



November 23, 2005

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

**Re:** Proposed Amendments to Bill C-19 – *Competition Act*

Dear Mr. St. Denis:

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section), to comment on proposed amendments to Bill C-19 recently tabled with the Industry Committee.

In the short time since the amendments were made public, the CBA Section has not had an opportunity to fully analyse the proposed amendments. However, we wish to share our summary comments on several of these proposals.

The *Competition Act* is a key legal underpinning of Canada's economy, and the product of extensive analysis and deliberation. In contrast to the careful approach taken in respect of prior amendments to the Act, the proposed amendments to Bill C-19 are not supported by cogent evidence or analysis. If enacted, the proposed amendments will fundamentally alter the Act. As a result, the CBA Section is of the view that the proposed amendments to Bill C-19 are not appropriate.

### **Timeliness of Amendments to Section 45**

In view of the serious issues raised by stakeholders with respect to reform of Canada's conspiracy laws (section 45 of the Act), the Competition Bureau decided that "more work needs to be done before we can recommend a course of action on ... changes to section 45"<sup>1</sup>. As a result, the Bureau has undertaken further study of international and alternative conspiracy law models. Recently, the Bureau engaged economic and legal experts to assist in this study, the results of which are not yet available.

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<sup>1</sup> Speech by Sheridan Scott, Commissioner of Competition, to the CBA Annual Competition Law Conference, September 23, 2004.

### **Increased Fines Under Section 45**

While the Government's proposal to increase fines under section 45 was designed in response to concerns over rising gasoline prices, evidence supporting the proposal appears to be deficient. The Bureau has conducted five major investigations into the gasoline industry since 1990 and has found no evidence that price increases resulted from a conspiracy among gasoline suppliers. The CBA Section recommends that the proposal to increase fines be considered under the continuing consultation process on amendments to section 45.

### **Undueness Standard Under Section 45**

Further study is required to ensure that any modification of the "undueness" standard under section 45 would appropriately identify agreements that are truly anti-competitive. The proposal to remove the word "unduly" from this section would effectively undo more than a century of jurisprudence and economic thought, and would extend liability to agreements with no significant effects on competition.

### **Section 45 Defences**

The proposal to introduce a defence for an accused who establishes that the impugned agreement "helps to lower prices" or "provides other benefits to society" is not a feasible mechanism for distinguishing between anti-competitive agreements that should be subject to criminal sanctions and agreements that do not have significant competitive effects. The proposed defence would, in fact, increase the chill to legitimate agreements, which is a concern with the current section 45. The CBA Section also questions the constitutionality of the proposed amendments: Would the amended section 45 be overly broad? Does requiring the accused to establish that the agreement lowers prices or provides other benefits violate the presumption of innocence? And does the proposed defence provide a justiciable standard?

### **Market References**

With respect to the Government's proposal to introduce a market reference power, the recent report by the Commissioner of Competition provides no concrete evidence that such a power would actually lead to any improvement in Canada's economy. Market references are likely to impose an unnecessary burden on Canadian businesses and Canadian taxpayers, and provide a diversion when issues arise which have political sensitivity. The Commissioner already enjoys extensive powers to conduct inquiries where there is a reason to believe that conduct is contravening the Act. The Governor in Council may ask the CITT to conduct broader economic inquiries.

### **Definition of Anti-Competitive Acts**

The proposal to alter the definition of "anti-competitive acts" for the abuse of dominance provision would significantly reduce its effectiveness by introducing an element of uncertainty, and potentially excluding conduct currently recognized as anti-competitive in certain circumstances. It also has the potential to change the focus of this provision from the protection of competition to the protection of particular firms.

### **Additional Administrative Penalties**

Bill C-19 already subjects companies engaged in deceptive marketing practices and abuse of dominance to significant administrative monetary penalties. The proposed amendments would also require those companies to disgorge all profits earned as a result of the impugned conduct. Such amendments reinforce concerns over the penal character of these provisions which, in combination with administrative monetary penalties, represent an excessive penalty for companies. Moreover, the amended provision would be very difficult to apply in practice.

**Private Access for Reviewable Conduct**

Permitting private litigants to commence proceedings and claim damages for reviewable conduct described in sections 75 and 77 to 79 is a significant change to the structure of the Act, which should not be made in the absence of a prior consultative process.

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

We urge the Industry Committee to reject the proposed amendments to Bill C-19, pending proper consultation. We also invite you again to consider the recommendations in our comprehensive December 2004 submission on the Bill.

Yours very truly,

*(Original signed by Madeleine Renaud)*

Madeleine Renaud  
Chair  
National Competition Law Section