

November 15, 2004

The Honourable David L. Emerson, P.C., M.P.  
Minister of Industry  
House of Commons  
Ottawa ON K1A 0A6

Dear Minister:

**RE: *Competition Act***

I write as Chair of the Canadian Bar Association National Competition Law Section (CBA Section).

The CBA 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. The CBA Section aims include:

- Promoting a greater awareness and understanding of competition law and policy issues among members of the Association, the judiciary and the Canadian public;
- Promoting ongoing consultation with the Competition Bureau, the Department of Justice and the Competition Tribunal on issues relating to the administration of the *Competition Act* and enforcement policies and practices; and
- Contributing to the review of competition legislation.

The CBA Section is particularly active in the area of law reform, contributing in the past five years over 50 formal submissions on various competition law initiatives.

The CBA Section welcomed the comments in the *Speech from the Throne* that the Government will propose changes to “modernize” the *Competition Act*. As our Section members practise in all aspects of competition law, the CBA Section would welcome an opportunity to participate fully in this review, including consideration of the recently introduced Bill C-19.

The *Competition Act* is a key legal underpinning of Canada’s economic system. Fundamental amendments to the *Competition Act* should be made with deliberate and considered reflection, including opportunity for study and comment by interested

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stakeholders, but also, and even more importantly, after the kind of careful economic reflection and study which led to the *Competition Act* itself, in 1986. We trust that this is the approach which the recent *Speech from the Throne* foreshadowed.

Our Section would like to bring a number of competition law priorities to your attention. We request a meeting at your earliest convenience, to discuss a number of specific issues of mutual interest and, more generally, the process of competition law amendment.

### **Role of Efficiencies in the *Competition Act***

Our Section opposed amendments to Section 96 of the *Competition Act* as proposed by Bill C-249 (during the 37<sup>th</sup> Parliament). That Bill would have diminished the role of efficiencies in merger reviews under the *Competition Act*.

Instead, we suggested that any amendments to the *Competition Act*'s merger efficiencies defence should be considered as part of a broader study of reform to the *Competition Act*. The CBA Section opposed any diminution of the role of efficiencies in merger review under the *Competition Act* as proposed in Bill C-249. Instead, the CBA Section favours, at least until there is convincing evidence to the contrary, an important role for efficiencies. As we understand it the Canadian economy continues to struggle with respect to productivity issues, which is fundamentally an issue of efficiency. The recent increase in the Canadian dollar relative to the U.S. dollar creates even more pressure on Canadian firms to achieve efficient scale.

The CBA Section welcomes the Competition Bureau's interest in considering the role of efficiencies in the *Competition Act*, as signalled by its consultation paper, *Treatment of Efficiencies in the Competition Act*, released in September 2004. However, we believe that possible changes to so fundamental an aspect of the *Act*, and indeed to its economic underpinnings, are not appropriately made after a 90 day consultation, but, as was the case before the creation of the current model which values efficiencies, only after detailed and thorough economic study and analysis.

### **Reform of Section 45 of the *Competition Act***

The CBA Section submitted detailed comments in 2003 relating to the proposals for amendment to section 45 of the *Competition Act* which is Canada's core criminal price fixing law. We responded to proposals by the House of Commons Standing Committee on Industry, Science and Technology (the Industry Committee) in its *Plan to Modernize Canada's Competition Regime* and the Government of Canada's June 2003 discussion paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (Discussion Paper). The CBA Section was divided regarding the necessity or wisdom of amending section 45. Some members supported the general thrust of the proposed reforms, while others raised serious concerns with the premises upon which the proposed reforms were based. Our submissions presented the views of members on both sides of this issue.

We are however agreed on the view that care is required to clarify the objectives of any such proposed amendments. While we can all agree on the goal of ensuring that true price fixing is unlawful, great care is required to ensure that the statute is drafted correctly. It may be that it will not be possible to redefine the offence without inadvertently criminalizing legitimate business agreements that do not deter competition, and increasing compliance costs for business. On the other hand, proposed amendments may inadvertently decriminalize truly hard-core cartel conduct, and make it harder to deter such conduct. Given the centrality of the offence to proper law enforcement, this is an area where care is important.

### **Strengthening the Civil Provisions**

In the CBA Section's response to proposals by the Industry Committee and the Government of Canada's June 2003 Discussion Paper, we stated that we did not believe that the introduction of administrative monetary penalties or restitutionary remedies in respect of the *Competition Act's* civil reviewable matters was appropriate.

The view of the CBA Section was that these remedies were not consistent with the philosophy established at the time the civil provisions of the Act were introduced which considers reviewable conduct to be most often benign or pro-competitive and therefore ought not to be deterred through punitive sanction. We were concerned that the Discussion Paper did not explain why this framework should be reviewed or abandoned. In the circumstances, the CBA Section was of the view that current remedies available in respect of reviewable matters were based on sound policy and the regime should not be transformed by new and overlapping remedies that threaten over-deterrence of generally salutary conduct. We will also be seeking an opportunity to explain our views in this regard to the Industry Committee in the context of its consideration of Bill C-19.

### **Reform of Pricing Issues**

In the CBA Section's 2003 submission on the discussion paper, *Options for Amending the Competition Act: Fostering a Competitive Marketplace*, we supported the proposal to de-criminalize price discrimination and predatory pricing and to address this conduct under the abuse of dominance provisions in section 79. Such conduct is appropriately dealt with as reviewable conduct given its often pro-competitive nature and the difficulty of assessing beforehand whether it is anticompetitive. The CBA Section sees no reason to supplement civil enforcement of price discrimination or predatory pricing with additional remedies such as administrative monetary penalties or rights of private action for damages. Accordingly, we hope to have an opportunity to express to the Industry Committee our support for this proposal.

### **Other issues raised in Bill C-19**

Our Section would also welcome a discussion on other matters in Bill C-19, including the proposed higher administrative monetary penalties and restitution and asset freezing powers in respect of certain marketing practice provisions as well as the proposed repeal of the provisions relating to the airline industry.

### **General Approach to Law Reform**

The CBA Section generally cautions against the hurried adoption of reform proposals whose full implications cannot adequately be appreciated until carefully studied in a time frame conducive to meaningful evaluation and consultation.

We would welcome the opportunity to meet with you in the very near future, to discuss these and other matters at greater length.

Yours very truly,

*(Signed by Trevor M. Rajah on behalf of Donald S. Affleck)*

Donald S. Affleck, Q.C.  
Chair, National Competition Law Section