Submission on Bill C-19:
Competition Act Amendments

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 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 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 Section of the Canadian Bar Association

Submission on Bill C-19: *Competition Act* Amendments

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its summary comments on Bill C-19 (*Competition Act* amendments) to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology.

II. SUMMARY COMMENTS ON BILL C-19

A. Decriminalizing Pricing Provisions

The CBA Section supports the proposal to repeal the criminal prohibitions against price discrimination, predatory pricing, geographic price discrimination and promotional allowances in sections 50 and 51 of the *Competition Act*.[1]

In our view, unequal prices are typically not harmful to social welfare, and can be pro-competitive, so ought not to be "chilled" by the threat of criminal sanction. Rather, such practices ought to be thoroughly assessed by the Competition Tribunal to determine whether a specific act of discrimination would be harmful to competition in the marketplace. This can best be done under the Act's civil abuse of dominance provisions, particularly since truly harmful discrimination in regard to pricing or

1 CBA National Competition Law Section, "Comments on the Competition Bureau's Discussion Paper: *Options for Amending the Competition Act*" (October 2003) at 61-69.

promotional allowances occurs only in situations where a seller is dominant and its discriminatory practices are resulting or will likely result in a substantial lessening or prevention of competition, particularly in the downstream market (i.e., among its customers).

Similarly, geographic price discrimination and predatory pricing ought to be addressed under the civil abuse of dominance provisions. Low pricing is perhaps the quintessential example of conduct that should be presumed lawful and encouraged unless it is demonstrated to be anticompetitive after careful analysis by the Tribunal. In addition, predation already has a notable history under the existing abuse provisions, which make specific reference to several predatory practices and which have been considered by the Tribunal in past cases alleging predatory pricing.[2]

B. Repeal of Airline Specific Provisions

The CBA Section supports the proposal to repeal the airline-specific provisions in the Act and to make consequential amendments.

The CBA Section opposed the introduction of the airline-specific provisions and welcomes their proposed repeal.[3] The Act is legislation of general application pertaining to virtually all segments of business activity throughout Canada. It is wrong in principle to include specific airline provisions in the Act creating higher hurdles for particular persons. The inclusion of the airline provisions strongly implied, contrary to experience, that the general provisions of the Act were insufficient to address the behaviour of a firm with a dominant market share in that one industry. The continued existence of measures applicable to dominant airlines threatens to set a dangerous precedent that could

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2 For example, Nutrasweet and Air Canada cases.

3 CBA National Competition Law Section, "Submission on Bill C-26, Amendments to the *Canada Transportation Act*, the *Competition Act*, and other statutes" (April 2000) at 7-10.
See also: CBA National Competition Law Section, "Response to the Recommendations of the April 2002 Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*" (August 2002) at 2.

precipitate demands for

similarly extreme measures in relation to other publicly unpopular businesses and perhaps beyond. Indeed, in its submission on Bill C-23, the CBA Section cautioned that the exceptional introduction of administrative monetary penalties for abuse of dominance in the airline sector could be used as a dangerous precedent to expand such a remedy to all cases of abuse of dominance[4] – something that Bill C-19 is now effectively proposing, which we discuss later in our submission.

Section 104.1 (temporary prohibition orders issued by the Commissioner without court approval in cases of suspected abuse of dominance by a domestic airline), was found by the Quebec Court of Appeal to violate the *Canadian Bill of Rights*.[5] The CBA Section clearly supports the repeal of this provision.

Regardless of the relative merits of introducing airline-specific provisions into the Act, the CBA Section agrees with the Government's view that significant changes in the Canadian airline industry in recent years remove any perceived need for those provisions and counsel their repeal.

C. Administrative Monetary Penalties

The CBA Section opposes the proposal to allow the Tribunal to impose administrative monetary penalties (AMPs) in civil abuse of dominance cases.

