Submission on Bill C-26

Transportation Amendment Act

NATIONAL COMPETITION LAW SECTION
NATIONAL AIR AND SPACE LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 38,000 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 and the National Air and Space 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 and National Air and Space Law Sections of the Canadian Bar Association.

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I. EXECUTIVE SUMMARY

The National Competition Law Section and the National Air and Space Law Section of the Canadian Bar Association (the CBA Sections) question the need for merger and acquisition review, competition regulation and consumer protection regulation beyond what is applicable to Canadian industries generally, and recommend removal of those provisions from Bill C-26. We also question the need for and appropriateness of much of the additional regulation to be imposed on Canada's aviation industry and recommend removal of those provisions.

The CBA Sections further recommend that, if a special public interest review process for transportation mergers is added to the *Canada Transportation Act* (the CTA), the process contemplated by Bill C-26 be revised to:

- Require an assessment of the merger's impact on competition solely by the Commissioner of Competition (the Commissioner), pursuant to the existing process and standards in the *Competition Act*;
- Ensure that the Commissioner's role is restricted to competition concerns, and not broad public interest issues;
- Remove the obligation of the parties to provide the Minister of Transport (the Minister) with copies of pre-merger notifications under Part IX of the *Competition Act*;
- Ensure the protection of commercially sensitive confidential information of the parties proposing a transaction subject to review; and

- Clearly define the scope of transactions involving transportation undertakings that will be subject to the special public interest review procedure.

With respect to other aspects of Bill C-26, the CBA Sections recommend that:

- It be amended to remove the special provisions for airline price advertising and allow such matters to continue to be dealt with by the Commissioner, pursuant to the misleading advertising provisions of the *Competition Act*; and

- The government explain the proposal in the Bill to limit the scope of private actions under the *Competition Act* in the transportation sector, and provide an opportunity for public comment following such explanation.

The CBA Sections support the addition of mediation as an alternative dispute resolution mechanism available to the Canadian Transportation Agency (the Agency) and the parties before it. However, it should be available without additional cost to the parties.

II. GENERAL PRINCIPLES AND COMMENTS

The CBA Sections are pleased to have the opportunity to comment on Bill C-26, the *Transportation Amendment Act*.

Bill C-26 contains amendments that, if passed, would significantly expand the types of transportation mergers subject to a broad public interest review by the federal Cabinet. Similar merger review provisions in the CTA are currently restricted to mergers and acquisitions involving air transportation undertakings.

1. Scope of Comments

The CBA Sections question whether a broad public interest review by the Minister or the federal Cabinet is appropriate for transactions involving transportation undertakings in Canada. We have concerns about:

- whether it is appropriate for the Minister or the federal Cabinet to conduct the proposed public interest merger review;
- the lack of transparency in the proposed merger review process; and
- the absence of any independent adjudicator or right of appeal.

The National Air and Space Law Section believes in fact that such a review is not necessary. In its view, it is not appropriate to impose on the transportation industry, and particularly on the aviation industry, a review of mergers and acquisitions beyond that applied to Canadian industries generally.

The broad public interest review by the Minister or Cabinet proposed in Bill C-26 is inherently political in nature and lacks predictability, consistency and transparency, as well as any right of independent or judicial review. The argument that the importance of air transportation to Canadian society justifies intervention can be countered by arguments that political intervention has proven unsuccessful, has harmed the industry and has not enhanced consumer protection beyond the levels that are available with respect to other industries. Those segments of the aviation industry that have not been the object of intervention seem to have done well and demonstrate the value of deregulation.

The following comments, however, focus on the proposed amendments to the CTA and the related amendments to the *Competition Act*, insofar as they relate to matters involving competition policy, the role of the Commissioner, the *Competition Act* and the aviation industry.

We have major concerns relating to section 11 of Bill C-26 and the proposed new sections 53.1 to 53.6 of the CTA. In essence, this amendment would give the Minister the right to require a broad public interest review of significant transactions that involve a transportation undertaking. Where required, such merger reviews would oblige the parties to file pre-merger notifications (including, among other things, confidential business information) with both the

Minister and the Commissioner. The proposed review process contemplates consultations by the parties with the Minister and the Commissioner, including negotiations of undertakings that are given statutory enforceability if the transaction is approved by the Cabinet, subject to those terms and conditions.

