THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 13, 2009

Hon. Jim Flaherty, P.C., M.P.
Minister of Finance
Esplanade Laurier, East Tower
140 O'Connor Street
Ottawa, ON K1A 0G5

Hon. Tony Clement, P.C., M.P.
Minister of Industry
5th Floor, West Tower
C.D. Howe Building
235 Queen Street
Ottawa, ON K1A 0H5

Dear Ministers,

Re: Bill C-10 – Amendments to the *Competition Act*

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section) with respect to Part 12 of the *Budget Implementation Act, 2009* (Bill C-10), which includes fundamental amendments to the *Competition Act*. The February 6 press release of the Minister of Finance indicated that these provisions of the Bill are intended to protect consumers from anti-competitive behaviour as well as unscrupulous business practices.

The CBA Section is on record as supporting a number of the proposed amendments to the *Competition Act*, including decriminalization of predatory pricing and price discrimination, which will remove impediments to low pricing and discounts to smaller businesses, for example. However, the proposed amendments in Part 12 are so far-reaching and technically complex that amendments to the *Competition Act* should be decoupled from Bill C-10 and given separate and careful consideration as a stand alone Bill. This is necessary to avoid the risk of unintended consequences, including the imposition of significant and unnecessary costs on Canadian businesses of all sizes. Consumers will not benefit from the imposition of unnecessary costs and uncertainties on Canadian businesses.

For example, the proposed *per se* conspiracy offence contemplated by section 410 of the Bill would make illegal certain categories of agreements between competitors even in the absence of market power – even certain forms of cooperation between small businesspersons who clearly cannot impact the market would become illegal and subject to strategic challenge, perhaps from

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lawsuits by larger competitors. In our submission to the Competition Policy Review Panel (the Panel), we also noted the serious danger of entrenching a potentially overbroad or inflexible definition of *per se* illegal agreements that would discourage Canadian firms from pursuing collaborative activities and joint ventures that foreign competitors may confidently pursue with impunity.[1] The current economic environment is not a good time to impose significant costs and uncertainty on Canadian businesses. Even if one supports the intent of this amendment, the draft legislation raises technical issues that need to be addressed, such as providing adequate exemptions from the *per se* offence and properly addressing the concept of the regulated conduct defence (such as exempting restrictions authorized by provincial legislation). Previously permissible provincially regulated arrangements may now offend this federal law.

Another aspect of the draft amendments to the *Competition Act* that needs careful and detailed review is the proposal to replace the current merger review process. Unlike most of the other proposed amendments, this proposal has not been subject to public consultation. As outlined in a letter we recently sent to Industry Canada[2], this proposal will dramatically increase the costs of merger review to both the Canadian business community and the government. The proposal mirrors the US *Hart-Scott-Rodino Act* "second request" process, which has not been adopted by any other country since it was implemented in the US over 30 years ago. Again, this is not a good time to impose such costs without careful consideration and public consultation, particularly given that the current marketplace conditions are likely to give rise to a need for consolidation in many industries as Canadian businesses seek to achieve greater efficiencies to remain viable and competitive. This proposed amendment creates a serious risk of decreasing Canada's attractiveness as a destination for foreign investment – contrary to the Panel's and the government's intent.

Raising the costs and uncertainty of doing business in Canada would be contrary to the intent of the Bill. In our view, the important legislation in Part 12 should be separated from Bill C-10 and carefully reviewed as stand alone legislation to ensure that it meets its intended objectives without imposing unnecessary costs on Canadian businesses of all sizes that may ultimately be passed on to consumers in the form of higher prices.

We would welcome the opportunity to meet with you to expand on our concerns.

Yours truly,

(Original signed by Tamra Thomson for John Bodrug)

John Bodrug
Chair, National Competition Law Section

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1 Canadian Bar Association, National Competition Law Section: Submission to the Competition Policy Review Panel, January 2008, at 4. http://www.cba.org/CBA/submissions/pdf/08-02-eng.pdf

2 Letter dated 3 February 2009 to Ron Parker, Sr ADM, Strategy Policy Sector, Industry Canada, from John Bodrug, Chair National Competition Law Section. http://www.cba.org/CBA/submissions/pdf/09-04-eng.pdf