August 28, 2002

Hon. Allan Rock, P.C., M.P.
Minister of Industry
235 Queen Street
Ottawa, ON
K1A 0H5

Dear Minister Rock:

Re: A Plan to Modernize Canada's Competition Regime, Report of the Standing Committee on Industry, Science and Technology, April 2002 ("Industry Committee Report")

Enclosed for your review is an initial response of the National Competition Law Section of the Canadian Bar Association (the "Section") to the 29 recommendations set forth in the Industry Committee Report.

We understand that you will be preparing a response to these proposals and we therefore thought it might be useful to you to have the benefit of our views before formulating your own on these subjects. The Section's response is intended to be on a level commensurate with the conceptual and directional nature of the Industry Committee's recommendations, which are outlined in principle rather than extensive detail.

The Section looks forward to the opportunity to discuss with the government the desirability and implementation of the Industry Committee's recommendations and to comment on any proposed amendments to the *Competition Act* or any proposed revisions to the Competition Bureau's guidelines, policies and practices prior to such amendments being tabled or such revisions being made.

The Section hopes our response is of assistance to you in developing the Government's response to the Industry Committee Report.

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. The enclosed response was prepared by the Section, 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.

We look forward to continuing to actively participate in the ongoing reform of our country's competition law.

Sincerely,

Tim Kennish
Chair, National Competition Law Section

Enclosure

cc: Konrad F. von Finckenstein, Q.C.
National Competition Law Section Executive
Michelle Lally

Response of the National Competition Law Section of the Canadian Bar Association to the Recommendations on the April 2002 Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of crime detection with a view to improving its current record of success.**

   The Section supports this recommendation and would be pleased to assist in its implementation.

2. **That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.**

   The Section supports this recommendation provided that it is afforded the opportunity to discuss with the Competition Bureau – and to comment on – any proposed revisions of the Bureau's enforcement guidelines, policies and practices.

3. **That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.**

   The Section does not agree with this recommendation. The Section strongly objects to the imposition of monetary penalties for any reviewable practice. The enforcement scheme of the *Competition 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. To date, fines are only imposed under the *Competition Act* in respect of criminal behaviour or civilly reviewable misleading advertising. Reviewable conduct is not unlawful under the *Competition Act* unless it is prohibited by the Tribunal.

The conduct which may be the subject of an application before the Tribunal often involves common business practices which are pro-competitive. Frequently, such conduct includes 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.

The introduction of administrative penalties for reviewable conduct will inhibit Canadian businesses from engaging in normally pro-competitive practices, given that they may 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. Otherwise, the chilling effect on Canadian commerce would be enormous.

4. **That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).**

The Section agrees with this recommendation. The *Competition Act* is intended to be a law of general application and should not be used to regulate specific industries and specific competitors. The use of the *Competition Act* to regulate specific industries has serious implications for the future of Canadian competition law and policy. Neither the Competition Bureau nor the Tribunal is qualified to regulate a specific industry. Additionally, the precedent established by the inclusion of these provisions in the *Competition Act* will increase the temptation to regulate other industries through the *Competition Act*. Finally, the Bureau's regulation of high profile or politically unpopular industries such as banks or airlines draws the Bureau more deeply into the political arena. This undermines the Bureau's independence and reinforces the perception that it may be susceptible to political influence.

5. **That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.**

The Section fully supports this recommendation.

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to that proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

The Section agrees that the Tribunal should have rules for awarding costs arising out of Tribunal proceedings. However, the Section does not believe that a primary consideration in awarding costs should be the resources available to the parties to that proceeding. In the Section's view, costs should be awarded on the basis of factors such as the result of the proceeding, the importance and

complexity of the issues raised, attempts to settle, the amount of work involved and the conduct of the parties – including, for example, vexatious, improper or negligent steps. The Section suggests that cost rules in respect of Tribunal proceedings should be modelled after the cost-related rules that govern proceedings before the Federal Court of Canada (see Rule 400 of the *Federal Court Rules*).

In particular, the Section does not agree that small businesses should be provided with a blanket exemption from liability for costs in Tribunal proceedings. Rather, the Tribunal should have discretion to take into account all relevant considerations when awarding costs. To base cost awards on the parties' ability to pay is inequitable and does not address one of the key rationales behind giving the Tribunal the power to award costs. The ability to award costs provides the Tribunal with a powerful tool in limiting vexatious and frivolous applications, motions and conduct. This is particularly important with the introduction of private access to the Tribunal. The Tribunal should not be prohibited from awarding costs against small businesses where the circumstances warrant such an award.

