



November 10, 2004

Mr. Brent St. Denis, M.P.
Chair
Standing Committee on Industry, Natural Resources,
Science and Technology
House of Commons
Ottawa ON K1A 0A6

Dear Mr. St. Denis:

RE: *Competition Act*-Bill C-19

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 welcomed the comments in the *Speech from the Throne* that the Government will propose changes to “modernize” the *Competition Act*. We anticipate that Bill C-19 will soon be referred to your Committee for review. As our Section members practise in all aspects of competition law, we would welcome an opportunity to participate fully in this review.

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

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8

Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185

Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

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 some of the priority issues to your attention.

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.

Strengthening the Civil Provisions

The CBA Section 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*. The CBA Section 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.

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 likely to be 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.

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 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, 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

cc: James Rajotte, M.P., Industry Critic, Conservative Party

cc: Paul Crête, M.P., Industry Critic, Bloc Québécois

cc Brian Masse, M.P., Industry Critic, New Democratic Party

cc: Louise M. Thibault, Clerk / Standing Committee on Industry, Natural Resources, Science and Technology