Submission on Bill C-23

Competition Act Amendments

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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TABLE OF CONTENTS

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PREFACE . . . . - i -

EXECUTIVE SUMMARY 1

I. INTRODUCTION 3

II. AMENDMENT PROCESS 3

III. MUTUAL LEGAL ASSISTANCE 4

IV. ABUSE OF DOMINANCE - AIRLINE INDUSTRY 5

V. INTERIM ORDERS 7
- A. Review by the Tribunal – Onus and Scope of Review 7
- B. Review by the Tribunal - Standing of Person Affected 8
- C. Variation and Rescission of Tribunal Orders Relating to Consent Agreements 9

VI. PRIVATE ACCESS 9
- A. Competitive Effects Test - Section 75 10
- B. Damages 12

VII. CONCLUSION 13

PREFACE

The Canadian Bar Association is a national association representing over 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 by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

Submission on Bill C-23
***Competition Act* Amendments**

EXECUTIVE SUMMARY

Bill C-23, *Competition Act* Amendments, is a positive step but still raises a number of serious concerns. This submission is limited to seven principal areas.

The *Competition Act* is fundamental to our economic system and amendments to the *Act* should only be made with considered and deliberate reflection. Unfortunately, substantial amendments concerning private access and remedial powers with respect to airlines were introduced at the last minute at the House Committee and then rushed through second and third reading in the House.

Information regarding mergers is highly confidential and warrants the greatest protection under the *Competition Act*. The mutual legal assistance regime proposed in Bill C-23 must be revised to protect against disclosure of information relating to proposed mergers.

The Bill, as amended by the House of Commons, would permit the Competition Tribunal to order a domestic airline to pay an administrative monetary penalty of up to $15 million. This amendment continues the undesirable trend of using the *Competition Act*, which is a statute of general application, to regulate particular industries and particular competitors. Moreover, the imposition of fines for reviewable behaviour is likely to seriously inhibit pro-competitive behaviour.

The Bill would permit the Tribunal to issue interim orders, which can be reviewed by the Tribunal on application by a party against whom an order is issued. When the Tribunal reviews an interim order, the Commissioner should bear the onus of demonstrating that the preconditions for issuing the order are satisfied. The onus should not be on the party seeking the review.

The Bill would grant persons directly affected by an interim order the right to present evidence and make representations at a hearing to review the order. Instead, the ability of an affected person to present evidence and make representations should be determined by the Tribunal in its discretion.

The proposed procedure for "consent agreements" should require the Commissioner to file a Statement of Grounds and Material Facts when the Commissioner registers a consent agreement. This would ensure a proper factual record in case there is an application to vary or rescind the agreement.

The Bill would allow private parties to challenge vertical practices before the Competition Tribunal. There is no consensus among the Section's members on whether private access is desirable. However, it is a significant change in Canadian competition law. The *Competition Act* is intended to protect competition, not individual firms. There must be strong safeguards against frivolous and strategic private applications. Therefore, section 75 should require that the conduct in question has resulted or is likely to result in a *substantial* prevention or lessening of competition. Also, the amendments should explicitly prohibit an award of damages in relation to a private party application under *both* sections 75 and 77.

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the Section) welcomes the opportunity to address Bill C-23, which would amend the *Competition Act*. In our detailed submission before the House of Commons Standing Committee on Industry, Science and Technology (the House Committee), the Section expressed the view that while the Bill represented a positive step, it also raised a number of serious concerns. The House Committee adopted many of our proposed amendments. We still have a number of concerns about the Bill, as amended by the House, but have limited our comments here to seven principal areas:

- treatment of merger information under mutual legal assistance;
- administrative penalties for abuse of dominance in the airline industry;
- onus on a review of an interim order;
- standing of persons "directly affected" by an interim order;
- variation or recission of orders relating to consent agreements;
- competitive effects test for private actions under section 75; and
- awards of damages for private actions under section 75.

As the Bill was referred to the House Committee prior to its second reading, it was able to propose substantial amendments not originally encompassed in the Bill. These amendments would, among other things, create a private right of access to the Competition Tribunal in respect of reviewable conduct for refusal to deal, exclusive dealing, tied selling and market restriction. This would significantly change the enforcement of competition laws in Canada.

II. AMENDMENT PROCESS

The *Competition Act* is a fundamental legal underpinning of our economic system. Amendments to the *Act* should therefore be made with deliberate and considered reflection, including opportunity for study and comment by interested stakeholders.

It is therefore unfortunate that substantial amendments — notably private access and remedial powers with respect to airlines — were introduced at the last minute in Committee and then rushed through second and third reading in the House. As a result, we have not had the opportunity until now to address these amendments.