2. The Commissioner's Role Should Not Be Politicized

The CBA Sections are concerned that Bill C-26 would require the Commissioner, in a wide-ranging merger review, to perform a political role that is inconsistent with the Commissioner's general responsibilities and the standards contemplated under the *Competition Act*. We recognize that the proposed merger amendments have parallels to the recently enacted merger review provisions for airline undertakings and also, to some extent, to the merger review process contemplated for large bank mergers. However, those processes, which were said to be exceptional when they were introduced, include consultation between the Commissioner and the relevant Minister, and have already contributed to a perception that the Commissioner's role within government has become politicized. We are concerned that Bill C-26 will deepen that unfortunate perception and possibly make that politicization more of a reality. This would be to the detriment of the public policy basis of the *Competition Act*.

The current *Competition Act* was conceived as a law of general application, containing standards of review and defined roles for the Commissioner and the Competition Tribunal (the Tribunal) with respect to specific business activity in Canada. Further, the *Competition Act* gives the Commissioner an investigative and prosecutorial role largely independent of the Minister of Industry. To obtain remedial relief, the Commissioner is required to establish grounds for an order, based on specified criteria, before the Tribunal.

The Tribunal is a quasi-judicial body, which has authority to determine whether grounds exist for an order and, if so, what its appropriate terms should be. Merger parties often negotiate undertakings or consent agreements with the

Commissioner that avoid resort to the Tribunal; however the knowledge that the Commissioner may ultimately have to prove the case to an independent tribunal imposes an important discipline on the Commissioner's review of a merger.

Where Parliament considers that it is good public policy to impose a general public interest review of mergers in a particular industry, the CBA Sections support the consideration of the merger's impact on competition as part of that review. We also support an important role for the Commissioner in that assessment. However, we believe that this objective can be accomplished, and indeed ought to be accomplished, in a manner that does not compromise the Commissioner's independence or even create an appearance of diminished independence of the Commissioner.

Bill C-26 contemplates a role for the Commissioner that is, in a number of important respects, very different from the normal role in reviewing mergers. These differences include:

a) close collaboration and consultations between the Commissioner and the Minister in their respective assessments of a proposed transaction;

b) a wide standard for review by the Commissioner, i.e. "concerns regarding potential prevention or lessening of competition that may occur as a result of the transaction", in contrast to the standard for merger review under the *Competition Act* ("substantial prevention or lessening of competition") that has been the subject of years of Tribunal and court decisions, and of published enforcement guidelines issued by the Competition Bureau (the Bureau), since 1986[1];

c) a determination by the Minister or Cabinet, rather than by the Commissioner or the Tribunal, whether any of the competition concerns must be addressed by the parties to a proposed transaction; and

d) the absence of any review by or appeal to the Tribunal, or indeed any hearing at all, and the absence of any recourse in the event of a perverse finding.

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1 See, for example, Director of Investigation and Research, *Merger Enforcement Guidelines*, *Competition Act*, *Information Bulletin* No. 5, March 1991.

In our view, if Parliament does enact a broad public interest review mechanism for transportation undertakings, it should not involve the Commissioner in the manner currently contemplated. The Bill unnecessarily abandons established standards and procedures in favour of ill-defined and potentially arbitrary alternatives.[2] The proposed procedure may also impair the credibility and reputation for independence of the Commissioner and the Bureau in merger reviews in other industries. It is desirable from a transparency and accountability perspective to keep the political assessment and decision-making separate from an independent assessment of the competitive effects of the merger by the Commissioner (and potentially by the Tribunal) in accordance with procedures and standards established under the *Competition Act*.

3. Current Merger Review Process in the Competition Act Can Work Within Framework of a Public Interest Review

In our view, a public interest review, if it is to be implemented, should allow the Commissioner to perform an assessment of competition in accordance with the general and established procedures and standards set out in the *Competition Act*. Where Cabinet or the Minister has a public interest mandate to review a proposed transaction, we think it is appropriate for the Commissioner to advise the Minister (as well as the parties) of the Commissioner's conclusions pursuant to the mandate under the *Competition Act*. The Commissioner should leave those conclusions, arrived at within that sphere of responsibility, unchanged by players moved by political motives.

