THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 3, 2009

Mr. Ron Parker
Senior Assistant Deputy Minister
Strategy Policy Sector
Industry Canada
CD Howe Building, 10th Floor, Room 1020B
235 Queen Street
Ottawa ON K1A 0H5

Dear Mr. Parker:

Re: Potential Amendments to the *Competition Act* Merger Review Process

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section) to provide preliminary views on potential amendments to the merger review process in the *Competition Act* as recommended by the Competition Policy Review Panel.[1]

The Panel recommended that:

- amendments should be introduced in order to "align the merger notification process under the *Competition Act* more closely with the merger review process in the United States"; and
- "the initial review period should be set at 30 days, and the Commissioner of Competition should be empowered, in its discretion, to initiate a 'second stage' review that would extend the review period for an additional period ending 30 days following full compliance with a 'second request' for information."

While not part of his terms of reference, a similar recommendation was made by Brian Gover in his June 2008 report (the Gover Report) to the Deputy Minister of Justice and Commissioner of Competition regarding certain issues with use of the formal investigative powers in section 11 of the *Competition Act* by the Competition Bureau .[2] Further, the Gover Report stemmed from concerns

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1 Competition Policy Review Panel, *Compete to Win* (Final Report – June 2008), at 60.

2 Letter by Mr. Brian Gover to Mr. John Sims and Ms. Sheridan Scott, dated June 19, 2008, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02709.html. In a letter to Mr. Sims and Ms. Scott dated September 4, 2008, the CBA Section expressed a number of concerns regarding the Gover Report, including that it was not the subject of adequate consultation on the issues that it addressed and noting in particular that "neither Mr. Gover nor the Bureau raised [the prospect of merger process amendments], or invited the CBA Section to comment on it, in the context of [the Gover Report]".

500–865 Carling, Ottawa, Ontario, Canada K1S 5S8
tel/tél. : 613.237.2925 toll free/sans frais : 1.800.267.8860 fax/téléc. : 613.237.0185 info@cba.org www.cba.org

raised about the process used by the Competition Bureau to seek information in the context of one particular merger.[3]

We are commenting at this time as we understand the government may be considering including this recommendation of the Panel in the current round of proposed amendments to the Act. This letter reflects the ongoing work of the CBA Section's Merger Task, which is comprised of senior members of the private competition law bar and does not include input from the Bureau.

Summary

The CBA Section agrees with the Panel's statement that the "Bureau needs relevant information and a reasonable period of time to analyse transactions that raise complex issues". The CBA Section also agrees with the Panel that "the time taken to review complex merger transactions and the use of formal investigative processes by the Competition Bureau … [can be both] time consuming and costly for merging parties and other market participants."

The CBA Section is concerned, however, that the Panel's recommendation to adopt a U.S.-style merger procedure may actually reduce rather than increase Canada's competitiveness. Most competition law experts in Canada, the U.S., and elsewhere would agree that the U.S. "second request" process is excessively burdensome, expensive and time-consuming. After more than 30 years, it has not been adopted as the model in any other country in the world.[4]

Moreover, the issues under consideration were not adequately addressed by the submissions made to the Panel. The reason for this is that the Panel's Consultation Paper did not specifically address the merger review process under the Act. We are not aware of any prior public proposals to significantly amend the current process. As a result, none of the private sector submissions made to, or third party expert reports commissioned by the Panel addressed the possibility of amending that process to adopt a U.S.-style "second request" process.[5] One participant in the Panel's consultative meeting in Montreal on February 22, 2008 expressed some support for the U.S. approach to merger review, and others expressed a desire for greater certainty in the Bureau's administrative process in the mergers it reviews.

The CBA Section recommends that any changes to the Act relating to the merger review process be postponed to a subsequent round of proposed amendments, after there has been a broad, public consultation process, particularly given that:

1. there has been no public consultation whatsoever with respect to these changes, including the Panel's consultations and the extremely limited consultation conducted by Mr. Gover;[6]

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3 *Commissioner of Competition* v. *Labatt Brewing Company Ltd*. (January 28, 2008) F.C. per Mactavish J.; *Commissioner of Competition* v. *Labatt Brewing Co. Ltd. et al.,* 2007 Comp. Trib. 9 (CT-2007-003), aff'd 2008 FCA 22; *The Commissioner of Competition* v. *Labatt Brewing Company Limited et al.,* 2008 FC 59 (FCA).

