



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 2, 2007

The Honourable Lawrence Cannon, P.C., M.P.
Minister of Transport, Infrastructure and Communities
Tower C
330 Sparks Street
Ottawa, ON K1A 0N5

- and -

Ms Sheridan Scott
Commissioner of Competition
Competition Bureau
Industry Canada
Place du Portage, Phase I
50 Victoria Street, 19th Floor
Gatineau, QC K1A 0C9

Dear Minister Cannon and Ms Scott:

RE: Regulations and Guidelines for Merger Notification and Review under *Canada Transportation Act* (Bill C-11)

I am writing as Chair of the National Competition Law Section of the Canadian Bar Association (the CBA Section) with respect regulations and guidelines under Bill C-11, amending the *Canada Transportation Act* (CTA) and other Acts (now S.C. 2007, c. 19). The amendments to the CTA established a new merger notification and review process for proposed transactions that are subject to the notifiable transactions provisions of the *Competition Act* and which "involve a transportation undertaking". These new provisions effectively extend existing merger notification and review provisions for mergers involving air transportation undertakings to mergers involving any type of transportation undertaking.

An important aspect of the new merger notification and review process is the issuance of regulations in relation to the information required in merger notifications to the Minister, and guidelines on the factors that will be taken into account in assessing the public interest as it relates to national transportation. The Bill expressly contemplates consultation with the Competition Bureau on these guidelines. The Bill also contemplates the possibility of regulations setting out exemptions from the CTA merger notification and review process.

The purpose of this letter is to stress the importance of establishing appropriate regulations and guidelines expeditiously, and to suggest some possible approaches to those documents. The practical problem for Canadian businesses is that numerous transactions are currently underway – and no doubt more to come – which may fall within the new regime, whether or not that was intended. This uncertainty is costly for the economy. There are ambiguities in the legislative provisions, including threshold issues such as what constitutes a "transportation undertaking," when a merger "involves" such an undertaking, and whether the new merger notification and review provisions apply to mergers that exceed the thresholds for notification under the *Competition Act* but are exempt from notification under that legislation, for example because of an advance ruling certificate or waiver of the obligation to file a notification in respect of a merger.

Given the subject matter of the provisions in question, there is an immediate need for guidance from both the Minister and the Commissioner.

The Canadian business community, as well as other interested stakeholders, would greatly benefit from guidance from the Minister and the Commissioner on their approach to these new merger provisions. For example, the Commissioner's November 2006 submission to the House of Commons Standing Committee on Transport, Infrastructure and Communities provided helpful guidance on her intent to apply the same competitive effects standard in a CTA merger review as she applies in a merger review under the *Competition Act*.

A number of the CBA's concerns about the uncertainty in the new merger provisions were set out in our September 2006 submission on Bill C-11 (a copy of which is enclosed with this letter), which in turn is consistent with our submissions on previous Bills.

Guidance from the Minister

The following are some illustrative examples of points on which we believe guidance from the Minister would be helpful:

1. The term "transportation undertaking" is not defined for the purposes of section 53.1(1) of the CTA. Is it intended to include every business that transports people or goods across a provincial or a national border on a continuous and regular basis, even if to a minimal extent, either in absolute terms or in the context of a much larger business? Is it intended to apply only to undertakings carrying third party persons or goods? Is it intended to apply only to transportation undertakings that have a national dimension (given the reference to "national transportation" in section 53.1(4) as the standard for determining whether a merger review is required and, if so, what constitutes a "national" dimension)? Is it intended to extend to businesses that provide ancillary services to airline, ship or rail operations, for example, such as stevedoring? Is it intended to apply to suppliers of parts or equipment to transportation businesses?
 - We suspect that the policy motivating the imposition of the new CTA merger notification and review provisions is not as wide as the statutory language might be interpreted. We submit that limitation of the scope of these provisions through guidelines and exemptions would be helpful.

