THE CANADIAN BAR ASSOCIATION
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September 14, 2010

Via email: indu@parl.gc.ca

Mr. Michael D. Chong, P.C., M.P.
Chair, Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Chong:

Re: Bill C-452 –Competition Act amendments (inquiry into industry sector)

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section), to express concerns about Bill C-452 (referred to your Committee on June 14, 2010), Bill C-452 proposes to amend subsection 10(1) of the *Competition Act* to mandate the Commissioner of Competition to cause an inquiry to be made "whenever the Commissioner has reason to believe that … grounds exist for the making of an inquiry into an entire industry sector."

The CBA is a national association that represents some 37,000 lawyers, judges, notaries, law professors and law students from across Canada. The CBA's primary objectives include improvement in the law and in the administration of justice. The CBA Section comprises some 1,500 members of the CBA who practice in the area of competition and antitrust law.

Past Experience – Time and Cost

The concept of an industry sector competition law inquiry power is not new. In fact, the power was in the *Competition Act*'s predecessor legislation, the *Combines Investigation Act* (the CIA). When the *Competition Act* was enacted in 1986, Parliament decided not to carry forward the industry sector inquiry power into the new legislation. We understand that the decision not to include this power was at least in part in response to concerns expressed by the business community about the enormous expense and questionable utility of an inquiry undertaken by the Restrictive Trade Practices Commission (the RTPC) into the petroleum industry in the early and mid 1980s (and which was itself preceded by an eight-year inquiry by the Director of Investigation and Research, as the Commissioner was then called). The RTPC inquiry took almost five years to complete and, following more than 200 days of hearings, evidence from over 200 witnesses, more than 1,800 exhibits, and more than 50,000 pages of transcripts, resulted in a three-volume report entitled *Competition in the Petroleum Industry*.[1]

[1] The Director of Investigation and Research commenced an inquiry under the CIA in 1973 based on a complaint from the Consumers' Association of Canada. After eight years of inquiry, the Director referred the matter to the RTPC under section 47 of the CIA to conduct a general inquiry into the industry. The RTPC held hearings across the country in 1981 and 1982, then returned to Ottawa for further hearings before issuing its report in 1986.

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The RTPC report cost millions of dollars, both to the government and to the private sector, and yet was arguably of questionable utility.[2]

The concerns expressed in 1986 about the high cost of industry sector inquiries remain true today. In 2004, the Public Policy Forum was retained by the Competition Bureau to conduct a public consultation on proposed amendments to the *Competition Act*, including a proposal to add a "market inquiries" provision to the *Competition Act*. In its Final Report, the Public Policy Forum noted that "[m]ost intervenors … expressed concerns with the potential high cost for businesses and industry participants of conducting such references."[3]

Notwithstanding that Canada's past experience with an industry sector inquiries power demonstrates both the burdensome cost and questionable utility of the inquiries, there have been a number of proposals to reintroduce an industry sector inquiry power into the *Competition Act*,.[4] To date, a comprehensive justification that would support the reintroduction of this power has not been articulated. For the reasons discussed below, the CBA Section remains of the view that, in addition to potentially imposing significant costs on the business community unnecessarily, expanding the Commissioner's mandate to undertake formal sector inquiries raises serious due process issues and is inconsistent with Canada's approach to competition law enforcement. Accordingly, the CBA Section recommends that this power should not be reintroduced.

Inconsistency with Canada's Approach to Competition Law Enforcement

A formal investigative power that may be exercised in the absence of potentially anti-competitive conduct is inconsistent with the underlying structure of the *Competition Act* and Canada's approach to competition law enforcement. While the Commissioner has a broad mandate to promote competition through a variety of means, when it comes to formal enforcement powers, the *Act* focuses on protecting the competitive process through enforcement action on potentially anti-competitive conduct. Thus, the mere existence of dominance or market power, obtained by legitimate means, does not violate the *Act* and cannot trigger enforcement action by the Commissioner. A dominant firm that engages in anti-competitive ***conduct***, on the other hand, may face enforcement action under the *Act*, for example for engaging in abuse of its dominant position if the anti-competitive conduct results in a substantial lessening or prevention of competition.