4 It was recently estimated that 110 countries and 115 jurisdictions now have some form of pre-merger control. See http://lawprofessors.typepad.com/antitrustprof_blog/2009/01/a-record-110-co.html. The vast majority of these regimes were enacted after the U.S. second request process was established. It can be assumed that this process was considered and rejected in designing those regimes.

5 See note 11 below regarding the Commissioner's Discussion Paper, dated March 31, 2008, that discussed the merger review process.

6 See the Section's letter to Mr. John Sims and Ms. Sheridan Scott, *supra* note 2.

2. the U.S. experience strongly suggests that a "second request" process would impose massive and unwarranted costs and other burdens, as well as substantially increased time delays. These costs and burdens would amount to a substantial tax on Canadian merger activity, particularly in the current economic climate.[7] They would also require significant increases in staffing and funding at the Bureau to deal with the exponentially greater amount of information that would be provided in response to information requests;

3. the nature of the technical issues is sufficiently complex that considerable time will be required to develop an appropriate Canadian approach that avoids the excesses and other shortcomings of the U.S. approach while preserving the benefits of Canada's current approach;

4. while there is room to improve the timeliness of merger reviews, overall the Canadian merger review process has worked well since it was first established over two decades ago – moving to a U.S.-style "second request" process would very likely do more harm than good;

5. there has never been any suggestion that section 11 is insufficient to permit the Bureau to obtain all the information it requires to perform its merger review mandate under the Act;

6. public consultation on possible amendments to the merger review process would benefit from greater input from the Bureau concerning whether, or the extent to which, its merger investigations have been impeded by additional delays or costs imposed on the Bureau by the section 11 process; and

7. significant constitutional issues would be raised by any proposed changes that permitted the Commissioner to issue compulsory production orders without judicial oversight.[8]

The Commissioner defended the existing merger review process in her initial submission to the Panel, dated January 11, 2008, and the slide deck for her presentation to the Panel on February 22, 2008 stated: "At this time, no [legislative] change is necessary."

If, notwithstanding the absence of public consultation, the government decides to change the existing merger review process in the current round of proposed amendments to the Act, the CBA Section submits that any changes should (a) retain the basic framework of the existing process, (b) recognize that many Canadian businesses are much smaller than their U.S. counterparts and are much less capable of incurring the massive costs and other burdens typically associated with the U.S. "second request" process, and (c) ensure adequate judicial or Competition Tribunal (the Tribunal) oversight of the process.

More specifically, in considering possible changes to the process, the government will need to address a number of complex issues, including:

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[7] According to a recent KPMG report, "the value of mergers and acquisitions by Canadian companies fell by 50 per cent in 2008 … as the credit crunch took the wind out of deal-maker's sails". See "M&A activity fell sharply in Canada in 2008" *The Globe and Mail* (13 January 2008) at B8.

[8] See, e.g., *Air Canada* v. *Canada (Attorney General)*, [2003] Q.J. No. 21 (C.A.), where the Quebec Court of Appeal struck down a section of the Act authorizing the Commissioner to make temporary Orders in relation to airlines.

1. ensuring adequate judicial oversight of any administrative power to delay closings or to compel document and oral productions. Such a function would ideally be fulfilled by the Tribunal, which already has the statutory power to oversee the merger review process, rather than the courts that currently issue section 11 orders separately from the merger review process;

2. allowing the Tribunal a greater role in supervising the review of mergers to ensure the timely and reasonable review of mergers. This could be accomplished by allowing the Comissioner or the merging parties to refer matters to the Tribunal for the summary determination of factual and legal issues which may arise during the course of a merger review;

3. considering whether there is a need to modify the existing statutory waiting periods in section 123 of the Act for long form notifications;

4. considering what amendments might be appropriate to sections 100 (interim order provisions) and 97 (three-year limitation period for merger challenges); and

5. considering what amendments might be appropriate to section 11, which already provides the Bureau with the formal information-gathering tools it requires, to adapt that provision to the needs and realities of a modern merger review process, while ensuring adequate judicial oversight of the process. (The U.S. system allows for its government agencies to issue civil investigative demands or CIDs to third parties. It is unclear whether this process would replace the section 11 process, let alone the issues that would raise.)

