proposed transaction?

   - We submit that some limitation of the scope of the CTA merger provisions in this regard consistent with the intended policy would be helpful. It is not clear, for example, whether and why the Minister would wish to review an acquisition by a transportation undertaking of a business outside the transportation sector.

3. What types of "transportation" undertakings are covered by the new merger provisions? Is the concept limited to air transport, shipping, rail, bus and port services, for example, or does it include other types of transportation services, such as trucking, pipelines, taxis, or power transmission lines?

   - We submit that the types of transportation undertakings that could reasonably raise a national transportation issue is limited and could be specifically identified.

4. Is the Minister prepared to use the regulation-making power to enact regulations exempting classes of transactions from the new merger review and notification provisions? If so, what classes of transactions will be exempt?

   - As above, we submit that the policy underlying the new merger provisions would not require notifications of the full range of proposed transactions that may fall within the scope of section 53.1(1). Exemptions would help to reduce uncertainty and unnecessary filings with the Minister, thereby minimizing the regulatory burden and costs associated with the provisions.

5. What criteria will the Minister use in determining whether a proposed transaction raises public interests issues, and whether such issues are sufficient as to require a public interest review?

   - It is not clear to the CBA Section what criteria the Minister will employ in this regard, particularly for transportation undertakings regulated by the CTA in any event, and given that competition issues are addressed by the Commissioner, and foreign investment is governed by the *Investment Canada Act*. We submit that publication of the criteria to be applied by the Minister is essential.

6. Will the Minister provide advance rulings on the application of the new CTA merger notification and review provisions to a particular proposed transaction? If so, can rulings be sought in confidence?

   - We submit that it would be very helpful for the Minister to provide advance guidance on a confidential basis.

7. Does the Minister intend to take the full 42 days to decide whether a notified proposed transaction will require a public interest review, or will there be a procedure for a faster determination from the Minister, for example in cases that involve only minimal or regional transportation components?

   - We believe that, in the vast majority of mergers that are notified, the Minister should be able to make a determination that no public interest review is required within 10 days.

8. If the Minister does require a public interest review, will such review be confined to the transportation component of the proposed transaction, or will the Minister review other, non-transportation aspects of the business to be acquired?

   - We submit that the review should be confined to transportation businesses, consistent with the statutory scheme.

9. Is it the Minister's position that confidential information provided to an appointee pursuant to section 53.1(5) of the CTA for the purposes of a public interest review is protected from disclosure by section 51(1) of the CTA, even though the information is not "provided to the Minister"?

   - We submit that confidentiality protection is essential for the business documents that may be required for a review, but the statutory basis is unclear. A statutory amendment would be helpful. Clarification of the position that the Minister would take in the event of an application under the *Access to Information Act* would also be helpful.

10. The new CTA merger provisions provide that the Commissioner's report to the Minister is to be made public (s. 53.2(3)). Is it the Minister's intention also to make public any report on public interest considerations from the Agency or an appointee pursuant to section 53.1(5) of the CTA? If not, will that report be disclosed to the Commissioner and/or the parties to the proposed merger?

    - We submit that the public interest report should be disclosed to the merger parties to enable them to address any issues. It is important for merging parties to know before they propose a transaction whether any such report will be made public as that fact may influence their willingness to proceed with a particular proposed merger. It is also important that any public report be edited to protect any confidential business information about the merging parties.

11. How will the new CTA merger notification and review process work in conjunction with the *Investment Canada Act* (ICA) in circumstances where a non-Canadian is proposing to acquire a business with a transportation undertaking? Will the Minister consult with the Minister of Industry or the Minister of Canadian Heritage and, for example, coordinate any requested undertakings with respect to the timing of the Minister's review? In this latter regard, the ICA provides the Minister of Industry (or Canadian Heritage) with an initial review period of 45 days from receipt of an ICA application, while the Minister of Transport has 42 days to decide only whether to

commence a public interest inquiry (with an inquiry taking up to an additional 150 days or more). Will the ICA process be delayed while waiting for the Minister of Transport to issue a decision? If not, would the Minister require a public interest review under the ICA after the Minister of Industry or the Minister of Canadian Heritage has determined the proposed transaction to be of "net benefit to Canada"?