2. When a transaction "involves" a transportation undertaking is also not defined. Is it the Minister's view that this concept applies only to acquisitions of transportation undertakings, or does it apply also to an acquisition by a transportation undertaking? Do the new CTA merger notification and review provisions apply to an acquisition of or by an affiliate of an entity that has a transportation undertaking, or only if the entity that carries on a transportation undertaking is itself a party to the proposed transaction?
 - We submit that some limitation of the scope of the CTA merger provisions in this regard consistent with the intended policy would be helpful. It is not clear, for example, whether and why the Minister would wish to review an acquisition by a transportation undertaking of a business outside the transportation sector.
3. What types of "transportation" undertakings are covered by the new merger provisions? Is the concept limited to air transport, shipping, rail, bus and port services, for example, or does it include other types of transportation services, such as trucking, pipelines, taxis, or power transmission lines?
 - We submit that the types of transportation undertakings that could reasonably raise a national transportation issue is limited and could be specifically identified.
4. Is the Minister prepared to use the regulation-making power to enact regulations exempting classes of transactions from the new merger review and notification provisions? If so, what classes of transactions will be exempt?
 - As above, we submit that the policy underlying the new merger provisions would not require notifications of the full range of proposed transactions that may fall within the scope of section 53.1(1). Exemptions would help to reduce uncertainty and unnecessary filings with the Minister, thereby minimizing the regulatory burden and costs associated with the provisions.
5. What criteria will the Minister use in determining whether a proposed transaction raises public interests issues, and whether such issues are sufficient as to require a public interest review?
 - It is not clear to the CBA Section what criteria the Minister will employ in this regard, particularly for transportation undertakings regulated by the CTA in any event, and given that competition issues are addressed by the Commissioner, and foreign investment is governed by the *Investment Canada Act*. We submit that publication of the criteria to be applied by the Minister is essential.
6. Will the Minister provide advance rulings on the application of the new CTA merger notification and review provisions to a particular proposed transaction? If so, can rulings be sought in confidence?
 - We submit that it would be very helpful for the Minister to provide advance guidance on a confidential basis.

7. Does the Minister intend to take the full 42 days to decide whether a notified proposed transaction will require a public interest review, or will there be a procedure for a faster determination from the Minister, for example in cases that involve only minimal or regional transportation components?
 - We believe that, in the vast majority of mergers that are notified, the Minister should be able to make a determination that no public interest review is required within 10 days.
8. If the Minister does require a public interest review, will such review be confined to the transportation component of the proposed transaction, or will the Minister review other, non-transportation aspects of the business to be acquired?
 - We submit that the review should be confined to transportation businesses, consistent with the statutory scheme.
9. Is it the Minister's position that confidential information provided to an appointee pursuant to section 53.1(5) of the CTA for the purposes of a public interest review is protected from disclosure by section 51(1) of the CTA, even though the information is not "provided to the Minister"?
 - We submit that confidentiality protection is essential for the business documents that may be required for a review, but the statutory basis is unclear. A statutory amendment would be helpful. Clarification of the position that the Minister would take in the event of an application under the *Access to Information Act* would also be helpful.
10. The new CTA merger provisions provide that the Commissioner's report to the Minister is to be made public (s. 53.2(3)). Is it the Minister's intention also to make public any report on public interest considerations from the Agency or an appointee pursuant to section 53.1(5) of the CTA? If not, will that report be disclosed to the Commissioner and/or the parties to the proposed merger?
 - We submit that the public interest report should be disclosed to the merger parties to enable them to address any issues. It is important for merging parties to know before they propose a transaction whether any such report will be made public as that fact may influence their willingness to proceed with a particular proposed merger. It is also important that any public report be edited to protect any confidential business information about the merging parties.
11. How will the new CTA merger notification and review process work in conjunction with the *Investment Canada Act* (ICA) in circumstances where a non-Canadian is proposing to acquire a business with a transportation undertaking? Will the Minister consult with the Minister of Industry or the Minister of Canadian Heritage and, for example, coordinate any requested undertakings with respect to the timing of the Minister's review? In this latter regard, the ICA provides the Minister of Industry (or Canadian Heritage) with an initial review period of 45 days from receipt of an ICA application, while the Minister of Transport has 42 days to decide only whether to commence a public interest inquiry (with an inquiry taking up to an additional 150