Until the CBA Section has had an opportunity to consult with its members more broadly, preferably in relation to a consultation paper, it is not able to make specific recommendations regarding the amount of time, if any, by which any waiting periods should be changed or regarding the need for or scope of any amendments that ought to be made to section 11. Indeed, before developing any recommendations regarding section 11, the CBA Section submits that it would be prudent to wait for the report of a joint CBA-Bureau working group that has already been established to develop recommendations for non-statutory process improvements to the section 11 process.

1. *Consultation*

There is a long standing tradition of public consultation with respect to amendments to the Act. This tradition is based on a recognition that the Act is framework ecomomic legislation that affects consumers, businesses and the efficiency and adaptability of the Canadian economy. The following examples illustrate this tradition:

- Following the release of a Discussion Paper dated June 20, 2003, the government launched a national public consultation (through the Public Policy Forum ("PPF")) on a round of amendments that ultimately resulted in Bill C-19, which died on the Order Paper when Parliament was dissolved in November 2005.
- Following the release of a Discussion Paper dated April 17, 2000, a national consultation was launched through the PPF on a round of amendments that ultimately resulted in Bill C-23, which was proclaimed in force in June 2002.
- Following the release of a Discussion Paper in June 1995, the government initiated national public consultations on a number of proposals, some of which were reflected in Bill C-20, which was proclaimed in force in March 1999.

- Following the release of a Discussion Paper in March 1985, the government initiated national consultations on proposals that ultimately were reflected in Bill C-91, which was proclaimed in force on June 1986.

In addition, consultations were conducted in 1999 and 2000 with respect to (i) the amendments to the *Notifiable Transactions Regulations* under the Act that were proposed in May 1999; and (ii) the report by J. Anthony VanDuzer and Gilles Pacquet, entitled *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*.

The CBA Section has also participated in consultations on virtually every significant enforcement policy initiative (e.g., guidelines and bulletins) related to the Act that has been proposed in recent memory.[9] The CBA Section has also been consulted on "housekeeping" amendments to the Act.[10]

Given this long standing tradition, the CBA Section is very concerned by the possibility that the Panel's recommendations regarding the merger review process might be included in the current round of proposed amendments without having had the benefit of any public consultation.[11]

The issues raised by these recommendations are more significant and complex than many of the past proposed amendments and enforcement initiatives in respect of which there has been public consultation. The CBA Section submits that it would be entirely appropriate for such consultation to occur in these circumstances.

2. The U.S. Second Request Process

The U.S. "second request" process is notorious in international competition law circles for imposing excessive document and electronic data production burdens and time delays on parties to proposed merger transactions.

As discussed below, that process is very expensive for merging parties (production costs can range from approximately US$5 million on average and up to US$20-25 million for the most complex cases), inordinately burdensome (typically requiring several hundreds, and sometimes even tens of thousands, of boxes of documents, as well as several gigabytes of data) and far more time consuming than the current approach in Canada. (As noted below, the average time required for a "second request" investigation is approximately 6-7 months. On average, the time required to close mergers in respect of which a "second request" has been issued is significantly longer than this. Such delay itself can prevent mergers that otherwise would not warrant challenge under the Act from proceeding.) Quite apart from these adverse impacts on merging parties, the Bureau may not have the ability to conduct more than one or two U.S.-style "second request" investigations at any given time without substantial additional resources.

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[9] A partial list of Section submissions on proposed amendments and proposed enforcement policies is available at http://www.cba.org/CBA/sections_Competition/main/Submissions.aspx.

[10] For example, the Section currently is updating a list of such amendments that the CBA Section submitted to Ms. Suzanne Legault, Assistant Deputy Commissioner of Competition, on May 19, 2005.

