February 26, 2002

Hon. Allan Rock, Q.C., P.C., M.P.
Minister of Industry, Science & Technology
C.D. Howe Building
11th Floor, East Tower
235 Queen Street
Ottawa, ON K1A 0H5

Dear Minister:

Re: *Competition Act* Amendments

On behalf of the National Competition Law Section of the Canadian Bar Association (the Section), I wish to extend our best wishes on your recent appointment as Minister of Industry, Science and Technology.

We are writing to express our concerns about the federal government's recent approach to amending the *Competition Act* and *Competition Tribunal Act*. As outlined below, we believe that recent amendments have undermined the framework philosophy of the *Competition Act* and that the amendment process has effectively prevented interested parties from providing input concerning proposed changes to the legislation.

The Section has over 1,300 members, including leading private practitioners and corporate counsel. Since its formation in 1992, the Section has been fortunate in attracting to leadership positions practitioners who are recognized nationally and internationally as leading competition lawyers, including persons who have served as Commissioners of Competition. The Section is active in providing informed, independent commentary on amendments to our competition laws, concerning practice before the Competition Tribunal and with respect to enforcement guidelines and other initiatives of the Competition Bureau.

We have raised these concerns over the past several years with the Commissioner of Competition, Konrad von Finckenstein, Q.C. — most recently at our semi-annual meeting with the Commissioner and senior management of the Competition Bureau in September 2001. At the time, we indicated that we might communicate these concerns with the Minister of Industry, Science & Technology.

The September 2001 meeting was followed up with an exchange of letters. We appreciate the frank and helpful exchange of views with the Commissioner. However, our concerns remain. As many of those concerns deal with legislative policy, we believe it is appropriate to draw them to your attention, as the Minister responsible for our competition laws and their enforcement.

Undermining the Framework Philosophy of the *Competition Act*

The *Competition Act* is intended to be framework legislation of general application to all Canadian businesses. However, this underlying philosophy is being progressively and significantly diminished, through recent amendments to the *Competition Act* and regulations and through the introduction of guidelines dealing with domestic airlines, travel agents, banks and the retail grocery industry. These developments have given currency to a widely held perception that the government intends to regulate specific business sectors through the Competition Bureau.

All of this has important implications for the future of Canadian competition law and policy. First, the Competition Bureau is not well suited to act as the regulator of any specific industry. Second, the temptation to "regulate" other industries under the *Competition Act* is becoming more difficult to resist. This is evident from the increasing number of private members' bills addressing the petroleum, grocery retailing and cable television industries. So far, none of these bills has become legislation but they no doubt have influenced the Government's amendment program and approach. Third, this course of action draws the Competition Bureau much more into the political arena, thereby undermining the independence of the Bureau and reinforcing the perception that the Bureau may be susceptible to political influence.

Lack of Consultation Regarding Desired Amendments

Our competition laws are an essential instrument to preserve and enhance the competitiveness of the Canadian marketplace in a global economy. It is therefore important that proposed amendments to the *Competition Act* be subject to extensive consultation and study. In the past, the government engaged in such consultation by publishing white papers about proposed themes for future amendments.

Unfortunately, the Government appears to have abandoned this approach. Instead, the first public notice of proposed amendments is often through the publication of draft proposed legislation. Frequently, draft legislation deals with areas where there is no demonstrated need for legislative reform. There is little, if any, public consultation about amendments that should be proposed. For example, the Public Policy Forum consultation in 2000 (which led to Bill C-23) sought comments only on specific draft legislation (in the form of four private members' bills). As a consequence of such inadequate public consultation and comment, proposed legislation often lacks coherence or consistency with the *Competition Act*'s other provisions.

An example of the lack of consultation is the process under which Parliament dealt with Bill C-23, which is currently pending before the Senate. The Bill was sent to the House Standing Committee on Industry, Science and Technology before, instead of after, 2nd Reading. This permitted the Committee to introduce amendments outside the "four corners" of the Bill before the House engaged in 2nd Reading to obtain "approval in principle". This included potentially significant amendments such as the introduction of the private-access regime and the availability of "administrative penalties" against domestic airlines. Unfortunately, these amendments were made at the last minute and then rushed through 2nd and 3rd Readings in the House. As a result, groups such as ours were unable to provide input on the specific changes made to the Bill.

Use of Private Members' Bills

We acknowledge and respect the right of private members to introduce legislation about any subject-matter. However, the government of late appears to be using private members to introduce legislation that it is unwilling to introduce as a government bill. The best example of this is the four private members' bills that were introduced in 2000 and which led to the Public Policy Forum consultative process. The Competition Bureau was on the record as supporting these bills and, we understand, provided assistance in drafting the bills. Again, we are concerned that this circumvents the usual process in developing legislative policy.

The *Competition Act* is vital to the health of our economy. Reduction in the status of the *Competition Act* as framework legislation, diminution in the independence of the Competition Bureau and ill-considered changes to the *Competition Act* cause harm to the Canadian economy and have an adverse impact on the economic well-being of Canadians.

My colleagues and I would welcome an opportunity to meet with you to discuss our concerns. We look forward to hearing from you.

Yours truly,

Tim Kennish
Chair, National Competition
Law Section

c.c. K. von Finckenstein, Q.C., Commissioner of Competition