Models consistent with this approach include, for example, that found in the *Investment Canada Act.* Under this Act, the Commissioner conducts an

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2 In this regard, we note that the July 18, 2001 report of the *Canada Transportation Act* Review Panel made recommendations for a public interest review process that included the Commissioner applying to the Tribunal for resolution of competition concerns. The Panel did not advocate that the Tribunal be excluded from the process or that a different review standard be applied by the Commissioner for transportation mergers. Rather, the Panel contemplated that a new public interest review would be separate from and in addition to that under the current merger review provisions of the *Competition Act*. In particular, Recommendation 6.2 states that "The existing *Competition Act* process should continue to be used to evaluate whether a proposed merger in the transportation sector would prevent or lessen competition."

investigation in accordance with the *Competition Act*, but also advises the Minister responsible for the *Investment Canada Act* of the conclusions. The responsible Minister may choose to approve a transaction or not, based on whether it is likely to be of net benefit to Canada. The decision is made independent of the Commissioner's determination. Similarly, the Commissioner can challenge a transaction on competition grounds independent of the determination of the Minister responsible for the *Investment Canada Act*. The merger review process for large bank mergers also contemplates the Commissioner advising the Minister of Finance of the conclusions based on the usual statutory criteria.

The principles supporting each of these cases present several possible outcomes for transportation mergers:

a) The Minister (or Cabinet) could approve the transaction and the Commissioner could decide that there are no grounds to challenge the transaction under the *Competition Act*, in which case the parties may proceed with the transaction;

b) The Minister could identify concerns about the transaction beyond the scope of the *Competition Act* that would lead to not approving the transaction, in which case the transaction would not proceed whether the Commissioner identified grounds to challenge it under the *Competition Act* or not;

c) Where issues within the scope of the *Competition Act* are either the only or the decisive factors for the Minister's decision whether or not to approve the transaction from the broader public interest perspective, there would be no other overriding public interest concerns. In such circumstances, it would be appropriate from a public policy perspective for the Minister to leave the matter to be determined in the normal course pursuant to the *Competition Act*. If the Minister decided to withhold approval and not to allow the assessment of the competitive impact of the transaction to proceed to the Tribunal, in our view it is preferable that the decision be clearly that of the Minister, for which the Minister will be answerable to the electorate; and

d) Where the Commissioner identifies concerns within the scope of the *Competition Act* but, because of broader public interest considerations, the Minister believes that the transaction is, on balance, in the public interest, it

is preferable that such a decision be clearly a decision of the Minister for which the Minister will be answerable to the electorate. However, because competition concerns have been raised, they ought to be considered even though the transaction has otherwise been approved.

e) For example, in a particular case, the Minister may consider that a merger as a whole is in the public interest, even though the Commissioner identifies a possible substantial lessening of competition in a few local markets affected by the merger.

f) A responsible approach in this circumstance may be to allow the merger as a whole to proceed, but allow the Commissioner to challenge before the Tribunal the alleged substantial lessening of competition in those local markets. As currently drafted, the Bill would not appear to permit such a process. The Bill adopts an all or nothing approach – once Cabinet approves a transaction as in the public interest, the approval (together with the Minister's "certification" of the names of the parties) automatically exempts that transaction from the merger provisions in section 92 of the *Competition Act*.[3]

g) If the Commissioner is concerned about a more broadly based and extensive lessening or prevention of competition as a result of the merger, the Minister or Cabinet may be given the power to exempt the merger from section 92 of the *Competition Act* in extraordinary circumstances where they consider that wider public interest considerations ought to override such competition concerns.

In each of these instances, the Commissioner's role can be distinct and separate from the political or broader public interest mandate of the Minister or Cabinet. The Tribunal, moreover, provides an important discipline on the transparency and fairness of the competition review.