Subsection 10(1) of the *Competition Act* provides the Commissioner with the necessary tools to investigate conduct where there is reason to believe that conduct may contravene the statute.

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2 Notwithstanding the Bureau and RTPCinquiries, which together spanned 13 years from 1973 to 1986, the petroleum industry continues to be the subject of regular complaints alleging anti-competitive conduct. These complaints have caused the Bureau to undertake several examinations of the industry, in relatively few cases leading to enforcement action (principally for conduct by participants in local markets). Since 1986, the Bureau has undertaken significant examinations involving the petroleum industry in 1991, 1994, 1996, 1999, 2003, 2005 and 2008-2009.

3 Public Policy Forum, *National Consultation on the Competition Act: Final Report* (8 April 2004), at 23.

4 In 2001, the issue of a sector inquiries power was discussed in Parliamentary Committee review of Bill C-23 (*An Act to amend the Competition Act and the Competition Tribunal Act*). The Bureau subsequently included the subject of sector inquiries in a national consultation undertaken in the context of its 2003 discussion paper, *Options for Amending the Competition Act: Fostering a Competitive Market Place*. During the 38th Parliament (2004-2005), members of the Bloc Québécois raised questions as to why Bill C-19 did not include a sector inquiry power. Following a report of the Bureau's findings, Bill C-19 was amended in 2005 to include such a power, but the bill died on the order paper in November 2005. The possibility of this power was again raised by the Competition Policy Review Panel in its October 2007 consultation paper, *Sharpening Canada's Competitive Edge*, however the Panel did not recommend creation of the power in its June 2008 Final Report, *Compete to Win*. See also Suzanne Legault, *Market Studies: A Contextual Overview,* presented at the 2006 Langdon Hall Competition Law and Policy Forum in Cambridge, Ontario on April 25, 2006, at pages 5-13.

Providing the Commissioner with a broad formal power to examine the state of competition in a market would represent a significant departure from the current approach to competition law enforcement. Certainly, in such circumstances, the onus should be on those who advocate amending the Act to demonstrate the necessity and desirability of this power. To date, they have not done so.

Availability of Other Tools

Even assuming exceptional circumstances which may warrant an examination of the state of competition in an industry sector in the absence of a concern that the *Competition Act* is being contravened, other legislative mechanisms exist to institute those inquiries. In the CBA Section's view, these are preferable to an industry sector inquiry power in the *Competition Act*.

For example, section 18 of the *Canadian International Trade Tribunal Act*, allows the Governor-in-Council to refer economic inquiries to the Canadian International Trade Tribunal (CITT). To the extent that input is desired to address competition issues, section 125 of the *Competition Act* allows the Commissioner, as of right, to "make representations to and call evidence before any board, commission or other tribunal in respect of competition," including the CITT. The Governor-in-Council also has discretion to commence an inquiry under the *Inquiries Act,* and could do so on competition law grounds.[5] In either case, the formal nature of these mechanisms increases the likelihood that inquiries will be limited to those rare circumstances where substantial need for such an inquiry exists.

In addition, where the Commissioner wishes to examine the state of competition in a particular industry absent specific concerns about anti-competitive conduct, she may do so through a variety of informal means. For example, she may, on her own or with the assistance of a third party retained by her, examine the state of competition in an industry on the basis of information obtained by the Bureau voluntarily or, subject to confidentiality protections in the *Competition Act*, in the course of a normal investigation. Indeed, there are numerous examples of the Commissioner examining the state of competition in certain industries using this approach.[6]

Due Process Concerns

Under the proposed amendment, the Bureau could obtain court orders to compel persons to testify or provide information. If this were the case, due process concerns would arise if the evidence were used for purposes beyond examining the state of competition in the industry in question. For example, on the basis of information obtained in a sector inquiry the Bureau could determine that grounds exist to initiate enforcement proceedings against certain persons for conduct brought to its attention in the inquiry, including proceedings against persons who provided information pursuant to the sector inquiry. Serious questions may arise respecting the due process rights of those persons, including their rights against self-incrimination. Indeed, due process concerns may arise even where no proceedings are brought, insofar as an inquiry may draw conclusions impugning the conduct of certain persons but falling short of indicating that enforcement action is warranted.[7]

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5 See section of the *Inquiries Act*, R.S.C. 1985, c. I-11, which gives the Governor-in-Council discretion to initiate a public inquiry or even informal consultations with the Commissioner or with sector-specific regulatory bodies.