- We submit that it is critical for parties to a proposed merger to understand the relationship and timing implications of these two reviews before they decide to proceed with a proposed transaction. This issue should be addressed in regulations, guidelines, or amendments to the legislation.

Guidance from the Commissioner

We also believe that additional guidance from the Commissioner would be helpful on the following points:

1. Will the Commissioner alter the Competition Bureau's normal course review of mergers where the Bureau determines that a merger may involve a transportation undertaking? We note, for example, that notification to the Minster will not be required where a proposed transaction is exempt from notification under Part IX of the *Competition Act* because the Commissioner has issued an advance ruling certificate under section 102 of the *Competition Act* or waived compliance with Part IX. The application of such exemptions is common, if not routine. In fact, the vast majority of the mergers reviewed by the Bureau are cleared within two weeks, often without a formal notification filing.

    - We submit that the Commissioner should carry out the statutory mandate under the *Competition Act* in the normal course consistent with past practice. It is difficult to understand the intent of section 53.1(1) in this regard, but we believe that Parliament intended that there be no public interest review if there are clearly no competition issues and an advance ruling certificate is issued or a waiver of the Part IX notice requirement is granted.

2. What is the position of the Commissioner on the availability of sections 11 or 15 of the *Competition Act* to assist in merger reviews by the Commissioner under the CTA?

    - We submit that these provisions apply only to inquiries under the *Competition Act* and not to merger reviews pursuant to the CTA.

3. Is the position of the Commissioner that confidential information provided in the context of a CTA merger review is protected by sections 29 or 29.1 of the *Competition Act*? If so, what is the basis for that position given that the Commissioner's review is conducted pursuant to the CTA, not the *Competition Act*.

    - We submit that a statutory amendment should be made to ensure protection of confidential information in this regard. In the meantime, confirmation of the Commissioner's position in the event of an application under the *Access to Information Act* would be helpful.

We believe that clarification of the Minister's and the Commissioner's positions on these and other issues likely to arise in the application of the new CTA merger notification and review provisions is required urgently. Canadian businesses frequently assess possible transactions in the course of their day-to-day activities and devote significant time and resources to doing so. Awareness of the Minister's and the Commissioner's position on these and other fundamental issues raised by the new CTA merger notification and review provisions will likely avoid significant inefficiencies in pursuing, proposing and implementing transactions, as well as inefficiencies in the application of government resources in dealing with proposed transactions that may be subject to the new provisions. For example, some proposed time sensitive transactions may not even be proposed if it is clear that they will be subject to a CTA public interest review. Also, depending on the scope and application of the CTA merger notification and review provisions, some Canadian transportation businesses may choose not to bid on other businesses if they determine that they will be at a competitive disadvantage relative to other bidders, including foreign bidders who are not subject to the same regulatory uncertainty and delay.

In our view, it would be advisable for the Minister and the Commissioner to consult with interested stakeholders on guidelines, procedures and possible exemptions in relation to the new CTA merger notification and review procedure. We would be pleased to participate in any consultations. It would be advisable to start the process as soon as possible, to avoid the necessity of making ad hoc policy decisions in the context of time impacted transactions.

Finally, we believe that the new CTA merger review provisions are highly relevant, and may be of significant interest, to the recently appointed Competition Review Panel. Clarification of the foregoing points would assist the Panel in assessing the likely impact of the new CTA merger review process on the competitiveness of Canadian businesses and on foreign investment in Canada. Given that the Panel is tasked in part with reviewing the ICA, we expect that it will be highly relevant for the Panel to understand how the ICA and the new CTA merger notification and review provisions will work together when they both apply to the same proposed transaction.

We look forward to working with you on these issues.

Yours very truly,

(original signed by Tamra Thomson for Barry Zalmanowitz)

Barry Zalmanowitz
Chair,
National Competition Law Section

Att.