[11] It may be noted that neither the consultation paper released by the Panel in October 2007 nor any of the submissions that were subsequently made to the Panel mentioned the possibility of amending the Act to reflect a U.S.-style "second request" process. Cf. *supra* note 2. It appears that it was not until the Commissioner submitted a Discussion Paper to the Panel, dated March 31, 2008, that the Commissioner raised any issue with the merger review process and drew attention to certain features of the U.S. and European merger review processes, which she favourably contrasted with the existing statutory waiting periods and compulsory information gathering powers under the Act.

The Antitrust Section of the American Bar Association (the ABA) has noted (i) a "consensus in the private bar that second requests are unduly burdensome", (ii) "[t]he burden imposed by second requests today far exceeds what Congress originally envisioned in enacting the HSR Act", (iii) "[d]espite prior efforts by the agencies and the private bar to reform the process, the cost and burden of second request compliance has risen steadily over the years", and (iv) "[t]here is … no evidence that the burden imposed by the second request process in the U.S. leads to better decision making".[12]

The April 2007 *Final Report* of the U.S. Antitrust Modernization Commission (AMC) noted that that "commentators and witnesses uniformly expressed concern over the excessive cost and delay associated with the second request process".[13] In this regard, it observed that "[o]ne estimate places the current cost of responding to a second request investigation at between $5 million and $10 million" and that "[t]he time needed for review of a transaction and receipt of approval from the agency now can be six months or longer".[14] It also cited a second survey which found:

> [O]n average, second request investigations took seven months and resulted in median compliance costs of $3.3 million. In addition, the median values for these data illustrate some of the specific burdens involved in complying with second requests: electronic document production of 583,000 pages of email and 555,000 pages of other documents; 275 pages of interrogatory responses; 13 gigabytes of electronic data; $2.4 million in fees for attorneys; and $300,000 in fees for economists.[15]

The AMC added that another "recent broad survey concluded that the external costs to the merging parties subject to a second request investigation in the United States (including payments for attorneys, economists, and document production) were at least double that of any other jurisdiction".[16]

As the AMC recognized, the "burden imposed by the second request process is not a new problem":[17]

- In 2002, in response to a consultation process initiated by the FTC to improve the merger review process, the ABA observed that the largest document productions in response to a second request had increased from "hundreds of boxes" a decade earlier to "thousands to tens of thousands of boxes of documents".[18] It also cited a prior

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[12] *Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding the Hart-Scott-Rodino Second Request Process* (December 5, 2005), at pp. 1, 3, 6 and 7, available at http://www.abanet.org/antitrust/at-comments/2005/12-05/hsr-2nd-request-comm.pdf.

[13] Antitrust Modernization Commission, *Report and Recommendations* (April 2007), at 162, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

[14] *Id.* at 152.

[15] *Id.* at 163. Table C, at p. 164 of the Report, indicates that the mean values for these categories were 1,566,867 pages of e-mail documents; 5,411,437 pages of other electronic documents; 1,515,662 pages of documents produced in hard copy; 872 pages of interrogatory responses; and $5.1 million in total compliance costs.

[16] *Id.* at 153. Cf. p. 163, where the PricewaterhouseCoopers survey is discussed in further detail.

[17] *Id.* at 3.

[18] American Bar Association, Section of Antitrust Law, Letter to Joseph Simons, Bureau Director, Bureau of Competition, Federal Trade Commission (August 6, 2002), at 6 available at http://www.abanet.org/antitrust/at-comments/2002/08-02/simons.pdf.

Transition Report that noted that "complaints that second requests routinely ask for far more material than the staff will ever review or need are still widespread."[19]