7. **That the Competition Tribunal, in consultation with the Tribunal-Bar Liason Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.**

The Section is in full support of this recommendation.

8. **That the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79).**

There is no clear consensus in the Section with respect to the extension of the right of private access to the abuse of dominance provisions of the *Competition Act*. This proposal would have serious consequences, which the Section has stated repeatedly in the context of the extension of private access to sections 75 and 77 of the *Competition Act*. Our concerns include the possibility of strategic litigation being brought by competitors and the chilling effect that private access may have on pro-competitive activities and initiatives by dominant firms. These concerns may be even greater in relation to private access under the abuse of dominance provisions, as the range of conduct which may be subject to challenge under section 79 is virtually limitless. The Section would be pleased to provide a more

comprehensive review of the possible concerns surrounding private access under section 79 if this is an area that Parliament intends to pursue.

The Section does not agree that the Tribunal should be permitted to award damages in respect of private action proceedings. 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. The inability of private litigants to benefit financially from a private application is a critical safeguard that must be maintained.

In addition, the activities addressed in sections 75, 77 and 79 are civilly reviewable practices. They are not illegal. The enforcement scheme in respect of reviewable practices recognizes that whether certain activity is pro-competitive, competitively neutral or anti-competitive depends upon the surrounding circumstances. The intention of the reviewable practices provisions is to permit conduct that in one context or at one point in time may be pro-competitive but that may be injurious to competition in a different context or a different point in time. It is not appropriate to award damages for conduct that may or may not be anti-competitive depending upon the particular circumstances of the market at any given point in time. Accordingly, the *Competition Act* should not be amended to provide the Tribunal with the jurisdiction to award damages in respect of any private access application.

9. **That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part IIV.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.**

The Section believes that the Commissioner and a person subject to an inquiry under section 10 or a person subject to merger review should be permitted to refer matters to the Tribunal. This would apply to any question of law or mixed law and fact, jurisdiction, practice or procedure, regardless of whether or not a contested or consent application has been commenced. The Section agrees that the Commissioner should not have the ability to unilaterally block the disposition of an issue that is based on a question of law, jurisdiction, practice or procedure. Accordingly the Section supports a broader amendment than that proposed by the Industry Committee.

10. **That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.**

The Section disagrees with this recommendation. The lay members of a Tribunal panel are intended to bring their expertise and experience to the hearing. However, questions of law should be determined by the judicial members of the panel hearing the proceeding. They have the legal background and decision-

making experience to do so. The Section is not aware of any reason to adopt a different approach for Tribunal proceedings.

11. That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.

The Section disagrees with this recommendation. It is customary that appeals on questions of law or mixed law and fact may be brought without leave of the appellate court. This is consistent with the principle of appellate review that is generally imposed on the determinations of law or mixed law and fact made by lower courts or quasi-judicial bodies. Although there are some exceptions to this principle, the Section sees no reason to change the existing practice before the Tribunal.

12. That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.

13. That the Government of Canada repeal the term "unduly" from the conspiracy provision (section 45) of the *Competition Act*.

14. That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the "beyond a reasonable doubt" standard, for such an exception would be placed on the proponents of the agreement.

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under section 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections of the *Competition Act* covering essentially the same conduct.

16. That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the same treatment as the merger review provisions

(sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

17. **That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.**

18. **That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.**

19. **That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the *Act*.**

    That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition, failing which the applicant is deemed to have been granted a certificate.

20. **That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.**

    With respect to recommendations #12 to 20, there is a divergence of opinion within the Section as to the desirability of proceeding with a two-track approach for agreements among competitors. The Section will provide a comprehensive response to any forthcoming White Paper or other policy discussion paper on these issues.

21. **That the Government of Canada repeal paragraphs 50(1)(b) and 50(1)(c) of the *Competition Act* and amend the *Act* to include predatory pricing as an anti-competitive act within the abuse of dominant position provision (section 79).**

The Section agrees with this recommendation. The existing provisions are at odds with current economic thought on efficiency-based predation because they protect all competitors, regardless of the effect of the conduct on competition or efficiency. The Section also suggests that consideration be given to maintaining a revised criminal predation provision. This would be applied where there is clear evidence of intent to eliminate a competitor. In addition, the criminal provision should be amended to define "unreasonably low", as this term is too vague and extremely broad, which results in considerable uncertainty as to its scope. If a criminal provision is not maintained, damage actions would not be available. This may be seen by many stakeholders to be a significant issue. The Section's views on this matter are set forth in its June 2002 submission regarding the Bureau's Draft Guidelines on Unreasonably Low Pricing.