4. Industry-Specific Competition Regulation Should Be Avoided

The CBA Sections are concerned about the apparent trend of creating separate competition-related rules for different industries or sectors, where there does not appear to be a clear basis for creating different rules, as opposed to applying the

3 This is in contrast to the large bank merger review process where the Minister's approval under the *Bank Act* is a separate and distinct step from exempting a bank merger from section 92 of the *Competition Act* pursuant to section 94 of the Act. (The National Competition Law Section is not aware of the Minister of Finance having ever used the exemption provision in section 94(b) of the *Competition Act*)

same general principles contemplated in the *Competition Act* in the appropriate context. We have already seen special provisions added to the *Competition Act* dealing with airlines under the abuse of dominance provisions and merger review under the CTA, as well as previous proposals to amend the *Competition Act* to deal specifically with the retail gasoline industry.[4] These examples raise a concern about where this trend will stop. The result may be a needlessly complex set of rules and regulations applicable to a range of different industries that gain public profile from time to time. Absent exceptional circumstances, we believe that the *Competition Act* is the appropriate means to address concerns about the effects on competition of mergers and abuses of market power. The creation of multiple sets of rules for different industries is both unnecessary and inefficient.

Further, the proliferation of non-judicial types of reviews of mergers or other business conduct on competition grounds will create an unstable playing field, wherein the rules of the game are uncertain, unknown and subject to the influence of lobbyists and special interest groups. It is in the public interest that rules for business be as certain as possible and that the processes affecting them be transparent.

5. Additional Regulation of the Aviation Industry

Section 3 of Bill C-26 would amend the statement of Canada's national transportation policy (section 5 of the CTA), declaring that the type of transportation system sought is most likely to be achieved when:

a) Competition and market forces are, whenever possible, the prime agents in providing viable and affective transportation service; and

b) Regulation occurs only if it is necessary to achieve economic, environmental or social outcomes that cannot be achieved sufficiently by competition and market forces and it does not unduly favour, or reduce the inherent advantages of, any particular mode of transportation.

4 See, for example, Bill C-381, an Act to amend the *Competition Act* (vertically integrated gasoline suppliers), given First Reading February 13, 2003.

However, Bill C-26 imposes significant additional regulation on the aviation industry, much of it on the Agency's or Minister's own initiative. It subjects air and other modes of transportation to significant political intervention.

Other changes to section 5 would remove requirements of practicality and the economic viability of the industry from this underlying policy. Removing those policy criteria, while increasing regulatory intervention, invites the risk of failure in an industry that already faces significant challenges.

6. Airline Advertising

The proposed amendments to the CTA also relate to advertising and disclosure in the airline context. Canadians already enjoy multi-jurisdictional protection from misleading advertising and other unlawful business practices. The "sticker shock" referred to in the Parliamentary Research Branch Legislative Summary can be attributed in large part to taxes and fees imposed by the federal government that do not correspond to the value of services provided or paid for by it.[5] What is regulated is therefore not the licensee's actual pricing but rather a requirement to advertise, as a component of that "price", government and other third party charges. The aviation industry has identified other ways to reduce this "sticker shock" by eliminating the industry as a special source of general revenues for the government.

Section 16 of Bill C-26 seeks to impose compliance with sections 60.1 and 60.2 of the CTA on persons outside Parliament's jurisdiction – by requiring licensees to incorporate compliance as a term of agreements with those persons. It is unclear how this indirect exercise of jurisdiction is to be enforced. It is not clear if licensees are expected to assume the responsibility of enforcement officers for

5 Library of Parliament, Parliamentary Research Branch, *Bill C-26:Transportation Amendment Act, Legislative Summary* LS-451E (March 20, 2003).

the federal government or to be guarantors of compliance by those beyond Parliament's jurisdiction.

The provinces have exercised their jurisdiction to respond to consumer protection situations in the transportation field. In our view, the federal government should not, through regulation of aviation, attempt to reach beyond its jurisdiction in an area where the provinces are already exercising authority.

Proposed section 60.1 requires total price disclosure for airline price advertising and section 60.2 would prohibit advertising a service if no person can obtain the service at the advertised price. Proposed section 60.4 would also allow the CTA to make additional regulations addressing airline price advertising in Canada. The explanation for this power to impose additional requirements through regulations is to permit greater clarity of the advertising provisions in the Act, if needed. We believe that legislation this intrusive must be clear in the first instance to avoid regulations that can go far beyond what Parliament intended to authorize.