- In 2004, after noting that the costs associated with just the production of electronic files in the context of even a small "second request" can be "quite staggering," the ABA urged the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, U.S. Agencies) to make it "a top priority … to re-examine the process and to focus collectively on meaningful ways in which the respective public and private interests can be balanced within the original intent of Congress".[20] In that same year, after acknowledging that it was "[p]ressed by an information overload that threatens to overwhelm the antitrust review process", the Chair of the FTC initiated a "soup to nuts" look at ways to streamline reviews.[21] However, the costs and time delays associated with merger review in the U.S. have continued to escalate.
- In 2006, the U.S. Agencies announced significant reforms to the merger review process that were specifically designed to reduce the significant cost and time delay associated with that process. In announcing the reforms, the Chair of the FTC recognized this problem and acknowledged that merging parties and the agencies "often spend millions of dollars to collect, review, and analyze the responsive materials, and [that] second request investigations can take a substantial amount of time, often ranging from six to nine months."[22] Similarly, the DOJ acknowledged that "searching and reviewing … vast electronic sources of potentially responsive documents and information places a significant and costly burden on parties. It also places significant burdens on Division staff, which must review enormous quantities of documents submitted in response to second requests".[23]
- In its recent *2008 Transition Report* to President-elect Obama and the next U.S. Administration, the ABA noted that the 2006 reforms "have had mixed success" and recommended that the U.S. Agencies be required to revisit the 2006 reforms with a view to "increasing the transparency and decreasing the burden [of the second request process] on the agencies and the parties."[24] The ABA added that "it is still widely believed that challenges posed by electronic document production still are considerable and are growing more formidable as time passes."[25]

In its submission to the AMC, the ABA "cited reports that compliance with a second request typically takes six months and costs $5 million, while the reviews in more complex investigations can take eighteen months and cost merging parties up to $20 million".[26] In addition to reducing the

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19 *Id.* at 8.

20 American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2004*, at 42-43, available at http://www.law.berkeley.edu/faculty/rubinfeldd/Profile/publications/Comments%20on%20State%20of%20Fed%20AT%20Enforcement04FINAL-1.pdf.

21 *Id.* at 5.

22 Deborah Platt Majoras, Chairman, Federal Trade Commission, *Reforms to the Merger Review Process*, February 16, 2006, at 5, available at http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

23 United States Department of Justice, Antitrust Division, *Background Information on the 2006 Amendments to the Merger Review Process Initiative*, available at http://www.usdoj.gov/atr/public/220241.pdf.

24 American Bar Association, Section of Antitrust Law, *2008 Transition Report* at 6, available at http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf.

25 *Id.* at 7.

26 AMC Final Report, *supra* note 13, at 163.

scope of second requests, the ABA recommended that the U.S. Agencies be allowed a "second bite" at the discovery apple, "to reduce the incentive for the agencies to make their second requests so broad and all encompassing."

Given all of the foregoing, the CBA Section is very concerned that serious consideration is being given to adopting a U.S.-style "second request" process in Canada. The U.S. process has obvious and well documented shortcomings. Further, the U.S. experience illustrates the practical difficulties of improving a flawed process once it has been adopted.

3. The Apparent Concerns Underlying the Panel's Proposals

The Panel recognized concerns that were expressed during its consultation process regarding "the time taken to review complex merger transactions and the use of formal investigative processses by the Competition Bureau, both of which can be time consuming and costly for the merging parties and other market participants".[27] However, the Panel also observed that the Bureau "needs relevant information and a reasonable period of time to analyse transactions that raise complex issues."[28] In this regard, it added that "[s]eeking court orders to obtain more information or obtain an extension of the review period is unsatisfactory, both for the private and public sectors, because it diverts time and attention away from consideration of the subsantive issues arising in connection with proposed merger transactions."[29] It appears that this observation was drawn from a similar statement made in the Commissioner's submission to the Panel dated March 31, 2008.[30] Based on the foregoing, the Panel recommended changing Canada's merger review process to a two-stage regime that would more closely align our procedures with those in the U.S.

The CBA Section respectfully submits that the Panel's concerns regarding the time available to the Bureau to conduct its merger review mandate under the Act can be much better addressed in a manner that preserves the desirable features of the existing merger review process. As one example, the Tribunal, which is already charged with overseeing the merger review process (including issues such as whether closing will impair remedies, the conduct of the hearing into a merger's effect on competition, and ultimately whether to prevent a merger or order remedies such as divestitures or dissolution) could be given the power to issue production orders, to address timing issues, and to determine discrete factual and legal disputes in a summary and timely fashion. As another example, the Bureau could triage cases more effectively, thereby freeing up resources to expeditiously address cases that truly raise competition issues.