days or more). Will the ICA process be delayed while waiting for the Minister of Transport to issue a decision? If not, would the Minister require a public interest review under the ICA after the Minister of Industry or the Minister of Canadian Heritage has determined the proposed transaction to be of "net benefit to Canada"?

- We submit that it is critical for parties to a proposed merger to understand the relationship and timing implications of these two reviews before they decide to proceed with a proposed transaction. This issue should be addressed in regulations, guidelines, or amendments to the legislation.

Guidance from the Commissioner

We also believe that additional guidance from the Commissioner would be helpful on the following points:

1. Will the Commissioner alter the Competition Bureau's normal course review of mergers where the Bureau determines that a merger may involve a transportation undertaking? We note, for example, that notification to the Minister will not be required where a proposed transaction is exempt from notification under Part IX of the *Competition Act* because the Commissioner has issued an advance ruling certificate under section 102 of the *Competition Act* or waived compliance with Part IX. The application of such exemptions is common, if not routine. In fact, the vast majority of the mergers reviewed by the Bureau are cleared within two weeks, often without a formal notification filing.
 - We submit that the Commissioner should carry out the statutory mandate under the *Competition Act* in the normal course consistent with past practice. It is difficult to understand the intent of section 53.1(1) in this regard, but we believe that Parliament intended that there be no public interest review if there are clearly no competition issues and an advance ruling certificate is issued or a waiver of the Part IX notice requirement is granted.
2. What is the position of the Commissioner on the availability of sections 11 or 15 of the *Competition Act* to assist in merger reviews by the Commissioner under the CTA?
 - We submit that these provisions apply only to inquiries under the *Competition Act* and not to merger reviews pursuant to the CTA.
3. Is the position of the Commissioner that confidential information provided in the context of a CTA merger review is protected by sections 29 or 29.1 of the *Competition Act*? If so, what is the basis for that position given that the Commissioner's review is conducted pursuant to the CTA, not the *Competition Act*.
 - We submit that a statutory amendment should be made to ensure protection of confidential information in this regard. In the meantime, confirmation of the Commissioner's position in the event of an application under the *Access to Information Act* would be helpful.

We believe that clarification of the Minister's and the Commissioner's positions on these and other issues likely to arise in the application of the new CTA merger notification and review provisions is required urgently. Canadian businesses frequently assess possible transactions in the course of their day-to-day activities and devote significant time and resources to doing so. Awareness of the Minister's and the Commissioner's position on these and other fundamental issues raised by the new CTA merger notification and review provisions will likely avoid significant inefficiencies in pursuing, proposing and implementing transactions, as well as inefficiencies in the application of government resources in dealing with proposed transactions that may be subject to the new provisions. For example, some proposed time sensitive transactions may not even be proposed if it is clear that they will be subject to a CTA public interest review. Also, depending on the scope and application of the CTA merger notification and review provisions, some Canadian transportation businesses may choose not to bid on other businesses if they determine that they will be at a competitive disadvantage relative to other bidders, including foreign bidders who are not subject to the same regulatory uncertainty and delay.

In our view, it would be advisable for the Minister and the Commissioner to consult with interested stakeholders on guidelines, procedures and possible exemptions in relation to the new CTA merger notification and review procedure. We would be pleased to participate in any consultations. It would be advisable to start the process as soon as possible, to avoid the necessity of making ad hoc policy decisions in the context of time impacted transactions.