III. MUTUAL LEGAL ASSISTANCE

Bill C-23 would create a regime for cooperation between the Bureau and its foreign counterparts for more effective international enforcement of antitrust legislation. In this submission, we will focus only on the protection of information relating to proposed mergers, even though we suggested other amendments to the House Committee which were not ultimately accepted. In our view, information relating to mergers warrants the greatest protection under the *Act*. If Canadian businesses become concerned that sensitive documents relating to their merger plans will be disclosed to third parties, then this may inhibit future merger activity involving Canadian businesses.

Information provided under a pre-merger notification process or an application for an advance ruling certificate, including information obtained through the Competition Bureau's compulsory investigative powers, is highly confidential. The merger review process involves the most sensitive business information — not only of the parties involved, but often of third parties as well. It includes historical records, future projections and strategic plans. The disclosure of such information, particularly to foreign jurisdictions that may not appreciate or respect its sensitivity, could have a devastating impact on Canadian businesses, their employees, their shareholders and the communities in which they operate. Some foreign jurisdictions are known to be lax in dealing with merger information supplied by parties. On occasion, they provide such information to competitors and merger opponents in the course of their merger review.

In our view, no information submitted by parties in the context of a merger review should be exchanged with foreign states, unless there is waiver from the parties. This would be consistent with the practice of United States and European Union antitrust enforcement authorities. Indeed, the laws of a number of foreign jurisdictions, including the United States, actually prohibit the disclosure of pre-merger filings. In the United States, antitrust authorities may not disclose information in Hart-Scott-Rodino merger filings without a waiver from the parties. Canada's ability to do so ought to be similarly constrained. Parties usually do not refuse reasonable waiver requests, given their desire to secure expeditious approval of the merger. At the same time, however, merging parties should be able to protect their sensitive information from misuse by certain jurisdictions, even if they are generally agreeable to reasonable waiver requests.

IV. ABUSE OF DOMINANCE - AIRLINE INDUSTRY

The House added an amendment (proposed section 79(3.1)) to permit the Competition Tribunal to order the payment of an administrative penalty by a "domestic service" (as that term is defined in the *Canada Transportation Act*). The penalty would be assessed when the Competition Tribunal is making an order under the abuse of dominance provisions of the *Competition Act*. This amendment is clearly directed at regulating the conduct of Canada's dominant domestic airline, Air Canada.

The *Competition Act* should not be used to regulate specific industries and specific competitors. Rather, it is clearly intended to be a law of general application.[1] To introduce provisions directed at particular competitors in particular industries runs counter to this intent. Unfortunately, there is a trend of using the *Act* as an indirect means of engaging in sectoral regulation — for instance, the Competition Bureau's recent introduction of draft enforcement guidelines concerning the abuse of dominance in the retail grocery industry and

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1 See, e.g., section 1.1 and long title ("An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition").

its earlier *Bank Merger Enforcement Guidelines*. The Section is very concerned about this development. Bill C-23 would permit the Competition Bureau to regulate one company. It would also permit the Competition Tribunal to award significant administrative monetary penalties (up to $15 million) against that company.

All of this has serious implications for the future of Canadian competition law and policy. First, neither the Competition Bureau nor the Competition Tribunal is qualified to regulate a specific industry. Second, this precedent will increase the temptation to regulate other industries through the *Act.* Third, it draws the Competition Bureau much more into the political arena by involving the Bureau in the regulation of high profile or politically unpopular industries like banks or airlines. This in turn undermines the Bureau's independence and reinforces the perception that it may be susceptible to political influence.

The Section also strongly objects to the imposition of monetary penalties for any reviewable practice. The enforcement scheme of the *Act*, and of the reviewable practices provisions in particular, recognizes that while certain behaviour will most often be pro-competitive or competitively neutral, in a number of other circumstances the same behaviour may harm competition to the degree that it should be prohibited. Fines are imposed only in respect of criminal behaviour or civilly reviewable misleading advertising. Reviewable practices (including abuse of dominance) are not, however, criminal. Reviewable conduct is not unlawful under the *Act* unless it is prohibited by the Tribunal.[2]

[2] *Chadha* v. *Bayer Inc.* (1998), 82 CPR (3d) 202 (Ont. Ct. Gen. Div.).

The "anti-competitive acts" listed in section 78, as well as others identified by the Competition Tribunal, are often common business practices which are pro-competitive in normal circumstances. Often, they are customary methods for a company to enhance its relative business position, frequently at its rivals' expense. Such practices only have the potential to substantially lessen or prevent competition in limited circumstances.