These proposed changes are yet another example of needless and undesirable industry-specific regulation. It is not clear why special regulation of airline advertising is required when these practices, if misleading, are already within the scope of the general misleading advertising provisions of the *Competition Act*. The effectiveness of these provisions was recently enhanced by adding a non-criminal enforcement track (see Part VIII of the *Competition Act*).

7. Regulatory Intervention in the Aviation Industry

Aviation is subject to detailed and diligent regulation in matters of safety. There is no question that oversight on that account is appropriate. However, there is no evidence that the economic deregulation of the aviation industry has failed. While the public and political eyes have been captivated by Air Canada and Canadian Airlines International (AC/CAI), the past and current difficulties of

those carriers cannot obviously be attributed to a deregulated marketplace. On the other hand, many national, regional and local success stories are the direct result of air carriers being free to be entrepreneurial and innovative. Those successes continue notwithstanding the economic challenges facing the industry over the past several years.

Section 4 of Bill C-26 removes the requirement of substance in an application for relief from section 27 of the CTA. Section 27 currently requires that "substantial commercial harm" be demonstrated for a shipper to obtain relief with respect to rates or service for carriage of goods. The Bill would remove this requirement, thereby creating an opportunity for further regulatory intervention, even in the absence of commercial consequences. In our view, intervention should not be tolerated without a showing of substantial commercial harm.

Section 20 of the Bill amends section 66 of the CTA and section 22 of the Bill amends section 67.2 to permit the Agency to exercise its authority with respect to the reasonableness and ranges of pricing and conditions of carriage on its own motion. It is an undesirable practice to have the agency that decides to prosecute on its own motion also adjudicate. There is no separation of functions here as in the cases of Transport Canada/Civil Aviation Tribunal and Competition Commissioner/Competition Tribunal. The Legislative Summary prepared by the Parliamentary Research Branch indicates that this significant change, according to departmental officials, is required because carriers, travel agents and the travelling public are often unwilling to file a formal complaint with the Agency.[6] That reasoning seems inconsistent with the large number of complaints that are made to the Air Travel Complaints Commissioner and with the steady flow of cases that the Agency decides as a result of complaints received.

Much of Canada's legal system depends on private parties initiating proceedings. Given the existing powers of the Commissioner and Tribunal, as well as remedies

available under provincial consumer protection laws, this change appears unnecessary. The power to act without complaint was added to respond to public concerns about the apparent risks of the AC/CAI merger. It is not clear that this concern has expanded beyond that situation. The Agency may already initiate proceedings for non-compliance with published fares and tariffs on its own motion. Licensees should be free from interference in the absence of either complaint or unlawful action.

The proposed amendments to section 66(3) of the CTA open the criteria that the Agency may consider in determining the reasonableness of pricing. This provides lack of certainty that is troubling given the retroactive effect that an adverse ruling could have with the Agency's power to order refunds. Licensees need stated criteria against which to measure compliance.

Section 28 of Bill C-26 allows the Agency to impose commercial arrangements on Licensees. This is an extraordinary interference with the right of businesses to choose how to conduct their affairs. Parliament already imposes sanctions for abuse of dominant position, among other competitive concerns. While the Bill indicates that the Agency will take into account the financial hardship and the commercial reasonableness of the terms to be imposed, those criteria are established by regulation on recommendation by the Minister. This imposes on private enterprise a level of political and administrative interference that is arbitrary and not subject to effective review. It results in a one-sided situation in which the complaining party can reject the proposed "agreement" while the party to be imposed upon has no such privilege.

6 Ibid.

III. SPECIFIC COMMENTS

The CBA Sections have specific comments on the following aspects of Bill C-26:

- Scope of Merger Review
- Notice to the Minister
- Review of Act and Reporting
- "Potential Prevention or Lessening of Competition"
- Terms and Conditions
- Confidentiality
- Exclusion of Private Actions
- Mediation

1. Scope of Merger Review

If a public interest merger review process does proceed as contemplated by Bill C-26, we recommend that the Bill be amended to clarify the scope of transactions that may be subject to it. As currently drafted, proposed section 53.1 of the CTA applies to any transaction requiring notification to the Commissioner under section 114(1) of the *Competition Act* that "involves a transportation undertaking". Unless the Minister determines otherwise, a full public interest review would be required for such a merger.