22. **That the Government of Canada repeal the price maintenance provision (section 61) of the *Competition Act*. In order to distinguish between those practices that are anti-competitive and those that are competitively benign or pro-competitive, that the Government of Canada amend the *Competition Act* so that: (1) price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provision (section 45); and (2) price maintenance agreements between a manufacturer and its distributors (i.e., vertical price maintenance) be reviewed under the abuse of dominant position provision (section 79).**

The Section agrees with the recommendation that the price maintenance provision in section 61 be repealed from the *Competition Act*. The Section agrees that horizontal price maintenance should be dealt with by provisions governing agreements to lessen competition (section 45) whereas vertical price maintenance should be subject to review under section 79 of the *Competition Act*. Additionally, the provisions dealing with vertical price maintenance should take into account (i) the market power of the supplier, including the availability of alternative sources of supply, and (ii) the competitive effects of the price maintenance, including any efficiency-based explanations.

23. **That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(a) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.**

The Section agrees with this recommendation. Additionally, the Section does not believe that a price discrimination provision included in section 79 should apply to differential pricing by a supplier that is justified by differences in the cost to the supplier of serving different customers or pricing differences that are a temporary expedient or a defensive competitive response. Any price discrimination provision included in section 79 should take into account the market power of the

supplier, including the availability of alternative sources of supply, and the competitive effects of the price discrimination.

24. That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(a).

The Section disagrees with this recommendation. If the intention is to overcome uncertainty arising out of the use of the terms “control”, “class or species of business” and “throughout Canada or any area thereof”, the Section makes the following recommendation. Section 79(1)(a) should be amended to clarify that a remedial order under that section is only available where the person(s) whose conduct is being reviewed is dominant in a relevant market in Canada. To remove section 79(1)(a) entirely without including the concept of market dominance elsewhere in section 79 would run counter to the intention of that section. Section 79 is intended to deal with abuses by dominant firms.

25. That the Competition Bureau revise its Enforcement Guidelines on the Abuse of Dominance Provisions in order to be consistent with the addition of the anti-competitive pricing practices (paragraphs 50(1)(a) and 50(1)(c) and section 61) to section 79 of the *Competition Act*.

The Section agrees with this recommendation provided that it is afforded the opportunity to discuss with the Competition Bureau – and to comment on – any proposed revisions to the Enforcement Guidelines on the Abuse of Dominance Provisions.

26. That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.

The Section agrees that the transaction-size threshold in section 110 of the *Competition Act* should be raised from $35 million to $50 million. For greater certainty, to determine whether the monetary thresholds for notification in section 110 are met, the following thresholds should apply:

- section 110(2) - where the aggregate value of the assets being acquired or the gross revenues from sales in or from Canada generated from those assets would exceed $50 million dollars;
- section 110(3) - where the aggregate value of the assets in Canada that are owned by the corporation or by corporations controlled by that corporation, other than assets that are shares of any of those corporations, would exceed $50 million or the gross revenues from sales in or from Canada generated from the assets would exceed $50 million; and,
- sections 110(5) and (6) - the aggregate value of the assets in Canada that are the subject matter of the combination would exceed $50 million or the

gross revenues from sales in or from Canada generated from the assets would exceed $50 million.

See also the Section's comments with respect to the need for ongoing review of the relevant thresholds (see recommendation 27).

27. **That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.**

The Section agrees with this recommendation provided that stakeholders, including the Section, are afforded the opportunity to make submissions to the parliamentary committee or other body given the mandate of reviewing the notification thresholds.

28. **That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act*, and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.**

The Section supports the recommendation. Additionally, the Section recommends that efficiencies be included as a factor to be considered when assessing the competitive implications of all of the civilly reviewable trade practices in the *Competition Act*.

29. **That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstances where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.**

The Section believes that section 75 as drafted is sufficiently clear and that an interpretation guideline on this narrow point is not necessary. However, in the event that the Competition Bureau were to implement this recommendation, stakeholders (including the Section) should be afforded an opportunity to review and comment upon the interpretation guideline in draft form.