If administrative penalties are permitted for reviewable practices in one industry, it will not be long before they are expanded to other provisions in the *Act*. This will inhibit Canadian businesses from engaging in normally pro-competitive practices as they face the threat of monetary penalties being imposed by the Tribunal if those practices are found to be anti-competitive. In the view of the Section, reviewable practices should not give rise to the imposition of penalties of any kind, whether against a dominant airline or any other business. Otherwise, the chilling effect on Canadian commerce would be enormous.

Proposed sections 79(3.1), (3.2) and (3.3) of the *Competition Act* [clause 11.4 of the Bill] should be removed from Bill C-23.

V. INTERIM ORDERS

A. Review by the Tribunal – Onus and Scope of Review

Bill C-23 would permit a person against whom an interim order has been made to ask the Competition Tribunal to review its order. The request must be made within the first 10 days that the order is in effect. In such an application, the Tribunal is to consider whether one or more of the preconditions (harm to competition, elimination of a competitor or harm to a competitor) is satisfied. However, the Bill does not indicate who bears the onus of demonstrating whether these pre-conditions exist. In our view, that onus should be on the party seeking to uphold the order — namely, the Commissioner of Competition.

Section 104.1(9) of the *Act* states that in the event of an application under section 104.1(7) — which is identical to the proposed section 103.3(7) — the Commissioner is the respondent. Presumably, this suggests that the person against whom the order has been made would bear the onus of demonstrating that the preconditions are not satisfied. Proposed section 103.3 has no similar provision.

Under the Bill, interim orders would have an initial 10-day duration and would be made with either no notice or very short notice to the party against which the order is sought. In many cases, such orders would have a significant impact on the operations of the business whose conduct was being enjoined. Given these circumstances, the onus in a review hearing should be on the Commissioner to demonstrate why the order should be continued. Otherwise, the interim-order provision would effectively operate as a reverse onus, with the Commissioner being able to obtain an order on little or no notice and then the responding party being required to demonstrate why the order should not be made. This is inconsistent with Canadian legal traditions. A party obtaining an *ex parte* order is usually required to demonstrate why that order should be continued. The Commissioner should be required to establish that there are grounds for making the order under Part VIII and that the alleged harm is of a nature and degree that would warrant a remedy under Part VIII.

B. Review by the Tribunal - Standing of Person Affected

Proposed Section 103.3(9) of the Bill provides "any person directly affected by the temporary order with a full opportunity to present evidence and make representations before the Tribunal makes an order". This grants automatic standing to such persons in Competition Tribunal proceedings involving interim orders.

The Section objects to this provision. There is no basis for departing from the Tribunal's well-developed practice with respect to intervenors. Providing an automatic right to be heard to any "affected person" will probably lengthen and

complicate Tribunal proceedings. The Tribunal should have the discretion to decide whether a person may intervene and to determine the scope of any such intervention.

C. Variation and Rescission of Tribunal Orders Relating to Consent Agreements

Bill C-23 would create a new concept of a consent agreement. The Commissioner and a party would be permitted to sign a consent agreement based on terms that could be the subject of a Tribunal order. The consent agreement would be immediately registered once it is filed with the Tribunal.

The current consent order procedure contemplates that the Tribunal will make findings of fact or that the parties will place before the Tribunal a Statement of Grounds and Material Facts. This makes subsequent variation or recission of the order possible because it provides a factual record which forms the basis to argue that there has been a change of circumstances. However, the proposed consent agreement regime does not contemplate any factual record when a consent agreement is registered. This makes it difficult, if not impossible, to determine whether the order should be rescinded or varied should circumstances change. The Commissioner should therefore be required to file a Statement of Grounds and Material Facts at the same time the consent agreement is registered.

VI. PRIVATE ACCESS

The private access provisions of Bill C-23 would allow private parties to challenge vertical practices before the Competition Tribunal. This is a significant change in Canadian competition law. Private access has been a topic of public discussion for many years. In 2000, Private Member's Bill C-472 proposed a regime for permitting private applications to the Tribunal in relation to conduct under section 75 and 77 of the *Act* (refusal to deal, tied selling, exclusive dealing and market restriction). As part of the Public Policy Forum review which led to Bill C-23, the Section provided comments on Bill C-472. Although private

access wasn't originally part of Bill C-23, the Section's comments were appended to its submissions to the House Committee. When it opened its hearings, the House Committee indicated that it would seriously consider including a right of private access in Bill C-23. However, the specific private access amendments in the Bill were only introduced in December 2001 — after our appearance before the House Committee.

There is no consensus among the Section's members on whether private access is desirable. Permitting private access would shift the focus of the *Act* from a regime which challenges anti-competitive behaviour to one which entertains challenges arising from competitive rivalries and private interests.