The concept of a "transportation undertaking" is not defined in the Bill or in the CTA, and its meaning is unclear. Does a "transportation undertaking" include not only airlines and railways, but also bus lines, trucking operations, pipelines and related businesses, for example?[7] If so, are the proposed new provisions intended to apply to a company in which trucking, for example, constitutes only a small portion of their business?

7 We note that Recommendation 6.4 of the July 2001 report of the *Canada Transportation Act* Review Panel stated that "the Panel recommends that the proposed merger review process apply to all transportation modes under federal jurisdiction".

Further, proposed section 53.1 is unclear as to how a transportation undertaking can be "involved" with a transaction. Section 53.1 would apply to a merger of two transportation undertakings. The Minister's News Release of February 25, 2003 indicated that the proposed review process for transportation mergers would apply to a merger between a Canadian and an American railway. However, section 53.1 would also seem to apply to an acquisition by a transportation company of another company not engaged in any transportation business. Further, it is not entirely clear whether section 53.1 is intended to apply to a merger of two suppliers of products used by a transportation undertaking (for example, a merger of manufacturers of aircraft parts).

If there is a particular public interest concern with respect to some specific types of transportation mergers that require special review provisions, the special review provisions should not automatically be extended to cover the full gamut of the federal jurisdiction over transportation undertakings. For example, if the intention is to apply these special public interest review procedures only to mergers between airlines and between railways, it would be preferable for the legislation to say that expressly.

In the CBA Sections' view, the rationale for special notice provisions and a possible special public interest review of all transportation undertakings within federal jurisdiction should be explained with an opportunity for public comment.

Finally, if a special merger review process for transportation undertakings is to be implemented, then:

- the concept of "involves a transportation undertaking" should be defined in the CTA or replaced with a different defined term; and
- the scope of this special merger review provision should be narrowly limited to address identified and legitimate interests

which have been publicly articulated and debated.

2. Notice to the Minister

Under proposed section 53.1(2) a notice shall be provided to the Minister containing:

- the information required under the pre-merger notification provisions in section 114(1) of the *Competition Act*; and
- any information with respect to the public interest as it relates to national transportation required under any guidelines issued by the Minister.

We have several comments on these proposed notice provisions.

First, there does not appear to be any need for the Minister to receive the filings made with the Bureau (whether short or long form), particularly if the Commissioner and not the Minister is assessing the competitive impact of a transaction (as contemplated by the current Bill). Pre-merger notifications to the Bureau may contain extensive competitively-sensitive information and internal documents. It seems to us to be unnecessary duplication to provide the same information to both the Commissioner and the Minister when much of the information is likely to be irrelevant to the Minister and, as proposed, the Minister would have the power to set separate information requirements for the broader public interest review under the CTA. If information required by the Minister for the Minister's public interest review happens to include some information provided to the Bureau, then the parties could use part or all of the Bureau notification for that purpose. However, it is inefficient to require the parties to provide the Minister with the complete Bureau notice in all cases, even before the Minister makes a determination whether a public interest review is required.

Second, we question whether it is appropriate for a Minister to be given the power to issue guidelines setting out the notice requirements. In this regard, the system currently adopted under the *Competition Act*, in which long form and short form

filing requirements are established by regulation, seems preferable.

Finally, we question why the Minister would require 42 days to determine whether a merger involving a transportation undertaking requires a special public interest review. For those 42 days, nearly a month and a half, the parties and their shareholders would be in complete uncertainty, and the Commissioner would be in limbo and uncertain of what standard and process to apply to that merger review. More fundamentally, however, we would expect that the special public interest review would be required only in exceptional circumstances that would be immediately apparent and that a much shorter time frame for a determination by the Minister would be necessary. In this regard, it would also be preferable to reverse the presumption in proposed section 53.1(4). Section 53.1(4) should provide that a proposed transaction within the scope of section 53.1(1) shall be deemed not to require the special public interest review unless the Minister makes a positive determination that a review is necessary within a very short period of time following the notification.