As to the information required by the Bureau, section 11 is sufficiently broad to enable the Bureau to obtain all the information it requires in any given case. However, the CBA Section acknowledges that there may be rare circumstances in which a party intent on fully availing itself of its existing right to close its transaction immediately upon the expiry of the applicable (14 or 42 day) statutory waiting period may attempt to do so before the Bureau has had time to fully review information that may have been provided in response to a section 11 order. Even then, the Commissioner would, in

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27 *Supra* note 1 at 56.

28 *Id.*

29 *Id.*

30 Commissioner of Competition, Competition Bureau, *A Synthesis and Review of Recent Reform Proposals Regarding Canada's Competition Act*, March 31, 2008, at 18. It bears underscoring that the Panel pointed to no empirical evidence to support its conclusion that there was a need to "align" the Canadian and U.S. merger review systems in this or any other regard. Moreover, the Section submits that the existing merger review framework under the Act has not been an impediment to efficient parallel reviews of cross-border and international merger transactions in Canada and the United States. Indeed, the existing Canadian system has permitted much more expeditious and less burdensome reviews than the U.S. system.

appropriate circumstances, still have the ability to seek a temporary order under section 100 to prohibit the merging parties from taking steps toward completing their transaction for up to an additional 60 days.

In any event, it is not necessary to provide the Bureau with unfettered discretion to issue production orders, and to dramatically alter a system that has worked well for over two decades, in order to address the timing issue that the Bureau says has been a problem.[31]

Doing so may in fact increase merger litigation at least in the short run as it raises constitutional issues. The use of a production order is effectively a seizure of personal property by the government,[32] and as such calls into play the importance of balance between the requirements of the relevant administrative agency in carrying out its statutory mandate and the rights of, and burdens placed upon, parties subjected to such seizures. Currently, only the Federal Court or a Superior Court of record can make production orders to force companies to provide documents to the Bureau. The U.S.-style "second request" process advocated by the Panel does not provide this crucial judicial oversight and would place what has in Canada traditionally been a judicial function in the hands of a law enforcement agency. In this sense, a unilateral "second request" procedure also runs counter to increased accountability in law enforcement.

The CBA Section submits that the existing merger review process under the Act has worked well for over two decades, and that it would be an over-reaction to abandon that entire process in favour of one that has a long and well-documented record of imposing excessive costs, time delays and uncertainty on merging parties.

4. A Better Approach to Addressing the Panel's Apparent Concerns

(a) *Revise the Existing Regime to Give the Competition Tribunal Expanded Authority to Compel Information and Extend Review Periods in Appropriate Cases*

The number of "very complex" transactions for which the Bureau requires significant information and time beyond those provided for long form filings is very small. Rather than a wholesale move to a U.S. "second request" model, or extending time periods across the board, it would be preferable to provide a better mechanism to address those few exceptional cases. Under the current law, the Tribunal has authority under sections 100 and 104 of the Act to effectively extend the Bureau's review period, but it does not have authority to issue section 11 orders, or otherwise compel the production of information by merging parties (except after a section 92 application has been filed by the Commissioner).

While the current law contemplates an active role for the Tribunal in the merger review process preceding any section 92 application, the Tribunal's role in that process has been marginal, at most. Since 1985, only two section 100 applications have been brought to the Tribunal, and no contested section 104 applications have been brought in merger cases. Hence the resources of the Tribunal are underutilized, and it is not performing its intended role under the Act.

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[31] There are other issues that have been raised with respect to section 11 that need to be addressed. While a CBA/Bureau working group is currently examining ways to improve the section 11 order process within the existing statutory framework, it may be that statutory amendments would be appropriate to address some of the issues that have been raised, such as the issues of prior notice and the appropriate level of judicial oversight.

[32] *R.* v. *McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at § 22; *Thomson Newspapers Ltd.* v. *Canada (Dir. of Investigation and Research)*, [1990] 1 S.C.R. 425 at 495 and 505 and (per Wilson and La Forest JJ); *Law* v. *The Queen*, [2002] 1 S.C.R. 227 at § 15.