The private access amendments are largely based on Bill C-472, with some significant improvements. However, notwithstanding these improvements, the Section continues to have some serious reservations. We are principally concerned that the amendments fail to require proof of *a substantial lessening or prevention of competition* under section 75 and may be interpreted as permitting damages for private applications under that section.

A. Competitive Effects Test - Section 75

Section 75 of the *Act* addresses refusals to deal. The current section differs from other reviewable practice provisions of the *Act* in that it does not require the Tribunal to determine that there has been a substantial lessening or prevention of competition. Bill C-23 proposes a new requirement that the conduct in question "is having or is likely to have an adverse effect on competition in a market". This test was specifically endorsed by the Commissioner.

The standard upon which an order may be issued under section 75 is critical if private parties are permitted to bring applications for relief under section 75. Under the current regime, access is limited to applications brought by the Commissioner, who is concerned with the overall public interest. As a result, in

our experience, the Bureau will only bring a section 75 case where it believes there is a substantial prevention or lessening of competition. By contrast, private applicants for relief under Bill C-23 would only have to demonstrate the prospect of some (not necessarily a "substantial") adverse effect on competition. This means that some applications could be brought for remedies that would reduce, rather than promote, "the efficiency and adaptability of the Canadian economy" — one of the purposes in section 1.1 of the *Act*.

For example, the proposed right of private access under section 75 could permit a terminated distributor to bring an application against a supplier who elected to adopt a more efficient method of distribution. This method might have entailed no reduction in competition, although it might have adversely affected the ability of the terminated distributor to compete. In a regime of private access, terminated distributor challenges under section 75 may become commonplace. Yet an order requiring a supplier to reinstate the distributor could actually reduce the efficiency of the Canadian economy. Reduced efficiency would be a typical result of a private access application in an era of rapid development of new and efficient distribution regimes and technologies such as the internet.

Unless there is a clearly demonstrable substantial anti-competitive impact in any relevant market, it is inappropriate to allow any such challenges under a statute designed to promote competition. The applicable standard for granting a remedy for all other forms of reviewable conduct is substantial prevention or lessening of competition. The new adverse effects test would in practice create a completely new and different standard. The Commissioner has said that proving a substantial lessening of competition imposes too high a standard on a private applicant. However, the test of "adverse effect on competition in a market" is wholly insufficient. "Adverse effect on competition" creates a significantly lower threshold than a "substantial prevention of lessening of competition". How much lower is anybody's guess.

The purpose of Canada's competition law is to protect the process of competition, not to protect individual firms. The *Act* therefore does not provide an actionable civil remedy for every negative impact on competition. It only addresses effects which are "substantial". Any person who is refused supply of a product can demonstrate an adverse effect on its ability to compete in a market, regardless of whether that refusal is based on sound economic grounds. However, there should not be a remedy unless there is a substantial lessening or prevention of competition in the market. The proposed lower standard for refusals to deal would allow one business to challenge another's decision about the entities with which it chooses to deal. Without the need to demonstrate a substantial prevention or lessening of competition in a relevant market, this is dangerous.

B. Damages

The Tribunal does not currently have the jurisdiction to award damages for reviewable conduct under section 75 or section 77. Under section 75 (refusal to deal), the Tribunal's remedial power is limited to requiring that one or more suppliers accept that person as a customer. By contrast, under section 77 (exclusive dealing, tied selling or market restriction), the Tribunal may prohibit the person from continuing the offensive practice. In addition, the order may "contain any other requirement that, in its opinion, is necessary to restore or stimulate competition".

The inclusion of private access is a significant change in competition law enforcement in Canada. Therefore, there must be strong safeguards against frivolous and strategic private applications. As an incentive against such litigation, Bill C-23 should clarify that damages are not available for private applications under either section 75 or section 77. The Commissioner has endorsed the inclusion of such a safeguard, both in testimony before the House Committee and in the Competition Bureau's December 4, 2001 press release regarding the amendments to Bill C-23.

At the moment, Bill C-23 explicitly prohibits the Tribunal from awarding a private applicant damages under section 77. However, it does not expressly prohibit damages to a private applicant under section 75. In the absence of an explicit prohibition, the Tribunal's remedial jurisdiction under section 77 would arguably permit an award of damages. Accordingly, Bill C-23 should explicitly prohibit an award of damages under section 75 as well as section 77.

VII. CONCLUSION

The Section appreciates the opportunity to present its views concerning Bill C-23. The Bill would have significant impacts on Canadian businesses and we therefore urge principled and sober reflection on its provisions. In particular, we strongly urge that Bill C-23 be amended as noted above.