3. Review of Act and Reporting

Section 10 of the Bill significantly extends the time periods between review of the adequacy of the legislation and reporting by the Agency on its activities. Given the current state of the industry, a much earlier review and the current requirement for annual reports seem wise.

4. Potential Prevention or Lessening of Competition

Under section 53.2(2), the Commissioner is required, within 150 days after the Commissioner is notified of a proposed transaction under the *Competition Act*, to report to the Minister and the parties to the transaction on any concerns regarding "potential prevention or lessening of competition" that may occur as a result of the transaction. The proposed section does not require that the prevention or lessening be substantial.

We do not see why the Commissioner should apply a different standard in reviewing transportation mergers than he applies to mergers in other industries. Virtually any merger between competitors affects competition to some extent, simply because there is one less competitor as a result of the merger. In contrast, under section 92 of the *Competition Act*, enforcement action against a merger requires that the Commissioner demonstrate a *substantial* prevention or lessening of competition, or a likelihood of such effect. The concept of a substantial lessening of competition requires a demonstration that the merger creates or enhances, or is likely to create or enhance, market power.

Market power is usually reflected in an ability to raise prices or restrict output. The CBA Sections recommend that the same standard should apply to the Commissioner's review of transportation mergers. Requiring the parties to provide undertakings to address any "potential" lessening or prevention of competition" without requiring it to be substantial is effectively no standard at all. Nor does the application of such a test invoke the Commissioner's expertise. Instead, it provides the Commissioner with a wide discretion that is more appropriate for an elected official, if at all. Politicization of the Commissioner's role will not contribute to maintaining objectivity, which is a most important attribute of that role.

5. Terms and Conditions

Proposed section 53.2(7) contemplates that Cabinet may specify "any terms and conditions that [it] considers appropriate" in the context of considering a proposed transaction. Section 53.2(10) requires that "every person who is subject to terms and conditions shall comply with them". Further, sections 53.4 and 53.6 provide severe penalties for a breach of section 53.2(10).

The CBA Sections suggest that it would be helpful to make it clear that parties proposing a transaction subject to sections 53.1 and 53.2 would be bound to comply with such terms and conditions only if they do in fact proceed with the

transaction. If the parties believe that the conditions are too onerous, they should

be entitled to abandon the transaction without being subject to greater regulation than they were in the absence of having made the proposal.

6. Confidentiality

If Parliament proceeds with the proposed special review procedure for transportation undertakings, several deficiencies in the confidentiality provisions should be addressed. These deficiencies exist primarily because (1)the confidentiality provisions in the CTA protect only information given to the Minister, and (2)the confidentiality provisions in the *Competition Act* allow the Commissioner to share information with the Minister only in very limited circumstances. In particular:

- The confidentiality provisions in section 29 or 29.1 of the *Competition Act* would require amendment to allow the Commissioner and the Bureau to communicate information (such as pre-merger notices) for the purposes of the administration and enforcement of the relevant provisions of the CTA, and not just the administration and enforcement of the *Competition Act*. (In this regard, it is questionable whether the Commissioner could resort to investigative powers such as orders for production of records or written returns under section 11 of the *Competition Act* for the purposes of a merger review under the CTA. This is because the competitive effects tests are different and the investigative powers require that the Commissioner be on inquiry with respect to grounds for a possible order under the *Competition Act*, not the CTA.);

- Section 29.1(1) allows the Commissioner to communicate information to the Minister of Transport "if requested to do so by the Minister" in accordance with the CTA public interest merger review provisions. Since the proposed amendments require the Commissioner to make a report, even absent a specific request from the Minister, the confidentiality provisions should not be dependent on a request by the Minister;

- Pursuant to proposed new section 53.2(5)(b), a party may be required to provide the Commissioner with additional confidential information in the course of conferring with the Commissioner with regard to concerns about the transaction's impact on competition. Neither the CTA nor the *Competition Act* would protect this information from

disclosure by the Commissioner because (i)it will be provided to the Commissioner, and (ii)it will be provided pursuant to the CTA. The confidentiality provisions in section 51 of the CTA protect only information "provided to the Minister" and section 29 of the *Competition Act* protects only information provided pursuant to the *Competition Act*, not any other Act. We recommend that either section 51 of the CTA or section 29 of the *Competition Act* be expanded to protect the confidentiality of information provided to the Commissioner under the CTA in this context;