The addition of AMPs to the remedies currently available in respect of abuse of dominance is inconsistent with the structure and purpose of the Act. Currently, reviewable practices identified in Part VIII of the Act, including abuse of dominance, are effectively lawful until found to be unlawful after careful analysis by the Tribunal. This considered approach reflects Parliament's view that vertical

4 CBA National Competition Law Section, "Submission on Bill C-23: *Competition Act* Amendments" (March 2002) at 6-7.

5 *Air Canada v. Canada* (Attorney General), JE 2003-219, REJB 2003-36762.

restraints on competition are, in many (if not most) circumstances, pro-competitive or benign and that the line establishing when such conduct becomes offensive to competition law policies is often difficult to define. For these reasons, the practices identified in Part VIII were deliberately not made subject to the threat of punitive sanction but rather are addressed by means of injunctive-style remedies that avoid discouraging vigorous competition among firms. The CBA Section believes the current regime governing reviewable practices and its underlying rationales are sound and should not to be displaced.[6]

The proposed addition of AMPs would abandon the current regime by effectively rendering conduct under Part VIII unlawful, *ab initio*, and thus subject to punitive sanction. There is no evidence that this proposal is necessary or desirable from a competition policy perspective. Current remedies under Part VIII are appropriate, given that:

- reviewable matters ought to be subject to lesser consequences than more serious criminal conduct that is unambiguously harmful to competition;
- AMPs may discourage risk-taking or innovative behaviour that may be competitively neutral or pro-competitive;
- the current regime provides a sufficient deterrent effect (to the extent that one is desirable), especially given the significant costs of responding to information requests or section 11 orders in the context of Competition Bureau inquiries; and
- the addition of section 103.3 to the Act in 2002, which gives the Commissioner the ability to seek, on an *ex parte* basis if necessary, an interim injunction to prevent continuation of an alleged abuse — before the investigation is complete and thus before the Commissioner has even determined that an application is warranted — negates any real need for powerful deterrence.

6 *Supra* note 1 at 5-16.

Supra note 4 at 6-7.

CBA National Competition Law Section, "Response to the Recommendations of the April 2002 Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*" (August 2002) at 1.

At the very least, in the relative absence of section 79 applications by the Commissioner, and in the complete absence of applications under section 103.3 for interim injunctions in abuse cases, one must question whether current tools are really inadequate, or if the real problem is not one of a lack of resources. Finally, and significantly, the stated premise of international convergence must be seriously questioned when the United States rarely if ever seeks criminal sanctions for monopolization cases (even in the recent *Microsoft* battle, proceedings were civil, where no fines are sought).

In short, the need for more effective enforcement has not been proven. If the Bureau needs more resources to facilitate timely investigation of more cases, such resources ought to be provided directly rather than through a power to seek fines in respect of presumptively lawful conduct.

In addition, the ability to impose very large AMPs in respect of reviewable matters like abuse of dominant position may raise significant issues under subsection 11(d) of the *Charter*, as such penalties are penal in nature. As far as the CBA Section is aware, no constitutional opinion as to whether the AMPs proposed in Bill C-19 are *intra vires* Parliament has been prepared or submitted for this Committee's consideration. The presumption of innocence and the right to a fair hearing before an independent and impartial tribunal guaranteed by subsection 11(d) have been held to be available to persons prosecuted for regulatory offences involving punitive sanctions. Given the penal nature of the proposed AMPs, further consideration and consultation of the possible ramifications under the *Charter* are advisable, particularly in light of the inherent uncertainty associated with the abuse of dominance provisions that reflects the "reviewable" nature of the conduct addressed by those provisions.

Finally, even if AMPs are judged appropriate by this Committee, the CBA Section seriously questions the proposed maximum levels. In our view, it is inappropriate that

the maximum level of AMPs should exceed the maximum fine available for conspiracy offences under section 45.

