



The Voice of Canadian Business™
Le porte-parole des entreprises canadiennes™

February 18, 2009

The Hon. Tony Clement, P.C., M.P.
Minister of Industry
C.D. Howe Building
235 Queen Street
Ottawa, ON K1A 0H5

*Office of the President and
Chief Executive Officer*

*Cabines du président
et chef de la direction*

**RE: Competition Act amendments included in Bill C-10, Budget
Implementation Act, 2009**

Dear Mr. Clement:

I wanted to thank you for reaching out to me recently in your new capacity as Industry Minister and for inviting comments regarding Bill C-10, the Budget Implementation Act.

As you know, the Canadian Chamber welcomed the government's budget plan to deal with the recession and we look forward to getting the Canadian economy back on track. However, we were surprised that the government has decided to include amendments to the *Competition Act* and *Investment Canada Act* as part of Bill C-10.

While we were largely supportive of the recommendations contained in the Competition Policy Review Panel's final report, our preference would be that amendments to the *Competition Act* be dealt with separately from the Budget bill and these amendments should be considered in detail by the House of Commons Standing Committee on Industry, Science and Technology, given their potentially significant impact upon Canadian businesses.

The Canadian Chamber has asked to appear before the Finance Committee to discuss our concerns with the proposed amendments to the *Competition Act*. While the decriminalization of the pricing provisions of the legislation (price discrimination, predatory pricing, price maintenance and promotional allowances) is welcomed, several other proposed changes are potentially problematic for Canadian businesses. We will focus our attention on two issues in the proposed amendments that should be considered further: conspiracy provisions and the merger reviews.

Conspiracy

Bill C-10 proposes to replace the current criminal conspiracy provisions with a new dual-track approach. With this proposed change, competitors that enter into an agreement to fix/"control" prices, allocate customers/territories or control/lessen the production or supply of a product could be guilty of a criminal offence under a U.S. style *per se* standard and be subject to criminal sanctions that include fines of up to \$25 million and a possible jail term of up to 14 years. The Canadian Chamber believes that this new approach to conspiracy (where the impact on competition is

360, rue Albert St.
Suite 420
Ottawa, Ontario
K1R 7X7

613.238.4000
613.238.7643

www.chamber.ca
info@chamber.ca



not measured), with serious criminal sanctions, could lead to unintended consequences that would have a detrimental effect on businesses.

Although the intention is clearly to treat agreements between competitors that have no pro-competitive justifications more harshly than other legitimate forms of competitor collaborations, such as joint ventures or strategic alliances, the provisions as drafted still raise a very real risk that agreements between competitors that are competitively neutral or even pro-competitive may now be illegal. The breadth of the new *per se* provision could therefore have a chilling effect on legitimate competitor collaborations.

Additionally, if the provision is enacted, many Canadian businesses will find themselves in the difficult position of having to identify and review existing joint venture, non-competition and other similar agreements to ensure that arrangements that were previously legal do not raise risk under the new provisions. In the current economic context, Canadian businesses do not need more uncertainty and disruption. The proposed changes to section 45 may, if the *per se* language in the Bill is chosen, eventually yield some benefits, but the costs to thousands of businesses of re-arranging competitively benign relationships are certain and significant today.

Though the amendments contain transitional provisions, as we understand it, they merely permit Canadian businesses to seek advisory opinions from the Bureau at no cost for up to a year after the legislation is passed; the transitional provisions do not acknowledge that agreements that are lawful today could become unlawful under the amended Act. These new conspiracy provisions would not be in effect until one year after they are passed.

Merger Reviews

The proposed amendments regarding the merger review process that would align Canada more with the U.S. merger review process are also of concern, particularly as they have not been the subject of any prior consultation with stakeholders. These new amendments will allow the Competition Bureau to make a “second request” for detailed information of companies seeking to merge.

While most mergers do not raise serious substantive issues, mergers that are complex may end up going to a “second request” by the Competition Bureau without judicial oversight (as is currently the case), significantly increasing the costs companies would have to incur to prepare and make available all of the requested information to the Bureau. The changes also would give the Bureau the ability to delay completion of mergers for potentially long time frames, in comparison to what the law currently allows.

It is important to note that although the proposals have similarities to U.S. procedure, many American commentators have expressed grave concern about the use of the second request process by U.S. antitrust agencies – and it is noteworthy that the procedure has not been adopted to date in any other major jurisdiction.

These are significant changes to the *Competition Act* on which we have not been consulted and that could have a very negative impact on Canadian businesses.

I would appreciate an opportunity to have a discussion with you and some of our members to be able to put forward the business community’s positions on any future amendments to the *Competition Act*. All of us know the value of ensuring that the



Act recognizes current practices and needs and we look forward to working with you to produce amendments that will best serve Canada's interests.

Sincerely,



Perrin Beatty,
President & CEO

- cc. The Hon. Jim Flaherty, P.C., M.P., Minister of Finance
- James Rajotte, M.P., Chair of the Finance Committee
- Massimo Pacetti, Vice Chair of the Finance Committee
- Jean-Yves Laforest, Vice Chair of the Finance Committee
- Hon. Michael Chong, Chair of the Industry Committee
- Anthony Rota, Vice Chair of the Industry Committee
- Robert Bouchard, Vice Chair of the Industry Committee
- Marc Garneau, M.P.
- Siobhan Coady, M.P.
- Melanie Aitken, Interim Commissioner of Competition