Consideration could be given to authorizing the Tribunal, at the request of the Commissioner, to compel additional information from parties, and to grant commensurate extensions of the Bureau's review period, up to specified maximums. Beyond those maximum time periods, the Bureau would continue to have its rights under section 104 of the Act. The process could be informal and expeditious, but would be subject to oversight of the Tribunal.

Consideration could also be given to expanding the reference process in section 124.2 of the Act to allow merging parties to refer discreet questions to the Tribunal. That would create a mechanism for the expeditious resolution of particular issues which may arise between the Commissioner and the merging parties.

(b) *Providing the Bureau with More Time while Providing More Timing Certainty to Merging Parties*

If it is truly necessary to provide the Bureau with more time, another (less optimal) approach could be extending the statutory waiting period applicable to long form notification filings. The existing waiting period is 42 days. Keeping in mind the Panel's recognition of the importance of timely merger reviews under the Act and the concerns that have been expressed in this regard, we submit that, if necessary, increasing the long form waiting period by a relatively modest degree of time would provide the Bureau with sufficient time to complete its merger reviews.

With respect to short form notification filings, there is no need to extend the existing 14 day waiting period, as we are not aware of any suggestion that this period is not sufficient for the Bureau to complete its review of straightforward transactions. The Bureau's submission to the Panel dated March 31, 2008 states that "the vast majority of mergers are reviewed in 10 days or less" and the average time taken to review "non-complex" transactions is 9.1 days.

If, despite the above, the statutory waiting periods were extended, the CBA Section submits that section 100 may no longer be necessary for those transactions that are notified to the Bureau.[33] In such circumstances, the Bureau would have sufficient time to complete its review and to prepare a filing under section 92 of the Act in respect of any transaction that the Commissioner believed would likely prevent or lessen competition.

If the merger review process is amended in this manner, it may also be appropriate to consider amending section 97 (which allows the Bureau to challenge a merger for three years after its completion) to (i) preclude challenges commenced after the expiry of the waiting period for those transactions that have been notified, and (ii) reduce the three year limitation period for all other transactions.[34]

(c) *Addressing the Shortcomings Associated with the Section 11 Process*

The CBA Section submits that section 11 ought to continue to be used by the Bureau when it wishes to invoke formal process to compel the production of documents, written returns or oral testimony in connection with a merger review. Retaining section 11 as the principal formal information gathering

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[33] Section 100 provides that "[t]he Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger."

[34] Section 97 provides that "[n]o application may be made under section 92 in respect of a merger more than three years after the merger has been substantially completed." The Panel recommended that this period be reduced to one year, on the basis that a one year period "would provide more certainty for the Canadian business community and international investors".

power to be used by the Bureau in fulfilling its merger review mandate under the Act is particularly warranted given that:

(i) there are very considerable and well documented shortcomings associated with the U.S. "second request" process; and

(ii) there does not appear to be any evidence to suggest either that the Bureau incurs material costs or time delays in invoking the section 11 process or that section 11 is not sufficiently broad to permit the Bureau to obtain all of the information it may require.

While the CBA Section submits that section 11 ought to be retained, there are a number of issues relating to the Bureau's use of section 11 that need to be addressed. As noted above, consideration should be given to allowing the Tribunal to issue section 11 orders in merger cases and to connecting that process with the length of the Bureau's review period. The principal concerns that the CBA Section has expressed regarding the Bureau's use of section 11 orders in merger and other civil cases are (i) the lack of prior notice that an order under section 11 will be sought by the Commissioner, and (ii) the over-breadth of many section 11 orders. These concerns were underscored in the CBA Section's letter to the Commissioner dated February 6, 2007 regarding the Bureau's *Information Bulletin on Section 11 of the Competition Act*.

The CBA Section is optimistic that a broad, public, consultation with respect to the existing section 11 order process (including the consultation that currently is being undertaken under the auspices of the aforementioned CBA/Bureau working group) will lead to proposals to address these and other important issues that have been raised with respect to section 11.

We would be pleased to discuss or amplify upon any aspect of the foregoing if that would be helpful.

Yours truly,

(Original signed by Stéphanie Vig for John D. Bodrug)

John D. Bodrug

c. Melanie Aitken
Interim Commissioner of Competition