6 See, for example: Competition Bureau, *Canadian Generic Drug Sector Study* (October 2007); Competition Bureau, *Benefiting from Generic Drug Competition in Canada: The Way Forward* (November 2008); and Competition Bureau, *Self-regulated Professions: Balancing Competition and Regulation* (2007). The Bureau undertook similar examinations into cattle and beef pricing in Canada and the Canadian petroleum market in 2004, leading to the publication of "Backgrounders" in 2005 (Competition Bureau, Backgrounder, "Competition Bureau concludes examination into complaints about high gasoline prices" (March 2005) and Competition Bureau, Backgrounder, "The Competition Bureau's Examination into Cattle and Beef Pricing" (April 2005)). The Bureau also retained a third party to undertake an independent review of certain past Bureau merger assessments: see Mark Neumann and Margaret Sanderson, CRA International, *Ex Post Merger Review: An Evaluation of Three Competition Bureau Merger Assessments* (1 August 2007).

7 These concerns could be particularly significant where an inquiry is undertaken internally by the Bureau, with no public hearings, thereby depriving affected persons of an opportunity submit, review and challenge evidence.

This concern (in addition to others we have noted) was highlighted by former Commissioner Sheridan Scott in remarks to this Standing Committee in response to a question about why Bill C-19 (which died on the order paper in fall 2005) did not contain a sector inquiry power:

> … I think it is important to keep in mind the concerns that were raised about market studies during our consultations. Opposition to increasing the mandate of the *Competition Act* centred around [*Canadian*] *Charter* [*of Rights and Freedoms*] concerns and costs for business. Related to this was a worry that such a proposal might be used as an inappropriate means to divert political or popular pressure to the Bureau to take enforcement action even when there was no evidence of any wrongdoing or significant competition issues affecting the public interest. With respect to *Charter* concerns, there was some worry about the possibility of the power allowing the Bureau to engage in a fishing expedition and the possibility of self-incrimination by those providing market information.
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> Any amendments proposing to introduce such a power should therefore guard against these dangers. … These types of studies would need to be done for legitimate purposes, with a view to assessing the state of competition in markets, and not be disguised enforcement inquiries. … [8]

It bears repeating that it is unclear what might trigger an industry sector inquiry that would not also allow for an inquiry into potentially anti-competitive conduct under an existing provision of the *Competition Act*. In the CBA Section's view, there is a serious risk that the proposed power would lead to inquiries on matters not because they merit scrutiny from a competition law or policy perspective, but rather because an inquiry provides a convenient response to political pressures.

Outcome of Inquiry

Finally, an inquiry into the state of competition in an industry, particularly in an industry that is the subject of regular public and political attention, may create expectations that, at the end of the process, something constructive will be done. Even assuming a finding that a particular sector is not competitive (or not as competitive as the Bureau thinks it should or could be), one asks what action can be taken under the Act to remedy that situation where this finding is due, for example, to the structure of the market and not to conduct that offends the Act. The *Competition Act* focuses on protecting the competitive process through enforcement action against potentially anti-competitive ***conduct.*** It is not intended to regulate markets, or to cast the Bureau in the role of a regulator that proactively engineers competition in markets.

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In summary, we believe that a sector inquiry power is unnecessary and undesirable, and that Bill C-452 should not be passed. We would be pleased to further explain our views at your request.

Yours very truly,

(Original signed by Tamra L. Thomson for Michelle Lally)

Michelle Lally
Chair, National Competition Law Section

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8 House of Commons, Standing Committee on Industry, Natural Resources, Science and Technology, *Evidence*, No. 054 (6 October 2005) at p. 12.