D. Increasing the Level of AMPS for Deceptive Marketing Practices

The CBA Section opposes the proposal to increase the maximum level of AMPs available for contravention of the Act's civil deceptive marketing practices provisions. [7]

The limited cases to date do not suggest that the inability to set higher AMPs is either hampering administration of Part VII.1 or failing to provide proper incentives to encourage compliance. Cease and desist orders and corrective notices generally provide very good incentives to comply with Part VII.1, and the existing levels of AMPs provided in paragraph 74.1(1)(c) of the Act are sufficient to address instances of deceptive marketing that do not meet the criminal offence criteria of knowing or reckless deception. In practice, the ability of the Commissioner under the current civil deceptive marketing provisions to reach settlements in excess of the maximum AMP level strongly suggests that further deterrence in the form of higher AMPs is unnecessary. Contrary to the Competition Bureau's backgrounder on Bill C-19, this proposal is not "firmly rooted" in the 2002 report of the Industry Committee, which report made no reference to any perceived need to increase AMP levels for civil deceptive marketing practices. Nor is it clear how the increased AMPs contemplated in Bill C-19 would "ensure coherence and consistency across all civil reviewable matters in the Act" as claimed by the Competition Bureau.

In any event, as noted above, the proposed maximum fine levels of $10 million for the first order and $15 million for subsequent orders are much too high and disproportionate to the most serious criminal offence in the Act (a naked price-

7 *Supra* note 1 at 17-19.

fixing conspiracy under section 45) for which the maximum fine is $10 million. Such fine levels would discourage comparative advertising, a very valuable consumer tool. In addition, the long enforcement history under the Act's misleading advertising provisions means that many respondents would be subject immediately to the higher maximum fine level of $15 million by virtue of subsection 74.1(6), which provides a very broad definition of "subsequent order".

The maximum AMP levels proposed in Bill C-19 are also particularly disproportionate given the fine levels available under the Act's parallel criminal misleading advertising provisions. Under the criminal track, parties are subject to a maximum fine of $200,000 on summary conviction and to a fine in the discretion of the court for an indictable offence. The $200,000 limit applicable in summary conviction proceedings was established by Parliament as recently as 1999. Raising AMP levels under the civil track to an amount that is fifty times greater than the maximum fine for summary convictions under the criminal track is paradoxical and risks the perception that the proposal is an attempt to circumvent the stricter evidentiary and due process rules associated with the criminal misleading advertising provisions of the Act.

E. Restitution Orders

The CBA Section opposes the proposal to authorize the Commissioner of Competition to seek restitution orders against parties found to have made false or misleading representations under Part VII.1 of the Act. It also opposes authorizing the Commissioner to seek interim "freezing" orders to preserve assets in contemplation of a restitution order.

Restitution orders most commonly arise in a criminal context. However, like Part VIII of the Act, Part VII.1 deals with reviewable matters that are not done "knowingly or

recklessly" and so do not constitute a "wrong" that should be legally compensable.[8] Where a marketer's actions do not meet the criminal standard of section 52 of the Act, imposing a restitution order creates the potential for injustice. Furthermore, the proposal in Bill C-19 to distribute unclaimed restitution funds to not-for-profit organizations, and to base the amount of restitution on the amount paid by all consumers, whether aggrieved or not, goes well beyond the principle of restitution and potentially amounts to a tax on business without effective legislative oversight.

The addition of a freezing order provision to complement the proposed new remedy of restitution is also of concern. Since it might be anticipated that freezing orders would be used sparingly and only as a tool against truly fraudulent operations and scam artists, there appears little justification for adding such a provision to the Act's civil marketing practices regime.

As with the proposal to increase the level of AMPs for civil deceptive marketing practices, Bill C-19's proposal to introduce restitution and freezing orders is not "firmly rooted" in the Industry Committee's 2002 report on the modernization of Canadian competition law as claimed by the Competition Bureau. That report made no reference to a perceived need for restitution or freezing orders.

III. CONCLUSION

The CBA Section welcomes the proposed amendments that decriminalize the pricing provisions and also the repeal of the airline specific provisions in the Act. Our Section is concerned that the proposals to introduce AMPS with respect to civil abuse of dominance and restitutionary remedies in respect of false or misleading representations is inconsistent with the current structure and purpose of the Act. We also submit that the proposed increases in the level of AMPS for deceptive marketing practices are

8 *Supra* note 1 at 19-23.

unnecessary and disproportionate.