Finally, we believe that the new CTA merger review provisions are highly relevant, and may be of significant interest, to the recently appointed Competition Review Panel. Clarification of the foregoing points would assist the Panel in assessing the likely impact of the new CTA merger review process on the competitiveness of Canadian businesses and on foreign investment in Canada. Given that the Panel is tasked in part with reviewing the ICA, we expect that it will be highly relevant for the Panel to understand how the ICA and the new CTA merger notification and review provisions will work together when they both apply to the same proposed transaction.

We look forward to working with you on these issues.

Yours very truly,

(original signed by Tamra Thomson for Barry Zalmanowitz)

Barry Zalmanowitz
Chair
National Competition Law Section

Att.



THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

**The Voice of
the Legal Profession**

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Submission on Bill C-11 *Canada Transportation Act Amendments*

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

September 2006

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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.

Submission on Bill C-11

***Canada Transportation Act* amendments**

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-11. 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-11 be revised to:

- Require an assessment of the merger's impact on competition solely by the Commissioner of Competition, 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 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-11, 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*.
- While the CBA Sections support the addition of mediation as an alternative dispute resolution mechanism available to the Canadian Transportation Agency the parties before it, mediation 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-11, amending the *Canada Transportation Act* and other Acts.

Our comments build upon submissions made previously to the Minister of Transport with respect to earlier versions of this Bill. In May 2003, the CBA Sections commented on Bill C-26, the *Transportation Amendment Act*, which was introduced on February 25, 2003. In September 2005 the CBA commented on Bill C-44, the *Transportation Amendment Act*, which was introduced on March 24, 2005. Bill C-11 is a successor to those Bills.

Bill C-11 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.

A. 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-11 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 13 of Bill C-11 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.

B. The Commissioner's Role Should Not Be Politicized

The CBA Sections are concerned that Bill C-11 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 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-11 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-11 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:

- close collaboration and consultations between the Commissioner and the Minister in their respective assessments of a proposed transaction;
- 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 1986¹;
- 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
- 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.

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 alternatives². 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-

¹ See, for example, *Merger Enforcement Guidelines*, Competition Bureau, September 2004. These replaced: Director of Investigation and Research, *Merger Enforcement Guidelines, Competition Act, Information Bulletin* No. 5, March 1991.

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."

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.

C. 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 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:

- 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;
- 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;

- 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
- 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.
- 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.
- 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.
- 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.

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*.)

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.

D. 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 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 industry⁴. 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.

E. Additional Regulation of the Aviation Industry

Section 2 of Bill C-11 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:

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

- competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services; and
- regulation and strategic public intervention occur only if they are necessary to achieve economic, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and they do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation

However, Bill C-11 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.

F. Airline Advertising and Other Regulatory Intervention in the Aviation Industry

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 apparent necessity for further regulations 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. 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" felt by consumers by eliminating the industry as a special source of general revenues for the government.

Proposed section 86.1(1) would give the Agency the power to make regulations "respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada". Specifically, proposed section 86.1(2) allows for regulations to be made requiring total price disclosure for airline price advertising. 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 enhanced in 1999 by adding a non-criminal enforcement track (see Part VII of the *Competition Act*)

Additionally, 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.

Further amendments relating to the aviation industry are proposed in section 19(2) of Bill C-11, concerning section 66(3) of the CTA. The proposed amendments 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.

III. SPECIFIC COMMENTS

The CBA Sections have specific comments on the following aspects of Bill C-11:

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

A. Scope of Merger Review

If a public interest merger review process does proceed as contemplated by Bill C-11, 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 example⁵? 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?

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

⁵ 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".

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.

B. 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.

C. Review of Act and Reporting

Section 12(1) of the Bill significantly extends the time periods until a 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 on the state of transportation in Canada, rather than the three year reports proposed in section 11(1) of the Bill, seem wise.

D. 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 she 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 necessarily 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.

E. 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.

F. 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) 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 section 51(1) 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*.

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-11 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 further recommend that the special provisions relating to airline price advertising be removed.