- Proposed new section 53.1(5)(b) allows the Minister to appoint and direct any person to examine issues that relate to the public interest with respect to national transportation. Pursuant to this section, a party may be required to provide confidential information directly to an appointee of the Minister. Although new section 51(4) will protect information "provided to the Minister" by such an appointee pursuant to the CTA, like the scenario in the last bullet, section 51 is not broad enough to protect information which a party could be required to provide directly to a person other than the Minister. We recommend that section 51 be amended to protect information which is given directly by a party to an appointee of the Minister; and

- Proposed section 53.2(3) provides that the Commissioner's report to the Minister shall be made public immediately after its receipt by the Minister. In light of the commercially sensitive confidential information that can form the basis of the Commissioner's analysis, it would be preferable to provide that the Commissioner's report could be made public in a redacted form from which such confidential information had been removed. Otherwise, the Commissioner may be constrained in the report and the Minister and Cabinet may not have all the relevant facts before them when they make their decisions on the merger. Alternatively, if all relevant information is to be included in the report and made publicly available, then potential parties to even pro-competitive mergers that would benefit the public interest may be deterred from proposing a merger, for fear of disclosure of their confidential information. We note, for example, that the Tribunal receives confidential information *in camera* and is careful to avoid unnecessary disclosure of such information in its decisions.

In our view, the above issues associated with the treatment of commercially sensitive confidential information serve to further demonstrate that an assessment of the competitive impact of all transportation mergers should be conducted pursuant to the usual processes and standards in the *Competition Act*.

7. Exclusion of Private Actions

Section 4(2) of the CTA currently provides that "nothing in or done under the authority of this Act affects the operation of the *Competition Act*". The proposed new section 4(2) in Bill C-26 states that "nothing in or done under the authority of this Act affects the operation of the *Competition Act where the enforcement of that Act is undertaken by or on behalf of the Commissioner of Competition or the Attorney General of Canada*" (emphasis added).

The meaning and purpose of this amendment needs to be clarified. The proposed amendment seems to exclude private actions by persons suffering damages from conduct contrary to the *Competition Act* (but somehow contemplated by the CTA). However, the Commissioner or the Attorney General would still be able to prosecute or take other action against the same conduct. In our view, the rationale for this exclusion should be explained by the government, with an opportunity for public comment following such explanation.

8. Mediation

Section 5 of the Bill gives the Agency the power to order mediation of disputes prior to formal adjudication. The CBA Sections support the availability of mediation as an alternate mechanism to resolve disputes. However, the Bill does not permit a party to decline mediation. An unwilling party would therefore be subjected to the additional cost of the mediation process unless those costs are to be borne by the Agency itself. Accordingly, in our view, mediation should be available at no additional cost to the parties.

IV. CONCLUSION

The CBA Sections are generally concerned about whether it is appropriate for the Minister or Cabinet to conduct the proposed public interest merger review of transportation mergers, the lack of transparency in the proposed merger review

process, and the absence of any independent adjudicator or right of appeal. The National Air and Space Law Section believes that such a review is not necessary at all, and that transportation should be treated no differently than other industries. If a special public interest review process for transportation mergers is added to the CTA, the CBA Sections recommend that Bill C-26 be revised to:

- clearly define the scope of transactions subject to review;
- require the Commissioner to review transportation mergers pursuant to the existing process in the *Competition Act;* and
- remove the obligation for parties to provide the Minister with copies of *Competition Act* pre-notification filings.

The CBA Sections recommend that further provision be made to protect commercially sensitive confidential information supplied by parties to a proposed transaction. We also recommend that the government explain the proposal in the Bill to limit the scope of private actions under the *Competition Act* in the transportation sector (and provide an opportunity for public comment).

Finally, we believe that much of the additional regulation of licensees proposed in Bill C-26 should be removed. In particular, Agency action without complaint is viewed as unwarranted and inappropriate and the Agency's ability to force commercial arrangements on licensees is an unacceptable intrusion into the private sector. We further recommend that the special provisions relating to airline price advertising be removed.